Document:-
A/CN.4/SR.2298

Summary record of the 2298th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1993, vol. I

given by Mr. Caflisch, Legal Adviser of the Swiss Federal Department of Foreign Affairs, on the subject: "Peaceful settlement of international disputes: new trends".

The meeting rose at 10.20 a.m.

2298th MEETING

Monday, 17 May 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

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

Statement by the Deputy Legal Counsel

1. Mr. ZACKLIN (Deputy Legal Counsel) said that he was addressing the Commission on behalf of the Legal Counsel, who was unfortunately detained in New York on business in connection with the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991[1] (hereinafter referred to as the international tribunal). Mr. Fleischhauer, the Legal Counsel, greatly regretted not being able to attend the Commission's deliberations on the highly important topic under consideration and hoped to reschedule his programme in such a way as to be present at the Commission's meetings later in the session.

Draft Code of Crimes against the Peace and Security of Mankind[2] (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,[3] A/CN.4/449,[4] A/CN.4/452 and Add.1-3,[5] A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR

2. The CHAIRMAN reminded members that the General Assembly, in its resolution 47/33, had taken note with appreciation of chapter II of the report of the Commission,[6] entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction; had invited States to submit to the Secretary-General, if possible before the forty-fifth session of the Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; and had requested the Commission to continue its work on the question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

3. In that connection, he drew attention to the eleventh report of the Special Rapporteur for the topic (A/CN.4/449), which contained the draft statute of an international criminal court, and to the written comments received from Member States submitted further to General Assembly resolution 47/33 (A/CN.4/452 and Add.1-3). Relevant material was also to be found in the comments and observations of Governments on the draft Code of Crimes against the Peace and Security of Mankind adopted on first reading by the Commission at its forty-third session (A/CN.4/448 and Add.1). In addition members might wish to refer to the documents distributed further to Security Council resolution 808 (1993) and, in particular, to the report of the Secretary-General.[7]

4. Mr. THIAM (Special Rapporteur) introducing his eleventh report, said that certain corrections were required. In the first place, the text of article 8 should be amended to read:

> "Although the jurisdiction of the court is permanent, not all of its organs shall function on a full-time basis; the court shall be convened only to consider a case submitted to it."

Secondly, in alternative B of article 9 the word [*Seuls*], in the French text, should be amended to read [*Seul*]. In article 13, the words [*le ou*], in the French text of paragraph 1, should be added before [*les*] and, in the first paragraph of the commentary to that article, the words *et le*, should be added before the words *ou les* in the third line. Again in the French text, the words *une cour inter-Etat*, in the second paragraph, should be amended to read *une cour entre Etats*. The title of article 27 should be amended to read "Unacceptability of proceedings by default" and the body of the text should be amended to read "(No defendant may be tried by default)".

5. He had already submitted at least three reports on specific aspects of the question of an international criminal court, but they had been of an exploratory nature and had been designed to keep interest in the matter alive.

---

[1] See Security Council resolution 808 (1993) of 22 February 1993.

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

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

[4] Ibid.

[5] Ibid.

[6] Reproduced in *Yearbook... 1992*, vol. II (Part Two).

[7] Document S/25704 and Corr.1 and Add.1.

There were those who felt he should have submitted a draft statute of an international criminal court to the General Assembly much earlier. However, the Commission should not submit such a draft before the General Assembly requested it to do so. Fortunately, the Commission had now been provided, in General Assembly resolution 47/33, with a firm mandate to prepare a draft statute. As the draft statute had been distributed well in advance, members would have had ample time to take full cognizance of it. In view of the urgency of the matter, therefore, he would focus on certain general points.

6. The main characteristics of the draft were: (*a*) its realism, in that it took account of the existence of other bodies, that would undoubtedly meet with the approval of those of his colleagues who had always maintained that it was not possible to disregard, in particular, State sovereignty; (*b*) its flexibility, for it did not make the jurisdiction of the proposed court mandatory but left it to the discretion of States; and (*c*) the court would be a body of modest proportions, adaptable and inexpensive to run. These are the features the Commission had always wanted to see incorporated in a draft statute.

