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Summary record of the 2284th 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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2284th MEETING

Tuesday, 14 July 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, 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]

REPORT OF THE WORKING GROUP ON THE QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION

1. The CHAIRMAN invited the Chairman of the Working Group on the question of an international criminal jurisdiction, to introduce the Working Group's report.

2. Mr. KOROMA (Chairman of the Working Group) said that the Working Group, which had been composed of Mr. Thiam (Special Rapporteur, *ex-officio*), Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Crawford, Mr. de Saram, Mr. Idris, Mr. Jacovides, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagran Kramer and himself, had held a total of 15 meetings. It had endeavoured to discharge the mandate given to it under General Assembly resolution 46/54 of 9 December 1991, which was, "to consider further and analyse the main issues raised in the Commission's report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international court or other international criminal trial mechanism" and to draft concrete recommendations with regard to those issues.

3. The Working Group's report was the result of a truly collective effort. It consisted of three parts. Part A contained a summary and concrete recommendations; part B contained the report *in extenso*; and part C consisted of an appendix containing a summary of the proposals made earlier on an international criminal court concerning the mechanism of prosecution and the bringing of a complaint.

4. That presentation of the report had been adopted exclusively for practical purposes in order to stress from the outset in part A that the Working Group was formulating specific recommendations on the basis of what it perceived to be the minimum common ground on which a consensus could be built in the General Assembly that could lead to further work on the question in the coming years. In part B, the Working Group examined in detail the issues involved in the establishment of an international criminal court or other international criminal trial mechanism and reviewed the possible options available for arriving at specific conclusions. Part A was therefore a distillation of the conclusions and recommendations which had been arrived at in part B after careful study. It should also be noted that, in part A, the Working Group had stressed that the Commission should indicate clearly to the General Assembly that it considered its preliminary work to have been completed and that it would require a new mandate from the General Assembly if it was to carry out further work on the question and to draw up a detailed draft statute.

5. As to the contents of the report itself, as pointed out in the introduction to part B, the Working Group had initially identified five "clusters" of specific issues which had arisen out of the discussion in plenary on the question of an international criminal court, namely, the basic structure of a court or of the other options for an "international criminal trial mechanism"; the system of bringing complaints and of prosecuting alleged offenders; the relationship of the court to the United Nations system and especially to the Security Council; the applicable law and procedure and especially the issue of ensuring due process to the accused; and the process by which to bring defendants before a court, the relationship between that process and extradition, international judicial assistance to proceedings before a court and the implementation of sentences. The Working Group had endeavoured to examine those basic issues sequentially and, in each case, to indicate its preferred approach and the various possible solutions. It had tried to submit as balanced an analysis as possible without going into excessive detail or dealing with particular points that were not essential, its main aim being to provide the Commission with enough information to enable it to form a judgement.

6. In the second section of part B, the Working Group had dealt with arguments for and against the establishment of an international criminal court. Its conclusions were reflected in particular in the penultimate and antepenultimate paragraphs of that section and were summarized in the relevant paragraphs of part A. While it recognized that there was a case for some form of international criminal process beyond what now existed, the Working Group considered that it was necessary to be realistic and to start from a modest base. National systems of criminal justice were expensive and complex and it would be difficult and very costly to replicate such systems at the international level. There was no body of international experience in the matter to call upon as had been available in the field of international arbitration when PCIJ and its successor, ICJ, had been created. It would therefore be better to seek to establish a flexible facility which would be available in case of need and which would be essentially a facility for States parties to its statute. That meant that it would not have compulsory

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* Resumed from the 2264th meeting.

[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).

jurisdiction in the sense of a jurisdiction which the States parties to its statute would be obliged to accept *ipso facto*. Nor would it have exclusive jurisdiction in the sense of a jurisdiction which would exclude the concurrent jurisdiction of States in criminal cases. It would not be a full-time body, but an established structure that could be called into operation when required, without the disadvantages of a costly body with a permanent staff who might work only intermittently.

7. The next section of part B dealt with structural and jurisdictional issues. It had been subdivided into seven subsections: the method of establishment of a court; the composition of a court; the ways by which a State might accept the jurisdiction of a court; the subject-matter jurisdiction (*ratione materiae*) of a court; the personal jurisdiction (*ratione personae*) of a court; the relationship between a court and the draft Code of Crimes against the Peace and Security of Mankind; and possible arrangements for the administration of a court and, in particular, its relationship to the United Nations system. He would stress only those points which seemed to him to be most important.

8. With regard to the method of establishment of an international criminal court, the Working Group pointed out that any international criminal court or other mechanism should be established by a statute in the form of a treaty agreed to by the States parties, since no other method would provide a guarantee of a sufficient degree of international support to ensure that it worked effectively.

9. As to the composition of the court, the Working Group considered that judges must be independent and impartial and have the appropriate qualifications and experience both in the administration of criminal justice and in respect of knowledge of international criminal law.

