Document:-
A/CN.4/SR.2325

Summary record of the 2325th 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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settlement of the dispute to determine in each case whether compensation for loss of profits should be paid."

Paragraph (38), as amended, was approved.

The commentary to article 8, as amended, was approved.

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

9. Mr. PELLET said he had not wished to oppose the adoption of chapter IV of the draft report, but in his opinion draft articles 6 to 10 *bis* had been considerably toned down in comparison with the text proposed by the Special Rapporteur, which had in itself been insufficiently precise, so that the result proposed by the Drafting Committee was extremely general and failed to provide potential users with the guidelines they were entitled to expect from the Commission. The fact that problems were difficult or that the law was not settled was no reason not to suggest solutions. The commentaries to the draft articles were scarcely more satisfactory, in that to make up for the general nature of the articles themselves they dealt with things which did not appear in the articles. The purpose of the commentaries was to comment on the draft articles adopted by the Draft Committee and not those initially proposed by the Special Rapporteur.

10. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that the Drafting Committee had adopted the draft articles in question some years after the corresponding reports had been submitted. The superficial character of the draft articles noted by Mr. Pellet could also be explained perhaps by the tendency among a number of members of the Commission to produce rapid results at all costs, as well as the tendency of some to prefer the brevity of the articles proposed by the previous Special Rapporteur. Lastly, it was unfortunately a very common practice for the members of the Drafting Committee not to take part in the Committee's work with sufficient regularity. Consequently, they did not follow closely enough the developments in the questions the Committee was considering. This regrettable phenomenon had been particularly pronounced—not without consequences—during the work on articles 11 and 12 at the present session.

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

11. The CHAIRMAN said that chapter II of the draft report of the Commission (A/CN.4/L.482 and Add.1 and Add.1/Corr.1) had been reissued for technical reasons and bore the symbols A/CN.4/L.482* and Add.1*.

12. Mr. BENNOUNA, supported by Mr. ARANGIO-RUIZ, Mr. PAMBOU-TCHIVOUNDA and Mr. RAZAFINDRALAMBO, said that the documents A/CN.4/L.482* and Add.1* reissued "for technical reasons", were a veritable revision of the initial documents and no longer reflected the discussion in plenary. He would therefore like the Commission to revert to the initial documents.

13. Following a procedural discussion in which Mr. de SARAM (Rapporteur), Mr. CALERO RODRIGUES, Mr. ROSENSTOCK, Mr. PELLET, Mr. MAHIOU, Mr. CRAWFORD, Mr. BOWETT, Mr. VERESHCHETIN, Mr. TOMUSCHAT, Mr. MIKULKA, Mr. KOROMA, Mr. THIAM (Special Rapporteur) and Mr. AL-KHASAWNEH took part, the CHAIRMAN suggested that the Commission should instruct the Rapporteur, with the Rapporteur's agreement, to prepare with the help of the secretariat a further document on the basis of documents A/CN.4/L.482 and Add.1 and Add.1/Corr. 1 and A/CN.4/L.482* and Add.1*, in the light of the discussion in plenary.

It was so agreed.

The meeting rose at 1.15 p.m.

2325th MEETING

Wednesday, 21 July 1993, at 3.10 p.m.

Chairman: Mr. Julio BARBOZA

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

Draft Code of Crimes against the Peace and Security of Mankind[1] (*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]

Revised report of the Working Group on a draft statute for an international criminal court

1. The CHAIRMAN recalled that, at its 2298th plenary meeting, on 17 May 1993, the Commission decided to convene the Working Group on a draft statute for an international criminal court,[5] in accordance with the mandate contained in paragraphs 4, 5 and 6 of General Assembly resolution 47/33. He invited Mr. Koroma, the Chairman of the Working Group, to introduce its revised report (A/CN.4/L.490 and Add.1).

* Resumed from the 2303rd meeting.

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

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

[3] Ibid.

[4] Ibid.

[5] The Commission, at its 2300th meeting on 25 May 1993, decided that the Working Group on the question of an international criminal jurisdiction should, henceforth, be called "Working Group on a draft statute for an international criminal court".