7. The draft was divided into three main parts, a general part, one part dealing with organization and functioning and another on procedure. The general part addressed two questions: the jurisdiction of the court and applicable law. Under the draft statute, the court would not have exclusive jurisdiction. The idea of such jurisdiction had not received unanimous support and he had therefore acceded to the wish of the majority. The court's jurisdiction would also be subject to the agreement of the States most directly concerned: the State on whose territory the alleged crime had been committed, and the State of which the perpetrator of the alleged crime was a national. Those two States were the most important, but the possibility that the agreement of other States might be required could also be considered. Jurisdiction would also be limited to individuals: in other words, the court could not try international organizations or States.

8. He had confined the States whose agreement would be required to two broad groups because, under internal law, jurisdiction in criminal proceedings was governed by two principles. The principles in question were the territoriality and the personality of criminal law. No one questioned the former. The latter was designed for instances in which, as sometimes happened, a State, deeming that its fundamental interests or those of its nationals were at issue, in a given case, decided that it should try the case. Jurisdiction *ratione personae* would allow it to do so.

9. So far as the applicable law was concerned, he had followed the recommendations of the Working Group, whose view it was that such a law could derive only from international conventions and agreements. The proposed court, therefore, would try only such crimes as were defined in those instruments. The matter had given rise to lengthy debate in the Commission, but the prevailing—and, in his opinion, the realistic—view was that the applicable law should be limited to international conventions and agreements. Some members, however, felt that both custom and general principles of law could in certain cases also constitute a source of applicable law. Accordingly, he had placed those notions between brackets in the draft articles to enable the Working Group to review the matter. Nor, incidentally, was case-law to be disregarded, for it was difficult to see how a court could be prevented from applying its own case-law.

10. The organization and functioning of the court was governed by two principles: (*a*) the permanence of the court as an institution for which two factors had to be reconciled: the court must be permanent but it should not operate on a full-time basis; and (*b*) the actual composition of the court: the judges would not be elected, as was the general rule in international organizations, but would be appointed by their respective States of origin. The Secretary-General of the United Nations would then prepare a list in alphabetical order of the judges so appointed. They would not work full-time.

11. As for the composition of a chamber of the court, obviously it was not feasible for all the judges appointed by States parties to sit in a chamber of the court at the same time. He had therefore proposed that a chamber should be composed of nine judges, though the number could, of course, be greater or smaller. Such judges would be selected by the President of the court from the list prepared by the Secretary-General whenever a case was referred to the court.

12. In making his selection the President would have to take account of certain criteria in order to guarantee objectivity in the composition of the chamber. Thus, a judge who was a national of a State from which the alleged perpetrator of the crime came could not be selected, nor could a judge from a State on whose territory the crime was committed. The President himself would be elected either by all the judges sitting in plenary or by a committee of States, or by the General Assembly.

13. The court's procedure would follow various stages, including referral of a case to the court, investigation, and the trial stage. A case could be brought before the court only by means of a complaint made by a State. Members might wish to refer to the draft articles for the form of the complaint.

14. There were two systems of investigation: (*a*) the inquisitorial system, in which the investigation was entrusted to one person, the examining magistrate, who had excessive powers and whose investigation was surrounded by secrecy; and (*b*) the adversarial system, in which the investigation was carried out openly and publicly by the court itself. Though he came from a country which had adopted mainly the inquisitorial system, he preferred the adversarial system. That did not mean that, where circumstances required or in complex cases, the court could not form a commission of investigation. As a general rule, however, the investigation procedure should be conducted by the trial court.

15. The trial stage could commence only when the indictment had been drawn up. Under some legal systems, after the investigation, the Procurator General in charge of the prosecution drew up an indictment which was then notified to the accused and any interested parties and, on the basis of the indictment, the trial process took place. For the international criminal court he had none the less proposed a more flexible system—the majority in the Commission favouring a small and adaptable body—whereby the State bringing a complaint before the court

would assume responsibility for conducting the prosecution. That procedure would preclude the need for a Prosecution Department, with all the attendant legal staff. He knew from experience what a lengthy procedure that could entail. If responsibility for the prosecution were placed on the State bringing the complaint, and that State had to assemble the evidence and produce it before the court, the result, in the final analysis, would be virtually the same. What mattered was for the court to arrive at the truth by whatever means it could be established.

16. He had not mentioned such other issues as the drafting of the judgement, appeals and the execution of sentences, since the report would enlighten members on that score. In his view, the draft statute conformed with the Commission's desire for an adaptable and light body of moderate cost.