10. With regard to jurisdiction *ratione materiae*, the Working Group proposed that, initially at least, the jurisdiction of the court should be limited to crimes of an international character, as defined in specific international treaties in force, including the Code of Crimes against the Peace and Security of Mankind (once it had been adopted and had entered into force), and that raised the issue of the relationship between the court and the future Code. While it was clear that there was an important link between the two, the essential point, as stressed in the Group's report, was that, if an international criminal court was to become a reality, it must receive the widest possible support from States. Accordingly, when drafting the statute of the court, the possibility should be left open for a State to become a party to the statute without thereby becoming a party to the Code or for a State to confer jurisdiction on the court in respect of crimes covered by the Code or defined in other conventions or on an ad hoc basis. Maximum flexibility should be the criterion with regard to the jurisdiction *ratione materiae* of the court and that would most readily be achieved if the Code and the statute were separate instruments, with the statute of the court providing that its jurisdiction *ratione materiae* extended to the crimes covered in the Code and in other instruments. The Working Group did not, however, wish to prejudge the treatment of the subject in the Commission, bearing in mind the link the General Assembly had made with the draft Code of Crimes against the Peace and Security of Mankind and the proposal on international drug trafficking that had originated with the delegation of Trinidad and Tobago.[3]

11. The question of the jurisdiction *ratione personae* of an international criminal court could be examined from two angles. First, there was the issue of the kind of subjects of law who could be brought before the court. In that connection, the Working Group had pointed out, in its recommendations, that, in the first phase of its operations, at least, the court or other mechanism should exercise jurisdiction only over private persons and not over States. That was consistent with the approach taken by the Commission in the draft Code of Crimes against the Peace and Security of Mankind and, more particularly, in article 3, as adopted on first reading in 1991. Secondly, there was the issue of which State or States must give their consent before an accused person could be brought before the court. That involved a most difficult technical issue because the bases for the assertion of personal jurisdiction in criminal matters under the different national systems of law varied greatly and could involve, for instance, territoriality and the nationality of the offender. Furthermore, some treaties provided for universal jurisdiction in the case of certain international crimes. Those technical issues were considered in that section of the report dealing with jurisdiction *ratione personae*. The Working Group had not thought it necessary, at that stage, to set out in detail a regime of personal jurisdiction and had simply concluded that various options could be considered. There could, for instance, be a requirement that both the territorial and the national State should consent. Alternatively, it could be provided that the State of nationality could only prevent the court from exercising jurisdiction if it was prepared to prosecute the accused before its own courts. The Working Group believed that a solution could be found which respected the jurisdictional systems of States in criminal matters and which none the less catered for most of the situations that were likely to arise.

12. Since the General Assembly had requested the Commission to consider proposals for the establishment of an international criminal court or, alternatively, for some other international criminal trial mechanism, the Working Group had examined the various options in detail. It should be noted that it had reaffirmed a basic point, namely, whether at the national or international level, and in relation to serious offences of an international character defined in the various treaties and in the draft Code, the only appropriate criminal trial mechanism was a criminal court, duly constituted, in other words, a body with appropriate guarantees of independence which exercised judicial functions.

13. The Working Group's last recommendation was that, regardless of the precise structure of the court or other mechanism, it must guarantee due process, independence and impartiality in its procedures. That recommendation, together with many of its related issues, was considered at length in those sections of the report entitled "Applicable law and due process" and "Prosecution and related matters". The first considered the issues relating to applicable law from the triple perspective of

[3] See General Assembly resolution 44/39 of 4 December 1989.

the definition of crimes, the general rules of criminal law and the applicable procedure. After a careful examination of the issues involved, the Working Group had concluded that it was not easy to condense into a brief formula the various aspects involved in the question of applicable law and that, in particular, a general clause, along the lines of Article 38 of the Statute of ICJ, would not do justice to the complexity of the issues. None of the categories of rules listed in Article 38 could be dispensed with, but it might be necessary to add references to other sources such as national law and even to the secondary law enacted by organs of international organizations, in particular the United Nations, in order to supplement the primary rules contained in the treaties which defined the crimes over which the court would have jurisdiction.

14. The Working Group had also devoted separate paragraphs to the questions of the penalties to be imposed and of due process. In the latter connection, its task had been simplified, as it had referred to article 14 of the International Covenant on Civil and Political Rights which article 8 of the draft Code followed more or less word for word and which the statute of an international criminal court should likewise follow.

15. In the section dealing with prosecution and related matters, the Working Group had sketched out some possible solutions to the general question of how proceedings could be initiated before an international criminal court. It had started from the assumption that such a court, in accordance with the provisions of article 14 of the International Covenant on Civil and Political Rights, would not try defendants *in absentia*, but it had noted also that, in the case of an international criminal court, the requirement that the defendant should be in the custody of the court at the time of the trial was particularly important because, otherwise, such a trial might be completely ineffectual. On that basis, the Working Group had gone on to consider the system of prosecution, the initiation of a case, bringing defendants before a court, international judicial assistance in relation to proceedings before a court, the implementation of sentences and the relationship of a court to the existing extradition system. So as not to make the introduction of the report too long, he would refrain from going into detail on those very important technical issues.

