Document:-
A/CN.4/SR.2285

Summary record of the 2285th 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

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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

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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).

of the key issues. A common understanding could only come about through an in-depth consideration of the proposals. With regard to the court's jurisdiction *ratione personae*, the question of the court's jurisdiction to try crimes under general international law was too vaguely formulated and the concept must be further explored. As for the relationship between the court and the States parties, discussed in the section dealing with applicable law and due process, it was difficult to imagine that any bona fide party to the statute of the court would fail to accept the jurisdictional implications. The second part of the report should therefore be treated differently from the first.

5. Mr. GÜNEY said he paid a tribute to the painstaking work of the Working Group in producing a pragmatic and realistic report which reflected the complexity of the subject-matter and recognized the reserved attitude of States towards an international court with either exclusive or optional jurisdiction.

6. He did not intend to propose amendments to the report, something that would be inappropriate at the present stage. However, he could not agree with the method of establishing the court, as envisaged by the Working Group. Moreover, the list of crimes for which the court would have exclusive jurisdiction should be revised and supplemented; it should include international terrorism and systematic acts of violence against the territorial integrity and political independence of States, and against the right to life of innocent people, as well as certain specific crimes, such as the seizure of aircraft and the kidnapping of diplomats or internationally protected persons. To be effective, the court itself should be placed on at least a semi-permanent footing. He agreed with Mr. Crawford (2284th meeting) that, in a matter as complex as the establishment of a court or other international jurisdictional mechanism, it was necessary to proceed step by step. The Commission should endorse the specific recommendations of the Working Group and should include the *in extenso* part of the report in its own report to the General Assembly, either in the chapter dealing with the topic as a whole, or in an annex, specifying that it was a useful basis for future work, and that the text remained fully open to discussion.

7. Mr. YAMADA said he was appreciative of the Group's excellent work and of the informative presentation of the report by the Group's Chairman. It was particularly gratifying that the Working Group had addressed many of the questions he had himself raised (2257th, 2259th, 2261st and 2262nd meetings) during the discussion of the Special Rapporteur's tenth report (A/CN.4/442). The Group's general approach was to start with modest and practical proposals, an approach he wholeheartedly supported. He could also, in principle, endorse several of the basic propositions in part A. However, the proposition that the court or other mechanism would not be a standing full-time body, but one which could be brought into operation when required, called for further thought. He understood the reasoning behind the proposition, but criminal proceedings normally required a well-established court. A proposal for an ad hoc court would not be likely to create confidence among States in international criminal justice.

8. Part B of the report provided an extensive and valuable analysis and the conclusions should be scrutinized by experts in criminal law. The issues relating to prosecution must be further elaborated, since the feasibility of establishing a court would ultimately be determined by practical factors of that kind. As a whole, the report was an adequate response to General Assembly resolution 46/54; it contained excellent proposals for the establishment of an international criminal court and sufficient material on the problems involved. It could serve as a valuable basis for discussion in the Sixth Committee, before the Committee decided whether the Commission should be given a new mandate on the subject.

9. At the present stage, it would be difficult for the Commission to adopt the report as part of its own report, because of the differing views among members with regard to the substantive issues raised, and the fact that members preferred to keep an open mind until a later stage. However, he agreed with Mr. Crawford (2284th meeting) that it would be a hollow decision if the Commission were to adopt the report with reservations and without endorsing its contents. He agreed that it should be accepted as it stood, in other words, as the report of the Working Group. Naturally, the Commission would have to take its own decision on the subject-matter. It could do so on the basis of the recommendations contained in part A. For instance, it could decide to transmit the report by annexing it to its own report, with a recommendation to the General Assembly that it should be used as the basis for the Assembly's discussion of the subject. It could, in addition, request the General Assembly to decide whether, and on what basis, the Commission should undertake a new draft of a statute for an international criminal court.

10. Mr. FOMBA noted that the wording of General Assembly resolution 46/54 was close to that used in connection with dispute settlement machinery, since the word "jurisdiction" referred both to judicial and to arbitral procedures. The resolution envisaged a range of possibilities. The Commission was required to scrutinize them from a legal standpoint, with a view to determining to what extent they might undermine State sovereignty. It was for States alone to decide whether any of them was politically feasible.

11. From a philosophical point of view, he favoured the solution of a permanent international criminal court, with compulsory and exclusive jurisdiction to punish the most serious crimes. That would meet a real need of the international community, and the minor inroads into State sovereignty it would entail were a price well worth paying. However, States would have the last word.