17. Mr. de SARAM said that the Special Rapporteur's eleventh report was extremely useful and he looked forward to the Special Rapporteur's advice on the various points that would have to be determined as the work of the present session progressed. The Commission would, of course, proceed with that work on the basis of the recommendations of the Working Group contained in the annex to the report of the Commission on the work of its forty-fourth session.[8]

18. All members were well aware that, in putting together the various provisions of a draft statute for an international criminal court it would be necessary to identify and resolve a multitude of points, some of them much more difficult than others. The Commission should therefore make plain from the outset what it saw as the overall objective at the current session. A great deal would be achieved if the Commission could report to the General Assembly that it had agreed on three main points: first, the possible overall structure of a statute for an international criminal court in terms of its principal chapters and subchapters; secondly, the appropriate draft articles for the chapters on matters of an essentially technical nature—administrative, institutional and organizational matters, for example—on which consensus should be relatively easy to reach; and, thirdly, the more difficult questions that might take more time to solve, and within the context of each question, the particular points still to be agreed on and the options available on each point. By reporting to the General Assembly in such a way, the Commission would begin to make it clear to the Sixth Committee exactly what it had in mind as the draft statute started to take shape.

19. As to the overall structure of the draft statute, the Commission could gain much useful guidance from the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993),[9] notwithstanding the substantial differences between the legal basis for the establishment of the international tribunal referred to in the Secretary-General's report and the legal bases on which the Commission's draft statute for an international criminal court would be prepared. Agreement should be relatively simple to achieve on those chapters of the draft statute that concerned matters of an essentially technical nature. To judge from the numerous draft statutes already in existence, such provisions would account for 70 to 80 per cent of the provisions of the draft statute under consideration, while the remainder were the difficult residual questions on which much work would still have to be done.

20. Lastly, at the current session it would be necessary for the Commission, especially at the Working Group stage and in the inevitable informal consultations, to make choices as to how particular draft articles should best be handled or formulated. The provisions proposed by the Special Rapporteur were extremely helpful and would, of course, be kept continuously in view and consulted. In addition, it might be useful for some members to begin preparing, as each particular question came under consideration, a comparative table of provisions from some of the principal draft statutes in existence. There again, the provisions of the statute proposed to the Security Council by the Secretary-General would be of invaluable assistance.

21. Mr. IDRIS said that the Special Rapporteur was to be congratulated on an excellent report, prepared in a relatively short time, and on a brilliant oral introduction. Recent developments on the international scene had undoubtedly made the task more difficult, and the Special Rapporteur's tireless efforts were worthy of the Commission's praise and support.

22. Three important points emerged from paragraph 6 of General Assembly resolution 47/33. First, the question of an international criminal jurisdiction was a matter of priority in the eyes of the international community. Secondly, the Commission was expected to proceed with the actual elaboration of a draft statute for an international criminal court, rather than merely continue to deliberate the question. Thirdly, the Commission was requested to submit a progress report to the General Assembly in time for its forty-eighth session. By taking up that challenge in a spirit of cooperation and realism, it would do much to justify its role within the United Nations system.

23. The Special Rapporteur's eleventh report took account not only of the work of the Working Group set up at the previous session but also of views expressed at the forty-seventh session of the General Assembly. As Mr. de Saram had pointed out, a number of drafts prepared by other bodies were also in existence and could be consulted to good purpose. Governments were becoming aware of large lacunae in existing international law and of the need to set up an international criminal court that eschewed restrictive interpretations based on subjective and prejudiced views.

24. Although the report did not set out to offer definitive solutions, it could provide a sound basis for future work and it successfully reflected the general view that the structures to be established should be adaptable and of modest cost. There was, in principle, general agreement on that score. A number of problems would, none the less, need to be considered more closely. First, as regards the composition of the judgement organ, its non-permanent nature must on no account be permitted to detract from the organ's impartiality or independence. The court must be completely beyond the reach of political influence, an issue that required very careful and realistic consideration. Secondly, with regard to jurisdiction, arti-

[8] See footnote 6 above.

[9] See footnote 7 above.

cle 5, paragraph 3 of the draft statute, provided that, pending the adoption of a relevant criminal code, offences within the jurisdiction of the court were to be defined in special treaties between States parties, or in a unilateral instrument of a State. The question that arose in that connection was why any State should yield to the jurisdiction of an international court in matters in which its national courts were competent to deal. The issue of national sovereignty was involved. If the Commission wanted the court to succeed, it must limit the court's jurisdiction to exceptionally serious crimes of a morally reprehensible nature.