16. Having thus completed the substantive part of his statement, he would refer to the possible course of action on the report of the Working Group. That document—not only the recommendations, but also the *in extenso* report—had enough merits for the Commission seriously to consider incorporating it in full in its report to the General Assembly, with any substantive and drafting amendments it might find necessary, notwithstanding the fact that it had originally been planned that it should be annexed to the Commission's report. There were precedents for that course of action. In 1990, the entire report of the Working Group on the establishment of an international criminal jurisdiction had, with some amendments, become part of the report of the Commission itself.[4] The words "Working Group" throughout the document had simply been replaced by the word "Commission". The quality of the document under consideration would seem to favour such a solution.

17. Although the report had been primarily a team effort, he wished to express particular thanks to two members whose cooperation had been invaluable: Mr. Thiam, the Special Rapporteur for the draft Code of Crimes against the Peace and Security of Mankind, whose experience and observations had been particularly helpful and whose ninth and tenth reports, when discussed in plenary, had provided the Working Group with the necessary basis to identify the issues which had set the pattern for its future work, and Mr. Crawford, who had not only contributed substantial portions of the report, but had also coordinated and integrated the contributions of other members. He also thanked the secretariat of the Working Group, which had done very important research and compilation work.

18. Mr. RAZAFINDRALAMBO said the report showed that the Working Group took a triply negative approach to the possible establishment of an international criminal court: it said no to compulsory jurisdiction, no to exclusive jurisdiction and no to full-time jurisdiction. In view of the importance of the issues at stake, he wished to make a few comments on the more significant aspects of the question of the functioning and composition of the criminal court which might be established.

19. The Working Group expressed the view that any court should not have compulsory jurisdiction, in the sense of a general jurisdiction, and recommended a separate juridical act, analogous, for example, to the optional recognition of jurisdiction for which provision was made under Article 36, paragraph 2, of the Statute of ICJ. He would be prepared to accept that recommendation, provided that acceptance of the proposed optional clause would make the jurisdiction of the court compulsory for the signatory.

20. As to exclusive jurisdiction, the Working Group stated three conditions which would have to be met for an international criminal court to have jurisdiction over a case. That approach could be thought to exclude the parallel jurisdiction of national courts. As thus construed, the jurisdiction of a court would also not give rise to any insurmountable problems. Since the Commission's mandate was to study only the jurisdiction of an international criminal court, it should not be necessary to dwell, as the report did, on cases in which national courts would have jurisdiction. In any event, he was in favour of a system of exclusive jurisdiction for certain particularly serious crimes, such as aggression or genocide, along the lines of the suggestion made by the Special Rapporteur in his tenth report (A/CN.4/442). Jurisdiction would be optional only for the other international crimes. The Parliamentary Assembly of the Council of Europe appeared to go even further, since it had ruled in favour of the exclusive jurisdiction of the court for crimes against peace, war crimes and crimes against humanity. The Working Group had adopted a much more timid position, which seemed to detract from the Commission's predominant role in the progressive development of international law.

[4] See *Yearbook... 1990*, vol. II (Part Two), chap. II.

21. With regard to the intermittent operation of the court, it was hard to see how such a body could be satisfied with the occasional and temporary activity typical at the national level of the special courts that brought back so many horrible memories. It was not at all certain that the General Assembly had had in mind a court operating by fits and starts.

22. At all events, the system proposed by the Working Group was neither realistic nor workable. The trial of a State dignitary on the charges brought against him could not be disposed of in a few days, as the Noriega case had shown. Judges who did not work full-time would also have to find, or continue with, another gainful occupation, and that was absolutely contrary to the ethics of the profession and detrimental to the independence of judges. The independence of a sovereign court which ruled without appeal was based on the stability and permanence of the institution, as well as on the irremovability of its judges.

23. According to the report, moreover, each State party would have the right to nominate one judge: the composition of the court would thus change as and when States became parties to its statute and the result would be an increase in membership. Only a few judges would actually take part in proceedings and in building up the case law of the court. How much credit could be lent to a court in which justice would be delegated to a few, on the basis of criteria that were difficult to determine objectively?

24. The Working Group appeared, consciously or otherwise, to have drawn inspiration from the mechanism of institutional arbitration, such as that of the Permanent Court of Arbitration. All possible avenues would have to be explored that could lead to the establishment of an international criminal court acceptable to all. It was necessary, however, that the discussion should be conducted openly, in the framework of the General Assembly's recommendation. In that connection, he noted that the Working Group had interpreted resolution 46/54 as stressing the term "trial" in the sense of the French term *procès*, as explained in the report. That allowed it to say that the General Assembly had in mind a trial before a national court. That was not at all convincing, as could be seen by looking at the sentence in question in the English version of the General Assembly resolution. All the points made on national courts in the report might well be totally irrelevant.