12. As to the report, the question was how far the Working Group had succeeded in identifying the various possibilities and in producing detailed technical studies of each one. Having received the report, the Commission could not now challenge its contents. It must now decide, as a matter of urgency, how to approach the General Assembly with the report. Subject to certain reservations regarding substance, he was prepared to join forces with the Working Group, without necessarily adopting the report as it stood, since that would tie the Commission's hands for its future work. He therefore supported

the proposals made by Mr. Razafindralambo, Mr. Barboza and Mr. Pellet (2284th meeting).

13. Mr. de SARAM said he agreed with the proposal that the Commission should merely take note of the report of the Working Group and should annex it to its own report. However, the Commission's report should also contain a paragraph expressing appreciation of the work done by the Group and drawing attention to the fact that it was no mean achievement. The members of the Group held markedly divergent views, some preferring a permanent institution similar in structure to ICJ, others preferring no court at all, whether ad hoc or otherwise. Yet the Working Group had done what it was supposed to do; it had heard and considered the various opinions, and had sought to reconcile divergencies. It had succeeded in reaching, by consensus, conclusions on the manner in which the Commission and the Sixth Committee could now proceed, if desired, to establish an international criminal court. Moreover, those conclusions took sufficient account of practical realities to attract the widest possible support. Those realities included the question of funding, at a time when resources for global undertakings within the United Nations system were extremely scarce. To many, that consideration had influenced the preference for an ad hoc court. Certainly, if an international criminal court, in the pragmatic sense recommended by the Working Group, were to be established, it would represent a major achievement of the international community and of the United Nations. He therefore endorsed the Working Group's conclusions, as expressed in part A of the report. Those conclusions should be incorporated into the body of the Commission's report. In that form, he believed they would receive wide support, and would eventually be confirmed by the Sixth Committee. On that basis, the Commission would be able to begin preparing a statute for the court at its next session.

14. As part B of the report showed, a number of substantive and procedural issues remained, along with logistical problems and the question of funding. However, in view of the constructive way in which the Working Group had proceeded, and in the light of a review of comparable provisions in other statutes, he did not think the Commission need be unduly delayed in the task of drafting the statute of a court. He therefore hoped that an appropriate paragraph or paragraphs could be incorporated in the Commission's report, to reflect the basic propositions and recommendations made in part A of the Working Group's report.

15. Mr. JACOVIDES said that the Working Group's report was one of the main achievements of the Commission's present session.

16. He felt sure that some members of the Commission, and indeed of the Working Group itself, would have welcomed a less modest report embodying a proposal for a court with compulsory and exclusive jurisdiction, preferably tied to the draft Code of Crimes against the Peace and Security of Mankind already adopted by the Commission on first reading, yet he was sufficiently pragmatic to accept the idea that international law-making—no less than politics—was the art of the possible. The result achieved by the Working Group presented the greatest common ground, though it was undoubtedly modest in scope. It left the door open, however, for subsequent expansion when the proposed criminal jurisdiction was established and proved its worth. Similarly, he could see why, as a concession to political reality, the court should not necessarily be connected with the Code. At the same time, it should not be forgotten that the idea of the court had grown out of the Code—indeed, was now being discussed under the same item. He was prepared to accept as valid the considerations set out in the report on the relationship between a court and the Code, although he had much sympathy for Mr. Bennouna's suggestion that, on the analogy of the relationship between the Charter of the United Nations and the Statute of ICJ, a State's acceptance of the Code should automatically entail acceptance of the court's statute, although not necessarily acceptance of jurisdiction without special agreement.

17. The Commission should accept the recommendations in part A of the report and, with regard to the third of those recommendations, say that it had discharged the duty assigned to it by the General Assembly in 1989 and, in order to proceed further, would require a clear mandate for the preparation of a draft statute. Lastly, the summary and recommendations appearing in part A should form an integral part of the Commission's own report, which should also take note of the Group's report as a whole. He had an open mind about the suggestion that parts B and C should be annexed to the Commission's report. It would have the advantage of making the Commission's report shorter and also indicate that the Group's report, taken in its entirety, contained some issues that had not been fully considered by the Commission as a whole.

18. Mr. ROSENSTOCK said that the way in which the issue of an international criminal jurisdiction had been shuttled back and forth for so many years between the General Assembly and the Commission put him in mind of a game of ping-pong played with marshmallows. It indicated the unwillingness of the international community to move ahead with setting up a standing full-time court with compulsory and/or exclusive jurisdiction. Another indication was the failure of the Commission's previous efforts to secure acceptance.