Assembly resolution 47/33. He invited Mr. Koroma, the Chairman of the Working Group, to introduce its revised report (A/CN.4/L.490 and Add.1).

2. Mr. KOROMA (Chairman of the Working Group on a draft statute for an international criminal court) said that the revised report contained a preliminary version of a draft statute for an international criminal tribunal. The Working Group had begun by examining a series of draft provisions dealing with the more general and organizational aspects of a draft statute but had decided, in order to expedite its work, to create three subgroups to deal with jurisdiction and applicable law, investigation and prosecution, and cooperation and judicial assistance. The subgroups had been chaired by Mr. Crawford, later replaced by Mr. Tomuschat, by Mr. Calero Rodrigues and by Mr. Yankov, respectively. The reports of the subgroups had contained specific draft provisions and some preliminary comments. After considering the reports, the Working Group had requested the subgroups: (*a*) to incorporate into the draft articles, to the extent possible, the observations made in the Working Group, and (*b*) to consider a number of issues identified as possible additional matters for a statute.

3. On the basis of the further papers prepared by the subgroups, the Working Group had produced the draft statute and the commentary currently before the Commission. Square brackets in the text indicated that the Working Group had not yet agreed either on the content or on its formulation. In numerous instances the commentary to the draft articles explained the special difficulties encountered in drafting certain provisions. The Working Group recommended that the Commission should indicate in its report that the views of the General Assembly on such provisions would be welcome. The Working Group had been guided by the recommendations made by the Commission and by the report of the Working Group at the previous session,[6] but it had also taken into account the views expressed thereon by Governments.

4. Part 1 of the draft statute (arts. 1 to 21) dealt with the establishment and composition of the Tribunal. The brackets around the two paragraphs of article 2 reflected two divergent views in the Working Group, and indeed in the plenary discussion, about what the relationship of the Tribunal to the United Nations should be. Some members wanted the Tribunal to be an organ of the United Nations, while others advocated a different kind of link, such as a treaty of cooperation, similar to those between the United Nations and the specialized agencies. Article 4, paragraph 1, reflected the virtues of flexibility and cost-reduction advocated in the report of the Working Group at the previous session. The Tribunal would be a permanent institution, but it would sit only when required to consider a case submitted to it.

5. Article 5 laid down the overarching structure of the international judicial system to be created, which was called the "Tribunal", and its component parts: the "Court", or judicial organ, the "Registry", or administrative organ, and the "Procuracy", or prosecutorial organ. The three organs had to be considered in the draft statute as constituting an international judicial system as a whole, notwithstanding the independence which had to exist between the judicial and prosecutorial branches. Articles 6 to 11 dealt with the Court and its composition and with the status of the judges and the Bureau of the Court. The relatively long term of office of 12 years (art. 7, para. 6) was regarded as a trade-off for the prohibition on the re-election of judges. In contrast to ICJ, the special nature of an international criminal institution argued against the possibility of re-election. The only exceptions were set out in article 7, paragraph 7, and article 8.

6. It was, of course, desirable to ensure the independence of judges (art. 9), but the Court was not to be a full-time body and, in accordance with article 17, the judges would be paid not a salary but simply a daily allowance and expenses. Accordingly, article 9, without ruling out the possibility of a judge performing other salaried functions, endeavoured to define the criteria for determining activities which might compromise the independence of judges. In cases of doubt, the Court would decide.

7. The Registrar (art. 12) was the Court's principal administrative officer and, unlike the judges, was eligible for re-election. He performed important functions under the statute, such as notification, receipt of declarations of the Court's jurisdiction, and so on. The Working Group had been strongly of the opinion that the Procuracy (art. 13) should be independent in performing its functions and kept separate from the structure of the Court. The Prosecutor and the Deputy Prosecutor were therefore to be elected not by the Court but by a majority of the States parties to the statute. Article 13, paragraph 4, also provided that the Procuracy should not seek or receive instructions from any Government or any source.