25. He supported Mr. de Saram's proposals concerning arrangements for work on the topic within the Working Group and, in particular, the suggestion that a comparative table of provisions from some existing statutes should be prepared for the purpose of comparison.

26. Mr. CALERO RODRIGUES said that the three parts of the draft statute set out in the eleventh report of the Special Rapporteur would assist the Working Group in organizing its proceedings in two or possibly three separate parts.

27. While not in agreement with the statement that it was difficult to imagine the United Nations requesting the Commission, by a resolution, to elaborate the statute of a court that would not be an organ of the United Nations, he none the less thought it normal that the court should be an organ of the United Nations at a time when international crimes were, unfortunately, once again in the forefront of events. In that connection, he wondered whether, in view of the procedure for the appointment of judges proposed in draft article 12 which would mean that the proposed organ would have over a hundred members, it was appropriate to refer to "the court", as the Special Rapporteur frequently did in his eleventh report, or whether it would be preferable to speak of "organs of the court" as the Secretary-General did in his report.[10] The point was perhaps only a technical one, but should nevertheless be considered with care.

28. On the question of jurisdiction *ratione personae*, the fact that the court would try only individuals was not in dispute. The same was not true, however, of article 5, paragraph 2, which introduced the principles of territoriality and nationality. If it was decided that the court could judge an individual only if its jurisdiction was accepted by the State of which that individual was a national and the State in whose territory the crime was presumed to have been committed, the effectiveness of the court would be greatly reduced; indeed, the action of the court might be blocked altogether because of the refusal of one of those States to accept jurisdiction. The question of the national sovereignty of States had been mentioned earlier. When a State entered into a treaty it might relinquish some of its sovereignty. If a State agreed to the establishment of the court, it should at the same time be expected to accept the court's jurisdiction, ceding its rights of sovereignty, in that particular case, to the international community. Unless that principle was recognized, the importance of the court would be very limited.

29. Article 5, paragraph 3, was somewhat confusing because it dealt both with jurisdiction *ratione personae* and with jurisdiction *ratione materiae*. It was difficult to accept that States could, by special treaties or unilateral instruments, indicate what offences should be included within the jurisdiction of the court. Surely, the court must have a clearly established jurisdiction that did not depend on acceptance or non-acceptance by particular States. The problem which had haunted the Commission for a long time, and would doubtless continue to do so, was that the effectiveness of the court depended on the existence of substantive criminal law, without which it would be very difficult indeed for the court to function at all. In that connection, he recalled that a proposal for an international criminal court had been raised within the Committee which was preparing the establishment of the Permanent Court of International Justice at the time of the League of Nations, but had been withdrawn in the absence of clear substantive law in the matter. The same problem had arisen in connection with the Nürnberg and Tokyo Tribunals and was again creating serious difficulties in connection with the case of the former Yugoslavia. He hoped that, while working on the priority issue of the establishment of an international criminal court, the Commission would not forget how essential it was to resolve the problem of substantive law without too much delay. In the absence of a clear definition of the crimes to be tried, a court, however well organized, would be but an imperfect instrument.

30. As to article 7, paragraph 2, fifth subparagraph, it was not possible to agree that everyone should be entitled to be tried only in his presence. Many legal systems admitted trial in the absence of the accused, provided the accused knew that he had been indicted and was being tried. If the accused chose not to attend the trial, that did not necessarily constitute a denial of a basic right.

31. He, too, was of the opinion that the matters dealt with in Part 2 of the proposed draft statute were mostly of an administrative nature and were unlikely to give rise to many problems. The Commission should stand by its own recommendations as contained in its report on the work of its forty-fourth session,[11] approved by the General Assembly. The court should not sit permanently; it should only function when necessary, and the chambers system was undoubtedly the most satisfactory.

32. With reference to Part 3, on procedure, it was important to distinguish between bringing a case to the attention of the court and the actual beginning of proceedings. It was normal for a State to submit complaints, and any State could do so. The Special Rapporteur was suggesting that the State on whose territory the offence was committed and the State of which the accused was a national were to be informed. He hoped that that did not imply States could object to proceedings being instituted against a particular individual. In the matter of article 25, he believed that States should indeed be allowed to be present at the proceedings, but prosecution should be in the hands of a separate organ of the court.

33. Article 26 suggested that the court should decide whether a complaint was admissible. Surely that did not mean the 100 or so members were to be asked whether

[10] Ibid.