19. The Working Group's report was an effort to end the deadlock and suggested a modest way of responding affirmatively to the problem. It did not answer all of the questions: not even the ones it raised. Moreover, there were questions raised by the model suggested by the Working Group that would not exist in a full-time court on the pattern of ICJ.

20. Attention had been drawn to the little time available to deal with the Group's report. The split-session formula would have provided a satisfactory solution in that respect. At least, the report seemed to demonstrate the utility of the innovative technique of establishing working groups. He agreed with Mr. Yamada about the need for certain issues to be considered by experts in criminal law.

21. The report sufficiently illustrated the issues to enable Governments to decide whether to instruct the Commission to draft a statute. Governments were not

being asked to accept either the modest proposal embodied in the Working Group's report or a bolder version. They were being asked to say whether they would have enough interest to authorize the necessary drafting and, if so, for what type of institution. Drafting should not be authorized unless the world community was favourably disposed, so as not to repeat the experience of the 1950s. He believed the Commission should emphasize that the response to the question of an international criminal jurisdiction would be the most important matter before the Sixth Committee at the forthcoming session of the General Assembly and that considered views on the subject were required.

22. With reference to Mr. Bennouna's remarks (2284th meeting), he would point out that the court did not imply the Code of Crimes against the Peace and Security of Mankind, but the Code might well imply the court. He did not believe that that point needed to be addressed at the present stage, but was of the view that the interests of both the Code and the court would be served by treating them separately, for any attempt to deal with them as a single topic was unlikely to produce early results on either.

23. Lastly, it was essential for the Commission to endorse the recommendations contained in part A of the report, and for the Group's full report to be made available to States Members of the United Nations as an annex to, or as part of, the Commission's own report.

24. Mr. THIAM (Special Rapporteur) said that, as Special Rapporteur and *ex officio* member of the Working Group, he had hesitated to speak but wished to put forward some personal views on the Group's report. There could be no question of expressing views on the substance, but the report was clearly a compromise. Two trends had become apparent on the issue of an international criminal court. One favoured a traditional-type permanent criminal court with well-defined jurisdiction, and the other took a more modest approach, favouring an ad hoc court with optional jurisdiction. The Group's report steered a middle course and put forward a compromise which did not satisfy either trend, yet left the door open to future developments. The Group's proposals took into account what was realistically possible, leaving out what was perhaps desirable but not feasible at the present time.

25. The only question before the Commission now was the way in which the report was to be adopted. Part A, the more important one, contained the conclusions which would state the Commission's position on the problem. There appeared to be general disagreement about adopting them. At the same time, those conclusions should not be treated as being absolutely definitive, since they contained a number of points that were still controversial. For example, only some members believed that the statute of the future court needed to be formulated as an international treaty. Also, some difficulties had arisen in the matter of the relationship between the draft Code and the court. On that point, he did not at all share the views advanced by Mr. Rosenstock. In the course of his statements as Special Rapporteur, he had had occasion to demonstrate the links between the Code and the court. He was therefore obliged to reserve his position on that issue. Again, he had to express reservations about the question of the possible establishment of an international criminal trial mechanism other than a court, for the Group's report did not explain what type of mechanism was envisaged and he would welcome explanations in that regard.

26. Two views had been expressed with regard to part B of the report. One was that it should form part of the Commission's report, and the other was that it should form an annex. His own preference was for the first solution, but that would mean having to consider part B paragraph by paragraph. Since the Commission did not have the time, he was prepared to accept the second solution, but the Commission should be very careful not to give to the General Assembly the impression that it had doubts or hesitations on the matter. It should stress its conclusion that the establishment of an international criminal court was feasible at the present stage in its work.

27. Mr. VILLAGRAN KRAMER said that the problem of an international criminal jurisdiction had been before the Commission for no less than 44 years, so that the time had come to say whether it was possible to go ahead with the project or not.

28. The Working Group had made a commendable effort to arrive at common ground. He appealed to those members who had expressed reservations, and drew their attention to three points in General Assembly resolution 46/54 of 9 December 1991, which set out the Commission's mandate in the matter. The first was that the General Assembly, in resolution 46/54, had asked the Commission to consider ". . . the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court . . .". He would emphasize the use of the word, "proposals", in the plural. The Working Group, in its report, had appropriately presented a whole range of proposals, very aptly described as a "cluster of proposals". The report thus offered a number of different possible solutions, thereby suitably answering the General Assembly's request.