8. Articles 14 to 18 dealt with matters related to the beginning and termination of the judges' functions and to the work of the judges and the Court and the performance of their functions. Articles 19 and 20 were concerned with the making of rules: the rules of the Tribunal relating to pre-trial investigations and the conduct of the trial itself (art. 19) and the rules necessary for the internal functioning of the Court (art. 20). Most members of the Working Group placed great emphasis on the distinction between the two kinds of rule, although some were unconvinced that a substantive distinction existed.

9. The place of article 21 (Review of the Statute) was still provisional, and it might be included in the final clauses. Subparagraph (*b*) had a special link with Part 2 of the statute, on jurisdiction and applicable law, as it would provide the basis for enlarging the strand of jurisdiction contained in article 22, which brought new conventions within the scope of the statute, including the draft Code of Crimes against the Peace and Security of Mankind.

10. Part 2 of the draft Statute (arts. 22 to 28) was in fact very important. Articles 22 to 26 laid down two basic strands of jurisdiction rooted in a distinction made by the Working Group between treaties which defined crimes as international crimes and treaties which merely provided for the suppression of undesirable conduct constituting crimes under national law. An example of the first category of treaty was the International Convention against the Taking of Hostages, and examples of the second category were the 1963 Convention on Offences and

[6] *Yearbook... 1992*, vol. II (Part Two), p. 58, document A/47/10, annex.

Certain Acts Committed on Board Aircraft and all treaties dealing with drug-related crimes.

11. Article 23 offered the Commission three alternatives with regard to the ways in which States might accept the Court's jurisdiction over the crimes listed in article 22. Alternative A was an "opting in" system, under which a State did not automatically confer jurisdiction on the Court by becoming a party to the statute but needed to make a special declaration. Some members of the Working Group thought that such a method best reflected the consensual basis of the Court's jurisdiction and the flexible approach to that jurisdiction recommended in the report of the Working Group at the previous session. Other members did not believe that such considerations necessarily led to the kind of system set out in alternative A. They preferred a system whereby a State, by becoming a party to the statute, automatically conferred on the Court jurisdiction over the crimes listed in article 22, although they would have the right to exclude some crimes ("opting out" system). Alternatives B and C were based on that approach. The Working Group recommended that the alternatives should be transmitted to the General Assembly with a request for guidance.

12. Article 24 specified the States which had to accept the Court's jurisdiction in a given case under article 22. The general criterion, set out in paragraph 1 (*a*), was that the Court had jurisdiction over a crime provided that any State which would normally have jurisdiction under the relevant treaty to try the suspect before its own courts had accepted the Court's jurisdiction under article 23. The paragraph should be read in conjunction with article 63 (Surrender of an accused person to the Tribunal) and the commentary thereto. If the suspect was not in the territory of any State with jurisdiction under the relevant treaty but present on the territory of the State of his nationality or of the State where the alleged offence was committed, then the consent of one of the latter two States was also necessary in order for the Court to have jurisdiction.

13. Article 25 did not constitute a separate strand of jurisdiction but rather broadened the category of subjects able to bring to the Court the crimes referred to in article 22 and article 26, paragraph 2, by investing that right additionally in the Security Council. The Working Group felt that such a provision was necessary in order to enable the Security Council to use the Court, as an alternative to establishing ad hoc tribunals.

14. Article 26 laid down the second strand of jurisdiction referred to earlier, allowing States to confer jurisdiction in respect of two other categories of international crime not covered by article 22. The first category (para. 2 (*a*)) covered "crimes under general international law", that is to say crimes having their basis in customary international law which would otherwise not fall within the Court's jurisdiction *ratione materiae*, such as aggression, which was not defined by treaty, genocide in the case of States not parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, or other crimes against humanity not covered by the Geneva Conventions of 12 August 1949 for Protection of War Victims. The Working Group did not think that, at the present stage of development of international law, the international community would create an international criminal court without giving it jurisdiction over such crimes.