25. The words "or other international criminal trial mechanism" in the resolution paved the way for other solutions, such as that of a court of a temporary nature, pending the setting up of a permanent court. The system advocated by the Working Group also belonged to the category of "other trial mechanisms" and it might operate for an interim period without exempting the Commission from getting on with the task of envisaging a genuine permanent international criminal court.

26. In conclusion, he said that he was not opposed to the adoption of the report under consideration and, in particular, the recommendations contained in part A, provided that the reservations he had made were included in the summary record of the meeting. The rest of the document could be reproduced as an annex to the Commission's report.

27. Mr. CALERO RODRIGUES said that the Working Group's report was an excellent document. From one standpoint, it was a high quality digest of the issues involved, which had been carefully analysed in all their multiplicity and complexity. It was thus one of the Commission's best works. From another, and that indeed was a feature of the entire text, it put forward a number of basic propositions which were intended to become recommendations of the Commission.

28. In that connection, he had some doubts about the functions of working groups, which raised the question of how a working group's conclusions could become Commission decisions or, in other words, how to bring in second-stage inputs. In the present case, the Working Group had held 15 meetings on the matter, whereas the Commission would hold only two and it might well be asked what contribution it could make in so short a time to a discussion which it had taken some 46 pages to summarize. Without a complete debate, which was not possible in the time available, could it really accept the propositions that the court would not be a full-time body, that it would be only a "facility" and that it would not have compulsory jurisdiction?

29. Those propositions were apparently the result of a feeling that States would not be prepared to accept anything more. That unambitious, supposedly pragmatic approach might be the correct one, but it aggravated many of the difficulties inherent in the establishment of the court.

30. While the report under consideration was an outstanding demonstration of the Commission's ability rapidly to identify and analyse the issues submitted to it by the General Assembly, it raised the following problem: the Working Group was recommending that the Commission should endorse its basic propositions and its "broad approach". The Commission would then have to ask the General Assembly ". . . to decide whether the Commission should undertake a new project for an international criminal jurisdiction and on what basis". The Commission could only accept or reject the recommendations of its Working Group. How could it seriously ask the General Assembly if it decided that the Commission should start on the preparation of a new draft statute, to tell it "on what basis" that should be done? The Sixth Committee itself would have no other choice than to accept or reject the Commission's recommendations. Since it was unlikely to reject them, it would probably request the Commission to continue its work on the basis of the report under consideration. In the end, once all the usual rituals had been performed, the Commission would be bound in its future work by the Working Group's recommendations, without their having been given the careful consideration they deserved.

31. In conclusion, he said that the Working Group could have offered alternatives and the Commission could have chosen one or brought them all to the attention of the General Assembly. He could only regret that that road had not been taken. However, he would not oppose the adoption of the recommendations. He hoped that, when the Commission undertook a "new project",

it would have an opportunity to consider the possibility of a more meaningful court than the one described in the report.

32. Mr. VERESHCHETIN said that the Working Group had fully discharged its mandate and he was sure that the results of its work would be helpful to the Commission. After studying the topic for several decades, the Commission had gone no further than the analysis and exploration of possible options. It was therefore time for it to make specific recommendations; it had done so through the Working Group and that was to be welcomed. Since the Working Group had been composed of nearly half the members of the Commission, had been open-ended and had worked for some 45 hours, there would be no need for the Commission to consider its report paragraph by paragraph in plenary. He commended the work done in the Working Group by its Chairman, Mr. Koroma, by the Special Rapporteur, and by Mr. Crawford.

33. He endorsed the report as a whole as well as the six basic propositions contained in part A. They clearly showed that, when the Working Group had considered all the possibilities, it had adopted the most realistic approach, namely, that of compromise, and had found the most flexible solution. Although it would not be a standing body and would thus not be expensive, the court would still be ready to function as and when necessary.

34. The report did not conceal the fact that a number of questions were still pending, but they were technical questions and the Commission should be able to settle them if it was given a mandate to complete the formulation of the statute of an international criminal court.

35. He drew attention to what he believed was a drafting error in the English text of part A, which had to be corrected, since it affected one of the propositions by the Working Group. The English text of the third proposition said that the court's jurisdiction should be limited "to specified international treaties in force defining crimes of an international character"; it would be more correct to say, as in the other language versions, that the court's jurisdiction should be limited "to crimes of an international character defined in specified international treaties in force".

36. In conclusion, he proposed that, when the Commission had completed its discussion, it should adopt the basic approach proposed by the Working Group in its report, together with the six propositions and the three recommendations contained in part A.

37. Mr. BENNOUNA expressed his thanks to all those who had taken part in the Working Group. He said that he found the report to be excellent, and not only because the proposed model of an international court was the same as the one he himself had recommended during the general debate on the question. A tribute should be paid to the realism of the members of the Working Group, who had taken account of the international situation in making their proposals. The result they had achieved should help the Commission to carry out the task entrusted to it. The international climate now seemed more favourable and the Commission must set the pace, not lag behind.