29. The second point was that the General Assembly had also mandated the Commission to consider the establishment of an "international criminal trial mechanism" other than an international criminal court. In response to that part of the resolution, the Group's report put forward a number of suggestions, without expressing a preference for any particular mechanism. It thus enabled the Commission to comply with that part of the General Assembly's mandate.

30. The third point was that the Assembly had requested the Commission to consider the issue of international criminal jurisdiction ". . . in order to enable the General Assembly to provide guidance on the matter". He believed that representatives on the Sixth Committee would find, on that point as well, that the Working Group had complied with the request.

31. On the question of the relationship between the Code and an international criminal court there had been tensions within the Group and the issue was one on which no unanimous view had been reached. A political decision by the General Assembly would be necessary for the work to go ahead in that regard. As to the appli-

cable law, he shared the conclusion in the report that a formula along the lines of Article 38 of the Statute of ICJ would not suffice. It would need to be supplemented by a reference to other sources such as national law, as well as to the secondary law enacted by international organizations, in particular the United Nations.

32. Lastly, the General Assembly should receive a document that would enable it to decide either that work on the statute of an international criminal court should go ahead or that the subject was not yet ripe for codification. The Group's report contained an adequate response to the relevant General Assembly resolution and it should be approved by the Commission. The conclusions to be adopted should not be watered down in any way.

33. Mr. MAHIOU said that the Working Group had produced a sound document which attested to the positive result achieved by its members. However, as there was so little time available, the Commission could not hold a detailed discussion at that stage on such a voluminous report, particularly as it dealt with a highly sensitive issue. All it could do was to adopt, and if necessary amend, part A of the report, which contained the Group's summary and recommendations. The report should none the less be brought to the attention of the General Assembly and, to that end, should be annexed to the Commission's own report to the Assembly. He agreed that the Group's report should be accepted by the Commission without reservation. That did not mean each and every word of it should be accepted, but rather that the Commission wished to make it clear that the report was a move in the right direction. It raised a number of issues and would enable the General Assembly to take a decision in the light of all the facts. Such an approach did not, of course, preclude a general discussion in the Commission, if only to allow the views of members, particularly those who had not participated in the Working Group, to be reflected in the summary records.

34. In the context of those considerations, he wished to make two remarks, the first of which concerned the link between the Code and the court. There were two positions in that connection both of which should be ruled out, in his view. One was that the court and the Code were closely linked and interdependent, while the other was that they were completely independent. Those positions were unrealistic and really more in the nature of an intellectual exercise. That was not what was expected of the Commission, whose task it was to make practical proposals. There were indeed links between the Code and the court, but the whole problem was to determine the nature of those links. The report dealt with that problem and did so in terms he was prepared to accept, although it was somewhat timid. It should, for instance, have listed a number of crimes, such as aggression, apartheid and colonial domination, among others, to indicate that such crimes could really only be tried by an international criminal court and not by national courts. In the case of certain other crimes, the flexibility that the report allowed for would enable States to decide whether they should in fact be referred to an international criminal court.

35. Secondly, on a more general note, he considered that the views of Mr. Razafindralambo (2284th meeting)—who as President of the Supreme Court of his country had had wide experience in matters of criminal law—on the threefold rejection of compulsory jurisdiction, exclusive jurisdiction and permanent jurisdiction for the international criminal court, merited special attention. Obviously, it would be over-ambitious to contemplate at that stage the institution of an international criminal court which had those three characteristics. At the same time, it was important to bear in mind the need for flexibility in the evolution of the court and, when its statute was drafted, care should be taken not to freeze its provisions in such a way as to preclude that flexibility. In short, the approach adopted should bring States to understand, and accept, that an international criminal court must tend towards those three characteristics. On that basis, he could agree entirely that the report of the Working Group should be annexed to the report of the Commission.

36. Mr. AL-KHASAWNEH said that he would like to know whether the possibility of ICJ discharging the functions of an international criminal court had been one of the options discussed by the Working Group.