[11] See footnote 6 above.

proceedings should be initiated; perhaps the bureau of the court could take such a decision. The same article went on to say that the court would decide whether or not to institute an investigation. But which chamber or individual would carry out that task? A preliminary investigation was certainly necessary, yet the draft statute did not make a clear distinction between such an investigation and the proceedings in the case itself. Those should be two separate phases.

34. It was gratifying to find that article 28 spoke not of "extradition", but rather of "handing over". It seemed strange, however, to admit that States could assert that a decision of the court had been taken on political, racial, social, cultural or religious grounds. He also wondered what would happen if a State refused to hand over an individual. Clearly the court should have the final say. In his opinion, penalties, which were the subject of article 34, should be set forth in the instruments of substantive law that were to be applied, but since there were currently few, if any, international instruments which, when defining crimes, indicated penalties, it was to be hoped that the court would do so. Moreover, he asked whether the court would apply the penalties provided for by the criminal law in the order that appeared in the article, namely: (*a*) the State of which the perpetrator of the crime was a national; (*b*) the State which lodged the complaint; and (*c*) the State on whose territory the crime was committed. One advantage of a permanent court was that it would provide a clear legal framework. Penalties, he wished to reiterate, should be established by international law, which might incorporate elements of national law, but did not necessarily have to apply penalties imposed by the latter. The case of the proposed international tribunal was unusual, because such a body would refer to the laws of the former Yugoslavia. The purpose of the court was not to deal with a given conflict, and provisions of general validity had to be established.

35. In the case of article 35, the Special Rapporteur would have the Commission choose between revision and appeal. Actually, a principle of human rights law was that it should always be possible to appeal against a judgement pronounced by a court. Clearly, revision was not sufficient.

36. The wording of article 37 was vague. He inquired whether the State in charge of executing the sentence had the initiative for granting pardon and conditional release and whether it was obliged to follow the advice offered in consultation with the other States concerned. He did not believe that special privileges should be given to the State on whose territory the crime was committed, the victim State or the State whose nationals had been the victims. All the States of the international community were concerned.

37. He agreed with other members that the remaining problems were very complex and should be dealt with not in plenary, but rather in the Working Group. The Commission should aim to produce a final draft in 1994. The Working Group could well split up into subgroups in order to focus on the various parts of the draft separately.

38. Mr. CRAWFORD said he saw no real need for a general debate. It was the task of the Working Group to take into account the Special Rapporteur's useful work, the report of the Secretary-General[12] and the Working Group's report of 1992. The question should not be debated in plenary. The Working Group should be allowed to decide on its own working methods. It might indeed want to create subgroups, but it should not be instructed to do so. Then, on particular issues, a given subgroup might be asked to produce a text, but the Working Group as a whole should begin its work without delay.

39. Mr. KOROMA did not agree with the view expressed by Mr. Calero Rodrigues that no clear substantive law had emerged at Nürnberg. The Nürnberg trials had been conducted under an ample body of law. To deny that was to imply that injustice had been done to the accused—a serious statement when it came from the Commission. Nor did he want to leave unchallenged the assertion that the crimes had not been clearly defined. Once again, that suggested that invalid verdicts had been reached, a view he did not share.

40. Mr. Calero Rodrigues was right to say that an international criminal court's jurisdiction must be clearly established and it should not depend on the will of States. However, the Special Rapporteur was attempting to respond to the fact that some members of the international community were in favour of a flexible international court. Although most members of the Working Group would have preferred an international criminal court with clearly established jurisdiction, a number had considered that national prerogatives should be retained in the matter of which cases should be referred to such a body. That, too, would seem to be the position of most of the permanent members of the Security Council.

41. He agreed with Mr. Crawford that, for the time being, the Working Group should meet to discuss the topic as a whole and that subgroups could then be established to focus on any particular difficulties that might arise. It was not in the interest of the Commission to reopen the general debate. The matter had been fully discussed and the Sixth Committee would not be pleased to find from the Commission's report that the question had been raised in plenary yet again.