15. The second category (para. 2 (*b*)) related to the distinction referred to in paragraphs (1) and (2) of the commentary to article 22 between treaties which defined crimes as international crimes and treaties which merely provided for the suppression of crimes under national law, such as laws on drug-related crimes giving effect to a multilateral treaty which regarded the offence in question as exceptionally serious. Given the process whereby the question of an international criminal court had been sent to the Commission by the General Assembly, the Working Group wished to emphasize that article 26, paragraph 2 (*b*), constituted a provision whereby the Court could acquire jurisdiction to deal with drug-related offences. However, in order to prevent the Court from being overwhelmed with minor cases, the category was limited to crimes which "having regard to the terms of the treaty constitute exceptionally serious crimes".

16. The Working Group recommended two criteria for the consent required for the jurisdiction of the Court to be effective under article 26. For crimes under national law giving effect to a multilateral treaty to suppress such crimes, the only consent required was that of the State on whose territory the suspect was present and which had jurisdiction under a treaty to try the suspect in its own courts. For crimes under general international law, the criterion was more restrictive, requiring the consent both of the State on whose territory the suspect was present and of the State on whose territory the act in question occurred.

17. Article 27 set out the relationship between the Security Council and the Court. If an act of aggression occurred, the responsibility of an individual would presuppose that a State had been held to be guilty of aggression; such a finding would be for the Security Council to make. The consequential issues of whether an individual could be indicted as having acted on behalf of that State and in such a capacity as to have played a part in the planning of the aggression would be for the Court to decide. The proposed relationship would apply not only in prosecutions on the initiative of the Security Council (art. 25) but also to prosecutions in which charges of aggression could be brought by a State (art. 26, para. 2 (*a*)). Article 28, on the applicable law, was very streamlined and almost self-explanatory.

18. Part 3 of the draft statute (arts. 29 to 35), entitled "Investigation and commencement of prosecution", set out the mechanism for invoking the Tribunal, namely a complaint, and the procedures to be followed in the investigation of a complaint and the commencement of a prosecution. It established the general powers of the Procuracy and the Court at the investigation and pre-trial stages. The Working Group had considered limiting resort to the Tribunal to States parties to the statute but had concluded that a universal mechanism available to all States would be more consistent with the interest of the international community in prosecuting, punishing and deterring international crimes. It had also felt that the Security Council should be authorized to invoke the judicial mechanism when situations so required and in accordance with the Charter of the United Nations. The complaint (art. 29) might be referred to the Court by the Security Council or by any State having jurisdiction over

the crime and accepting the jurisdiction of the Court. A State must have jurisdiction over the crime under a treaty listed in article 22, under customary law or its own national law. The State must also have accepted the jurisdiction of the Court with respect to the crime either as a State party to the statute or as a State not a party to the statute, in accordance with article 23.

19. In conducting the investigation (art. 30) the Prosecutor would have the power to question witnesses, collect evidence and make on-the-spot inquiries. He could request the Court to issue orders and could seek the cooperation of States in the investigation. The rights of the suspect must be fully respected in any investigation. On completion of the investigation, the Prosecutor must decide whether there were sufficient basis to proceed and inform the Bureau of his decision. At the request of the complainant State or the Security Council, the Bureau could review a negative decision and direct the Prosecutor to commence a prosecution. If there were sufficient basis to proceed, the Prosecutor would prepare the indictment. The Court could order provisional arrest of a suspect prior to indictment if there were sufficient grounds to believe that he might have committed the crime and that his presence at trial could not otherwise be assured.

20. Under article 32, the Court would examine the indictment and supporting documentation and confirm whether the indictment provided sufficient information for a *prima facie* case. The Court could then issue an arrest warrant or pre-trial orders. It would be required immediately to notify all States parties to the statute and transmit the indictment and other relevant documents to the State where the accused was believed to be (art. 33). The Court might order a State which had accepted its jurisdiction to notify the accused in person of the indictment and comply with any arrest or detention order. It might also request a State party which had not accepted its jurisdiction to cooperate in those procedures. If the accused was believed to be in the territory of a State not party to the statute, the Court could invite that State to cooperate. The Court could prescribe an alternative method of informing the accused of the charges if personal notification was not achieved within 60 days of the indictment. Once the accused was in custody, the Court had to decide whether he should be released on bail pending trial (art. 35).