37. While he endorsed all of the recommendations in part A of the report, he considered that the proposition that "... in the first phase of its operation, at least, a court or other mechanism should exercise jurisdiction only over private persons, as distinct from States," gave the impression that the position might change later on. If that were so, at what point would the second phase commence? He appreciated that the proposition had been drafted in modest terms to encourage acceptance by States, but it would be unwise to be unduly modest. The fifth of the basic propositions raised a more important question. He agreed entirely that the requirement of precision in criminal justice meant that a more permanent kind of institution would be needed. Again, the test applied in that particular case was the test of availability, with which the Commission had become familiar during its discussion on countermeasures under the topic of State responsibility. In the latter case, however, the availability related to dispute settlement procedures, whereas in the case of an international criminal court the main consideration was that justice should not only be done but should also be seen to be done. If there was some mechanism that was not a standing body but could be brought into operation as and when it proved necessary, could it be said that justice was seen to be done? Also, he felt bound to say that some of the Working Group's recommendations were disconcerting.

38. He agreed that the full text of the report should be made available to representatives in the Sixth Committee. There could, however, be no question of the Commission agreeing to all the points of substance raised in the report before it had discussed them. Possibly, therefore, some way could be found of placing the report before the representatives in the Sixth Committee, it being understood that, for the perfectly legitimate reason of lack of time, the Commission had been unable to discuss part B. Subject to those observations, he was prepared to endorse part A of the Group's report.

39. The CHAIRMAN said it had been agreed among the members of the Working Group that ICJ would not be a suitable body to hold criminal trials, as its members

were experts in public international law rather than in criminal law. There had been some disagreement among members of the Group about whether criminal jurisdiction over States should be introduced at a later stage. In particular, some believed that the idea of trying States would be revolutionary at the present stage in the development of international law, as well as being very vague. While some controversy remained as to the way in which the court would actually be established, he considered that it was too late to amend the report or to go into further detail on the subject.

40. Mr. THIAM (Special Rapporteur) said that there had never been any question, in his view, of vesting the international criminal court with jurisdiction to try States. Indeed, at the time when he had prepared his report on that aspect of the draft Code, many delegations in the Sixth Committee had entered reservations on that score. For the time being, it would be best to deal only with the court's jurisdiction to try individuals: any other course would simply open the door to endless debate in the Sixth Committee. He therefore agreed that the part of the Group's report dealing with that could be deleted.

41. Mr. KOROMA (Chairman of the Working Group) said he would plead for the report to be left as it stood, apart from any necessary editorial changes. Some of the proposals it contained did not reflect his own position, but, if the Commission started to tamper with the report, the debate might well be reopened. He agreed with the Chairman's remarks to some extent but not entirely: the Working Group had considered whether ICJ should try criminal cases involving States but had decided against that not only on grounds of competence but for a number of other reasons. As for the question of the stage at which the possibility of indicting States should be considered, one school of thought, to which he belonged, believed it was indeed conceivable that States could be indicted at some appropriate point. In a spirit of compromise, however, he and those who shared his views were prepared to leave the matter open.

42. Mr. AL-KHASAWNEH said he was only partly convinced by the Chairman's explanation, for he did not think that the Commission was in a position to comment on the competence of the members of the ICJ in matters of criminal law.

43. The stage at which States could be brought before an international criminal court appeared to be a question of constructive ambiguity and he would not destroy that ambiguity. However, he still entertained very serious doubts about the fifth basic proposition in part A of the report, but, not wishing to reopen the debate on the matter, would be content if his views were reflected in the summary record.

44. Mr. CRAWFORD said that ICJ was structured to hear cases, as a full court, between States; a major amendment to its Statute would be required to empower it to hear criminal trials. Mr. Al-Khasawneh had none the less touched upon a very important point, for there was a marked tendency towards the fragmentation of the international jurisdictional system. That point could perhaps be considered, however, in relation to any appeal structure. The general idea was that the Working Group's recommendations represented a modest first step and that the Commission could, if need be, consider further possibilities in due course.

The meeting rose at 11.40 a.m.

2286th MEETING

Thursday, 16 July 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: 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 (*continued*)

1. Mr. KABATSI said that he supported the adoption of the Working Group's report as a whole. It had been prepared by no less than 16 very eminent members of the Commission and reflected clearly the differences of view and positions in the Working Group and was therefore a very useful compromise. He was, however, prepared to agree that the Commission should adopt only part A and that it should take note of part B, which would appear in an annex. The most important thing was that the Commission had taken a clear and definite decision that an international criminal court should be established. For his own part, he would have favoured a strong court with exclusive jurisdiction, at least over certain grave crimes such as aggression and genocide, rather than a mechanism on the pattern of an arbitral tribunal. For the time being, such a solution did not seem possible and was perhaps not even wise. Provided that a court was established, even a very modest one and even if it functioned only as and when required, more could be done later on.

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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).