42. Mr. Sreenivasa RAO said that he reserved his comments on the international criminal court for later, but considered that a number of other points should be made. The Commission was a deliberating body and should be under no pressure to show results by the end of the current session. He did not share the sense of urgency experienced by some members. If the Commission allowed itself to be rushed into reaching conclusions without giving due consideration to the issues which were essential to be considered, it would be criticized for not discharging its mandate properly. The establishment of an international criminal jurisdiction, as pointed out by Mr. Calero Rodrigues, was a question that dated back to the League of Nations and had also been relevant in connection with the Nürnberg trials. Too much time had now been spent on general debate. It was for the Working Group to take up the remaining questions, such as jurisdiction and applicable law, the relationship between national and international jurisdictions, obligations under other treaties and the jurisdiction of an international criminal court, the relationship be-

[12] See footnote 7 above.

tween the court and the United Nations and between the court and the Security Council, and the role of prosecution. Subordinate issues must also be resolved. Thus, thorough analysis was still needed; hence, although the political climate was ripe, the Commission should not act in a hurry and must proceed with deliberate speed.

Organization of work of the session (*continued*)

[Agenda item 1]

43. The CHAIRMAN said it had been agreed that the Drafting Committee would meet that afternoon and also in the afternoon of the following day. However, in the absence of the Special Rapporteur, the Drafting Group was having difficulty continuing its work on State responsibility. As a consequence, the Enlarged Bureau had decided to recommend that the Commission should re-establish during the course of the current session the Working Group on the question of an international criminal jurisdiction under the chairmanship of Mr. Koroma. It was further recommended that no plenary meeting should be held on Wednesday and that the Working Group should meet instead. If he heard no objection, he would take it that the Commission agreed to those recommendations.

It was so agreed.

44. The CHAIRMAN, further to a comment by Mr. ROSENSTOCK, said that, in view of the number of speakers on the list for the plenary, it would not be possible to fit in an additional meeting for the Working Group, which could none the less meet three times in the course of the week.

45. Mr. BENNOUNA said he agreed about the need to cut the discussion in plenary at the current session to a minimum and to enable the Working Group to move ahead as much as possible. The general lines of the statute of the court had already been amply discussed. The need now was to focus on specific ways in which a court could be set up, and on the wording of the statute. Once the Working Group had accomplished those tasks, a discussion in plenary would be profitable.

46. Mr. CRAWFORD said a general practice should be established whereby, whenever a plenary meeting to discuss the international criminal court finished early, the remaining time would be given over to the Working Group. He urged that any statements made in plenary on the subject should be as brief as possible.

47. The CHAIRMAN said he wished to echo that appeal for brevity. At the end of its deliberations, the Working Group would submit a report to enable the Committee to take stock of the progress made.

48. Mr. KOROMA (Chairman of the Working Group) said that, after consultations, it had been decided that the Working Group would consist of Messrs. Al-Baharna, Arangio-Ruiz, Crawford, de Saram, Güney, Pellet, Razafindralambo, Robinson, Rosenstock, Thiam, Tomuschat, Vereshchetin, Villagrán Kramer, Yankov and himself. All members of the Commission were welcome to contribute to the efforts of the Working Group and could participate in the proceedings as observers, as was the practice in the Drafting Group.

49. Mr. Sreenivasa RAO expressed a desire to serve as a member of the Working Group and urged that Mr. Al-Khasawneh also be designated a member.

50. Mr. KOROMA said that they would be welcome and valuable additions to the Working Group's membership, as would Mr. Idris, who had indicated his interest in participating.

51. The CHAIRMAN said that, with the membership now established, the Group should adopt whatever working methods it considered appropriate, taking into account the comments about establishing subgroups. Its mandate was set out in General Assembly resolution 47/33, paragraph 6.

52. Mr. EIRIKSSON (First Vice-Chairman) announced the membership of the Planning Group: Messrs. Al-Khasawneh, Calero Rodrigues, Fomba, Güney, Kusuma-Atmadja, Mahiou, Pambou-Tchivounda, Sreenivasa Rao, Razafindralambo, Robinson, Rosenstock, Vargas Carreño, Vereshchetin and Yankov. Messrs. Bowett and Pellet would be ex officio members, as coordinators for their respective Groups. The first meeting of the Planning Group would be held as soon as it could be arranged for Mr. Fleischhauer, the Legal Counsel, to be present.

53. Mr. TOMUSCHAT said he believed that the Special Rapporteur's report should be discussed fully in plenary. It was a useful document that presented a philosophical background and concrete proposals for debate. As issues of principle had been fully explored during the previous session, however, he agreed that the task now should be to concentrate on drafting.