21. Part 4 of the draft Statute (arts. 36 to 54) related to the trial proceedings, the powers of the Court and the rights of the accused. Trials would take place before a Chamber consisting of five judges selected by the Bureau who were not from the complainant State nor the State of nationality of the accused (art. 37). That flexible procedure allowed the expertise of the individual judges to be taken into consideration. Under article 37, several Chambers might be established and sit concurrently to hear different cases, so that the whole Court would not have to sit on a case. The Chamber would decide where the trial was to take place and the language or languages of the oral proceedings and written documentation (arts. 36 and 39). The Court must be satisfied that it had jurisdiction and rule on any jurisdictional challenges raised by the accused in accordance with article 38.

22. The Chamber must also ensure that the trial was fair and expeditious and conducted with full respect for the rights of the accused and for the protection of victims and witnesses (arts. 40 to 46). The statute set out the rights of the accused under the International Covenant on Civil and Political Rights and required respect for the fundamental principles of *nullum crimen sine lege* and *non bis in idem*. Subsequent trials before national courts would be precluded only when the Court had actually exercised jurisdiction and reached a determination on the merits. The conflicting views in the Working Group about trials *in absentia* were reflected in the commentary to article 44. Trials were to be held in public unless the Court decided otherwise, in accordance with articles 40 and 46. The powers of the Chamber and the procedures to be followed during the hearings, as well as certain fundamental procedural and evidentiary rules, were set out in articles 47 to 49.

23. At the conclusion of the trial, the Chamber was required to issue a written judgement in open court (art. 51). If the accused was found guilty, the Chamber must hold a separate sentencing hearing, after which it might impose a sentence in accordance with articles 52 to 54. In determining the length of a term of imprisonment the Court must consider the law of the State of nationality of the perpetrator, of the State on whose territory the crime had been committed, and of the State which had custody of and jurisdiction over the accused (art. 53). In imposing a penalty commensurate with the crime, the Court must also take into consideration any aggravating or mitigating factors, as required by article 54.

24. Part 5 of the draft Statute (arts. 55 to 57) related to the right of appeal and review. The convicted person might appeal a decision of the Court on any of the grounds set out in article 55 and might also apply to the Court for revision of the judgement on the basis of a new fact that could have been decisive in the judgement (art. 57). Appeals would be heard by an Appeals Chamber established in accordance with article 56, but revisions would in principle be heard by the Chamber which had taken the initial decision. The Working Group planned to return to the question of the extent to which the Prosecutor should also be entitled to initiate appellate or review proceedings.

25. The effective functioning of the Tribunal would depend on the international cooperation and judicial assistance of States, matters that were dealt with in Part 6 (arts. 58 to 64). States parties to the statute had an obligation to cooperate with the Prosecutor and respond without undue delay to any request or order of the Court. Any request or order must be accompanied by sufficient explanation and appropriate documentation, as required by article 61. Article 63 provided for the surrender of an accused person, under three different circumstances: (*a*) a State party which had accepted the jurisdiction of the Court with respect to the crime in question must take immediate steps to arrest and surrender the accused to the Court; (*b*) a State party which was also a party to the treaty establishing the crime in question but which had not accepted the Court's jurisdiction over that crime must arrest and decide whether to prosecute the accused; and (*c*) a State party which was not a party to the relevant treaty must consider whether its internal law permitted arrest and surrender of the accused. Requests from the Court would be given priority over extradition requests from other States.

26. The rule of speciality would apply to persons delivered and a similar limitation would apply to evidence tendered to the Court, subject to a waiver by the State concerned, in accordance with article 64.

27. States parties were required, at the request of any other State party, to enter promptly into consultations concerning the application or implementation of the provisions on international cooperation and judicial assistance, in accordance with article 60. States not parties to the statute were also encouraged to cooperate with the Court and provide judicial assistance pursuant to article 59.