38. One point was nevertheless worth emphasizing. With regard to the relationship between the international criminal court and the draft Code of Crimes against the Peace and Security of Mankind, it was proposed in part A that a State "should be able to become a party to the Statute without thereby becoming a party to the Code". He regretted that nothing had been said about the other aspect of the question and that it had not been made clear whether a State could become a party to the Code without thereby becoming a party to the statute of the court. The Working Group had referred to the question of the relationship between the court and the draft Code, but had simply reviewed existing opinions on the matter, without taking a stance of its own. He personally had no doubt that a State which became a party to the Code of Crimes against the Peace and Security of Mankind must *ipso facto* become a party to the statute of the court. In that connection, he was thinking of the relationship between the Charter of the United Nations and the Statute of ICJ. Such an approach would guarantee consistency, since there was a definite link between the proposed court and the Code. He therefore suggested that the following words should be added at the end of the third proposition: ", but a State party to the Code would *ipso facto* become a party to the Statute of the court".

39. Mr. SHI said that, as he understood it, adoption of the report would not be interpreted as an endorsement of the content of the report as a whole: that was reassuring because he had been afraid of finding that his hands were tied. His position had not changed: he thought that, although an international criminal court should be established, that was hardly possible for the time being. In order to be successful in that undertaking, the Commission had to be modest, cautious and realistic, and not overambitious or idealistic. He had always thought that it had to give in-depth consideration to all the issues involved in order to determine whether the establishment of an international criminal court was possible. He could therefore agree to the adoption of the report because it reflected a modest and realistic approach, analysed many issues in detail and made recommendations which were not too ambitious, while proposing a range of solutions for every problem. He thus had no difficulty in accepting the recommendations made in part A, although he thought that in the second part of its recommendation to the General Assembly, it should say that the structure suggested in the report "might be a workable system", rather than "would be".

40. There were some other errors to be corrected and drafting changes to be made in some paragraphs. The reference in the second paragraph of part A should be to the "forty-fourth", not to the "forty-sixth", session. In the fifth paragraph, the words "could" and "would" in the second and third sentences should be replaced by the word "might". In part B, the words "in the changing international climate" in the third paragraph of the Introduction should be deleted because they gave the impression that the General Assembly's request to the Commission was linked to the changing international climate. Although the international situation had changed, the international climate was the same.

41. He thanked the members of the Working Group for the efforts they had made and said that he was in favour

of the adoption of the report of the Working Group by the Commission.

42. Mr. EIRIKSSON expressed his congratulations to the Working Group for its report. He said it was evident that it had dealt in the most professional way with all the important aspects of the topic. In addition, the report was well written and it clearly stated the possible options and the conclusions reached by the Working Group, so that the General Assembly should be able to make observations and issue guidelines for the Commission's future work. He could therefore endorse the recommendations contained in part A of the report, but he did want to make some further comments.

43. In the first place, as he had explained in the past, he thought that the establishment of an international criminal court was feasible in today's international climate.

44. In the second place, he agreed with the Working Group that, at the current stage, the proposed system must start from a modest and realistic base and, in that connection, he was thinking of the concerns expressed earlier in the meeting by Mr. Razafindralambo and Mr. Calero Rodrigues. However, his point of departure had not been the same as theirs. For instance, he had never advocated exclusive jurisdiction or compulsory jurisdiction and he had always been concerned not to contribute to the establishment of a system which would be too costly in relation to its initial work load. He had thus always been ready to accept an interim system, such as the one proposed in the report. At the same time, however, he recognized that, whatever future work the Commission was called upon to do on the subject, it should indicate that the current results were only one stage in a longer process.

45. His third and last point concerned the relationship between the Code of Crimes against the Peace and Security of Mankind and the court. In his view, the establishment of the court did not have to wait until the completion of the work on the draft Code; and once the Code had been completed, all the crimes covered by it should not necessarily come within the jurisdiction of the court. He took that view because he was not entirely satisfied with the way the Code was taking shape. In any event, no final decision could be taken and he hoped that, once the work on the draft Code had been completed, his fears would prove to be unjustified. For the time being, although the point was not exactly the same, he could not support the amendment proposed by Mr. Bennouna.

46. Lastly, he agreed with the Chairman of the Working Group, that, when it had been revised, the report of the Working Group should form part of the Commission's report.

47. Mr. BARBOZA said that he too congratulated the members of the Working Group and its Chairman on the very thorough and soundly argued report they had prepared. As to the international climate referred to by the preceding speakers, it was true that the international situation now seemed to be more favourable to the establishment of an international criminal court and the Commission should try to take advantage of the situation by putting forward acceptable and realistic proposals, thereby doing international law and the punishment of international crimes a great service.