54. Unlike Mr. Sreenivasa Rao, he thought there should be a sense of urgency in dealing with the topic. The international community expected visible results from the Commission, and completion of the work by the end of the next session should therefore be the goal. Admittedly, assigning certain tasks to subgroups could be profitable, but that was something for the Working Group itself to decide.

55. One thing that might speed the Working Group in its efforts, and which the secretariat might be able to provide, would be a comparison of recent efforts to draft similar statutes, including, of course, the statute of the international tribunal.

56. Mr. VERESHCHETIN said it was true that much had been accomplished at the previous session. The General Assembly had acknowledged as much in requesting the Commission to continue its work and, at its current session, to prepare a draft statute on a priority basis.

57. The progress made at the previous session could to a large extent be explained by the method of work chosen: the formation of a Working Group had made it possible to unravel a number of complex matters that had resisted resolution for many years. One such matter was the interrelationship of the court's statute and the draft Code of Crimes against the Peace and Security of Mankind. Due credit should be given to the Special Rapporteur, Mr. Thiam, and to the Chairman of the Working Group, Mr. Koroma; a creative contribution had also been made by Mr. Crawford.

58. He fully endorsed the proposal to re-establish the Working Group and hoped its efforts would be equally

successful. The Group should devise its own working methods and decide whether to break into subgroups for specific purposes. It should, of course, concentrate on those issues that remained unresolved, or for which a number of alternatives had been put forward at the previous session, but at the same time, it could work on formulating individual articles of the statute. It was precisely in the course of that drafting work that the merits or disadvantages of various approaches could best be discerned. He did not wish to imply that work on the statute should proceed at a forced pace but it should not be artificially slowed down either.

59. He agreed with Mr. Tomuschat that the goal should be to complete work on the statute by no later than the end of the forty-sixth session. Regrettably, the slow pace of that work had resulted in the task of drafting the statute for an international tribunal being done elsewhere than in the Commission. He hoped, however, that the work on the statute of an international criminal court would be useful in the efforts to set up an international tribunal. The time had now come to concentrate on the wording of specific articles. It would be possible to work with the useful proposals already put forward by Mr. de Saram and others. As much time as possible should be allocated to the Working Group so that true progress could be made in fulfilling the mandate entrusted to the Commission by the General Assembly.

60. Mr. EIRIKSSON said he agreed that the basic issues surrounding the statute had been adequately debated, and that the drafting of the statute was the task at hand. The fact that other institutions had accomplished similar tasks, with fewer resources and less time available than the Commission, should inspire it to achieve its goal. He would have favoured completing the work by the end of the current session, but could accept the goal of finishing it by the end of the next session.

61. The CHAIRMAN said it was apparent from the discussion that comments in the plenary on the Working Group's progress at the end of the session should not take the form of a general debate but should focus on the wording of the draft statute.

Expression of appreciation to Mr. Vladimir Kotliar, former Secretary to the Commission

62. The CHAIRMAN, speaking on behalf of all members, thanked Mr. Kotliar for his many years of devotion and assistance to the Commission and wished him all the very best for the future.

63. Mr. KOTLIAR thanked the Chairman for his kind words.

The meeting rose at 12.55 p.m.

2299th MEETING

Friday, 21 May 1993, at 10 a.m.

Chairman: Mr. Julio BARBOZA

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

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

[Agenda item 3]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN announced that Mr. Yamada, who had been called away from Geneva, had asked that his views on the subject under discussion be circulated. The secretariat would take the necessary steps.

2. Mr. FOMBA said that in resolution 47/33, the General Assembly had given the Commission a clear mandate: to draft a statute, taking into account the views expressed in the Sixth Committee and the written comments received from Governments and to submit a progress report to the Assembly at its forty-eighth session. With the submission of the Special Rapporteur's eleventh report (A/CN.4/449), the Commission had a draft statute to work with. It now had to determine whether the draft adequately reflected the views expressed in the Sixth Committee and by States in their written comments.

3. One could agree or disagree with the Special Rapporteur's approach in various instances, but there was no disputing the fact that he had accomplished the task assigned to him. He deserved thanks for the high degree of professionalism with which he had tackled a sensitive issue that had major implications for mankind in the future. The members of the Commission needed to work constructively in order to achieve the broadest possible consensus on certain important matters as rapidly as possible, so that cohesive material could be incorporated into the progress report and the expectations of the General Assembly could be fulfilled.

4. He had had a number of specific proposals to make concerning the best way the Commission could operate

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

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

[3] Ibid.

[4] Ibid.