48. He personally did not think the Working Group had adopted a timid approach: it would be more accurate to call it a "low-profile" approach. It must also be remembered that the report was a preliminary one and that, since it was not being considered in detail, what mattered most was to accept the basic approach it proposed and the recommendations it contained. The report did, of course, leave aside a number of questions which must be looked into, such as penalties, the connection between the future court and national courts, and the handing over of persons to be tried by the court and their possible extradition. He also disagreed with the report on certain matters: he did not think that it would be wise to appoint national judges to the court because of the political issues which would also arise. He was of the opinion that the Commission should not adopt the report, since it could not endorse it without considering it in detail. It should accept the Working Group's proposals and conclusions provisionally, as a basis for future work. The report should be annexed to the Commission's report because it could be helpful to the members of the Sixth Committee when they came to deal with the question. Finally, the Commission should also ask the General Assembly for a new mandate so that it could continue its work and, perhaps, prepare a draft statute.

49. Mr. CRAWFORD said that, in order to respond adequately to the questions which had now arisen, it was necessary to understand the position the Commission had been in before the Working Group had started its work. His understanding was that the Commission itself had not been able to agree whether it should undertake to draft a statute of an international criminal court. It had been working on the question without any clearly defined idea to guide it and it had not reached any conclusions on the structure and jurisdiction of the future court, even though it had expressed the opinion that it was possible to establish such a court. The General Assembly had not given the Commission any guidelines despite the Commission's repeated requests. The Commission had thus been looking at possible conclusions without any means of reaching those conclusions.

50. Within the Commission itself, moreover, there were diametrically opposed views. One group of members had been in favour of an international court with unlimited and compulsory jurisdiction which would be closely linked to the Code of Crimes against the Peace and Security of Mankind and be the exact counterpart of national systems of criminal law. Another group of members had been totally opposed to that idea, regarding it as completely unrealistic, and had not been in favour of establishing an international criminal court, or had believed, with the greatest reservations, that, at most, a minimal system could be adopted.

51. The first comment to be made on the report of the Working Group was that it provided that any mechanism to be set up at the international level would have to be established in stages. There were a great many problems involved and, in the light of the long experience the international community had gained so far in respect of the establishment of an international criminal court, it would

be better to proceed in that way. It was true that some members of the Commission and of the Working Group, Mr. Robinson being the prime example, would be in favour of much broader jurisdiction than that now proposed. The report expressly reserved that possibility for a later stage, but the idea that the Commission could go that far right away was totally illusory. If the Commission continued working on that basis, any text it might produce would have no chance of obtaining enough support to have specific effects. What was involved was a very expensive trial mechanism and he was thinking not only of the remuneration of the judges, but also of trial and prosecution costs. For instance, proceedings which had been instituted by the United Kingdom of Great Britain and Northern Ireland for crimes against humanity and which were not yet over had already cost US$20 million. The idea that a complete system of international criminal justice could be set up in one go was thus totally unrealistic. It should also be noted that, during the debate on the draft Code at the beginning of the session (2254th-2264th meetings), some members of the Commission had expressed doubts as to whether the undertaking was feasible at all. Yet the same members were now accepting the proposed approach. That change should be taken into account by those who wanted to go ahead immediately.

52. Mr. Calero Rodrigues had raised a very important point concerning the Commission's working methods. It was true that the Commission faced a dilemma in the sense that it might seem that work done by only some of its members tied the hands of all of them. The same problem could arise with the detailed work done by the Drafting Committee. For future reference, it might be useful if working groups which were asked to reach conclusions, as distinct from carrying out mere exploratory work, were required to produce an interim report setting out in broad terms the approach they intended to adopt. In the present case, the Working Group had been asked to submit definitive conclusions; it had done so and that explained why its report was so detailed.

53. One of the conclusions reached by the Working Group had a bearing on the relationship between the court and the Code and, in the light of what Mr. Bennouna had said, it was worth considering. An essential basis of the report was that the Code and the statute of the court should be distinct legal instruments and that States could become parties to the statute of the court without thereby committing themselves to the Code. If the Commission rejected that basic principle, it might just as well reject the entire report. The Working Group had also taken the view that there could be links between the two drafts, in particular, by providing for the possibility that some crimes contained in the Code could be tried only by an international court, the most obvious example being the crime of aggression. The report thus left open the question of links between the Code and the court for that category of crimes. Within those limits, he personally would not object to the idea of providing in the Code that States which became parties to the Code would thereby be bound by the statute of the court, as long as there was no derogation from the existing jurisdiction of national courts over at least some of the crimes contained in the Code, such as drug trafficking, the hijacking of aircraft, and the like.

54. There were other crimes contained in the Code that had never been the subject of national jurisdiction either because they had never been defined, as in the case of aggression, or because, for various reasons, they had never been tried, as in the case of genocide. For crimes of that kind, the Commission could recognize that the system of universal jurisdiction was, for the time being, entirely illusory and make provision to that effect. To that extent, there were links between the Code and the court, but the essential element was the distinction between the two and, without it, the general support for the court necessary for it to be effective could never be achieved. He thus had no objection if wording was added to leave open that general possibility, as well as more specific possibilities on which the Commission could decide later.

55. How was the report to be handled now? As a member of the Working Group, he would be happy if it became part of the Commission's report, but he could also agree with the Working Group's solution that the Commission would adopt only part A and take note of part B and the general approach. What would not be acceptable was the idea that the Commission might adopt the report and then disregard it or that it might accept the compromise the report represented and then reject the basis on which it had been worked out. That compromise also took account of the views of a number of members, including himself, who were very sceptical about the idea of an international criminal court. If the Commission adopted part A on the basis of the principle that nothing had been decided and the option of a court with universal jurisdiction and full-time judges was still completely open, it would be telling that group of sceptics, which was numerically quite strong, that, once their agreement had been obtained, it could disavow the basis on which they had given it. If that was the case, there had been no point in setting up the Working Group. In that area, more than any other, the only way to make progress was to proceed slowly.

56. He therefore urged the Commission to adopt part A of the report, with any amendments it saw fit to make, including the reformulation of the third proposition, as proposed by Mr. Vereshchetin, and the use of the word "might", as proposed by Mr. Shi. If the Commission also wanted to adopt part B, he would be willing to delete any reference to the international climate. However, if part B was simply annexed to the report, it would still be the report of the Working Group and it should then not be changed.

57. Mr. PELLET said that he wished to make five preliminary comments before referring briefly to the substance of the Working Group's report. First, the Commission could not endorse a document which it had not been able to consider paragraph by paragraph. If it had to "adopt" the document in question, it could adopt it only as the report of the Working Group. Secondly, the problem of what to do with the report was a perfect illustration of how sensible it would be to divide the Commission's session into two parts. If that had already been done, the Working Group could have met during the first half of the session and the Commission could have calmly considered its report during the second half. It was to be feared that the last week of the work in the

Commission would offer other examples of the problems caused by the end-of-session rush. Thirdly, while the expression *cour pénale internationale* was certainly the most widely used, the Working Group might have suggested other names for the proposed court. No matter what form it took, the chosen mechanism would try only crimes under international law and it would therefore be logical and legitimate to refer to a *cour criminelle* rather than to a *cour pénale*, a broader term that did not accurately reflect what was involved.

58. Fourthly, the document under consideration clearly showed that, in some cases, it could be helpful to set up a working group to discuss a difficult problem and try to reconcile opposing views expressed in plenary or in the Drafting Committee. At most, however, it was important to avoid having such a group repeat in small committee what had already been done, sometimes in a better way, by the Commission as a whole. That seemed to have been the case in the section of the report on the applicable law, which did not fully reflect the very full plenary discussion on that point, even though it consisted of only 13 paragraphs of a rich and promising document containing 156 paragraphs in all. Fifthly, he had been afraid that his very strong reservations about a criminal court replicating the Nürnberg Tribunal would be more of a hindrance than an intellectual stimulus for the Working Group and he had wanted to conserve his freedom of thought and expression so that he could criticize what he had thought the logical outcome of the Group's work would be, but he realized that his fears had by and large been groundless, in the sense that, although the report expressed a preference for a part-time court which he himself did not share, it did not rule out the possibility of other more flexible, less unwieldy and hence more realistic and effective mechanisms.

59. The majority of the members of the Working Group had expressed a preference for a part-time court set up in advance. That was a considerable improvement over the "heavy" mechanism he had been worried about based on earlier discussions. However, that solution did not eliminate all grounds for scepticism. The Working Group indicated more than once that a full-time court would be idle, but why would it be any different for a court such as the one being proposed, the main advantage of which was that it would be less costly? In its report, the Working Group stated, as if inadvertently, that it intended to address the "major concerns which underlie calls for an international criminal jurisdiction" but what about the concerns of the group of people who, rightly or wrongly, were not in favour of the establishment of such a court? The reluctance of the General Assembly and the Sixth Committee to give the Commission any guidance showed that that group was quite large. He fully agreed with the majority view of the Working Group that the establishment of a court, as proposed in the report, was possible, but he did not think that it would be very useful. What separated him from most of the Working Group was his belief that there was no rush to choose a particular solution and no reason to give priority to the one that had been proposed. Still, he was grateful to the Working Group for having, to some extent, taken his views into consideration, in particular in the paragraphs dealing with alternative possibilities and the last eight paragraphs of the section dealing with an international criminal trial mechanism other than a court, although those analyses could have been more thorough and detailed and, in some cases, presented in a more positive way.

60. With regard to the method of establishment of the court, he continued to believe that, while the conclusion of a treaty in due form was certainly a possibility, the most important point was that States and the international community as a whole should have a text at their disposal clearly stating how the court was to operate—and offering options, if necessary. In such a case, it would be enough to draft a text to which States could simply accede if necessary and which could be adopted by a resolution of the United Nations General Assembly. The Working Group did not, moreover, seem to have been entirely consistent in that regard: after asserting that methods other than a treaty would not give the court the assurance of a sufficient degree of international support for it to work effectively, it later accepted that States which were not parties to such a treaty could still accept the jurisdiction of the court, and that was tantamount to saying that the entry into force of a treaty was not essential. What really counted was that a text should exist; whether or not it was a treaty was entirely irrelevant. In addition, the requirement of the ratification of a treaty would probably discourage States from bringing cases before the court, even where it would be very useful to do so. The case of the crime of apartheid was a prime example. He realized that the solution proposed by the Working Group did not rule out the possibility that those responsible for that crime could be brought before the court, but its great inflexibility might well make such action more difficult.

61. The report of the Working Group seemed extremely ambiguous with regard to the relationship between the court and the Code of Crimes against the Peace and Security of Mankind: in the fourth paragraph, it clearly indicated that a State should be able to become a party to the statute of the court without thereby becoming a party to the Code, but immediately added that "... the Code, once it has been finally adopted, would be one of the international instruments defining offences of an international character which would be subject to the competence of the court". The last paragraph of the section dealing with the definition of crimes was just as ambiguous. In his view, a State should be able to request the court to try a person suspected of an international crime listed in the Code without having to accept the definitions the Code contained. The link the Working Group seemed to be establishing between the statute of the court and the Code could only give rise to reservations on the part of those States which did not accept the Code and would thus refuse to accept it indirectly through the statute of the court. That link was not only debatable, but also unnecessary. Apartheid and genocide, for example, were international crimes, whether or not States had ratified the treaties defining those offences and whether or not they had ratified the Code. There were international rules that prohibited those crimes. Those were customary rules, but, in international law, custom was a source of obligations that was as worthy of consideration as treaties. He thus strongly disagreed with the Working Group on that issue if it was true that the paragraph he had just mentioned and the one preceding it

could be interpreted to mean that a crime could be tried at the international level only on the basis of a treaty in force for the State concerned. Once again, the Working Group was not entirely consistent, since it recognized in the last paragraph of the section on jurisdiction *ratione materiae* that the concept of international crimes was evolving. Unfortunately, it might be tempting to say that mankind's inventive genius knew no bounds.

62. His last comment related to the very specific problem of drug trafficking. While the Working Group was often too ambitious, it was rather reserved on that issue. In particular, it did not seem to take adequate account of the guidelines contained in General Assembly resolution 44/39, which referred in a general and non-restrictive way to persons involved in international drug trafficking. For that crime, and that crime only, the international mechanism envisaged should, by contrast, be available on a full-time basis and, if it was well designed, there was, unfortunately, every reason to believe that it would not be idle. The question then arose whether it was legitimate to propose, as the Working Group was nevertheless doing, only one criminal court. Would it not be better to envisage specialized courts, adapted to different international crimes and operating according to modalities which met the particular needs of each one? In his opinion, such a solution would definitely be preferable in the case of transboundary drug trafficking and, most probably, in the case of aggression. In future, the possibility should thus not be ruled out of considering either a diversity of courts or a diversity of methods of operation of a court, depending on the crimes to be tried.

63. In any event, the Working Group had in general come up with constructive and imaginative solutions and he sincerely hoped that the General Assembly would encourage the Commission to continue along the lines that had been indicated, provided that the other possibilities suggested by the Working Group, particularly in that section of part B of the report dealing with applicable law and due process, were not excluded. He therefore agreed with the idea that the Commission should take note of, and possibly approve, the report of the Working Group, without necessarily adopting it.

The meeting rose at 12.50 p.m.

2285th MEETING

Wednesday, 15 July 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, 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]

REPORT OF THE WORKING GROUP ON THE QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION (*continued*)

1. The CHAIRMAN invited the Commission to resume its consideration of the report of the Working Group on the question of an international criminal jurisdiction (A/CN.4/L.471).

2. Mr. YANKOV said that the Working Group's report would serve as a valuable basis for studying the structural, jurisdictional and other issues related to the question of an international criminal jurisdiction. It was a significant step forward in the Commission's work on the question, although it would of course be an oversimplification of such a complex and difficult problem to claim that the report provided clear and detailed answers to most of the key questions. He welcomed the approach of splitting the document into two parts: part A, containing general guidelines for the Commission's immediate future work, and part B, containing an *in extenso* report which formed a background for comprehensive consideration of the main issues involved. There was a certain lack of practical consistency between the two parts, yet part A should be endorsed by the Commission and incorporated in its own report to the General Assembly.

3. The basic propositions set forth in part A should be regarded not as actual decisions taken by the Commission, but as general guidelines which would be subject to further elaboration and adjustment in the light of detailed discussion and of the views expressed by Governments. Some of the points contained basic propositions which required further study, particularly with regard to jurisdictional and institutional issues, which formed the core of the subject. In endorsing them as general guidelines, the Commission should therefore make it clear that they must be further elucidated, in order to pave the way for general acceptance.

4. As to part B, in view of the many unresolved and controversial issues, and the lack of time available to adopt that part of the report paragraph by paragraph, it should form an annex to the Commission's report and the wording of the first of the recommendations in part A should be amended accordingly. At the present stage, it would be inadvisable to associate the Commission with suggestions and concrete proposals it had not properly considered and adopted, especially since there was as yet no common approach in the Commission to most

[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).