28. Part 7 of the draft statute (arts. 65 to 67) dealt with enforcement of the judgements and penalties imposed by the Court. States parties to the statute must recognize and give effect to judgements of the Court and, where necessary, enact the national legislative and administrative measures to do so. Prison sentences imposed by the Court were to be served in a State designated by the Court, or in the absence of such a designation, in the Tribunal's host country, and in both instances would be subject to the supervision of the Court. The statute recognized the possibility of pardon, parole or commutation of sentence.

29. It was for the Commission to decide how it wished to consider the Working Group's report and how it would be reflected in the Commission's own report. He wished to express his appreciation to all the members of the Working Group, in particular, to Mr. Crawford, Mr. Calero Rodrigues, Mr. Yankov, and to Mr. Thiam, the Special Rapporteur, for their hard work and cooperation.

30. The CHAIRMAN said he wished to thank the Chairman of the Working Group for his lucid and comprehensive presentation of its report. Mr. Koroma had been too modest about his own contribution, which had undoubtedly been decisive.

31. Mr. CRAWFORD said that he wished to echo the Chairman's tribute to Mr. Koroma. Thanks should also go to Mr. Thiam, the Special Rapporteur, whose wholehearted acceptance of the method of work had greatly facilitated the Working Group's task; the Special Rapporteur's draft statute contained many ideas which had been taken up in the present draft report.

32. As the present session left little time for a thorough examination of the report, it would be unfair and unrealistic to expect the Commission to adopt the Working Group's report as a whole as a report of the Commission. The goal now was to elicit views from the Sixth Committee, on the important issues contained in the report, which reflected the five basic decisions on the structure of the statute of the Tribunal that had been accepted in principle by the Commission in 1992.[7] At its next session, the Commission could work out the details of that structure.

33. He proposed that, for the time being, the Commission should take note of the report and refer it to the General Assembly for comment.

34. Mr. SHI said that the Working Group, guided by its Chairman, had done an excellent job in a short period of time, demonstrating that the Commission could operate with great efficiency when its work was carefully and properly organized. The Special Rapporteur's excellent eleventh report (A/CN.4/449) and the discussions on it in plenary had no doubt greatly facilitated the Working Group's task.

35. Article 2 of the draft statute devised by the Working Group concerned the relationship of the Tribunal to the United Nations. The square brackets around the two paragraphs of the article reflected the fact that two views existed about that relationship. The Special Rapporteur's eleventh report clearly endorsed the view that the Tribunal should be a judicial organ of the United Nations, while the Working Group's revised report seemed to favour some form of association short of the status of a judicial organ. While he personally had no objection to the Tribunal being a judicial organ of the United Nations, such an approach could give rise to several problems: it might require an amendment to the Charter; it might meet with political obstacles from Member States; and it might imply that Member States would *ipso facto* be parties to the statute of the Court. He was therefore inclined to favour the wording of the second paragraph of article 2, which merely linked the Tribunal with the United Nations.

36. With regard to qualifications (art. 6), he believed that the judges should have experience not only in criminal law but also in international law, including international humanitarian law and human rights law, since the Court would be trying perpetrators of crimes under international law. Article 6 did not, however, require each member of the Court to have experience in both criminal and international law, and spoke only of taking "due account" of such experience in the "overall composition of the Court". The Commission would have to examine that issue further at its next session.

37. He endorsed the substance of article 9, on the independence of judges, which appeared to draw on Article 16 of the Statute of ICJ. Further commentary should be added to article 9 to clarify the issue of whether a member of the Court could properly serve as a judge in the criminal division of his own country.

38. There was no clear need for the presidency of the Court to be a full-time position. In the early stages, criminal proceedings before the Court would probably be infrequent, but as provided under article 12, a Registrar should be available on a full-time basis. There was nothing in the wording of article 10 to prevent the President from acting in a full-time capacity if required by the circumstances.

39. He would agree that, as stated in paragraph (3) of the commentary to article 13, the Procuracy should be independent in performing its functions and should be separate from the Court's structure. Hence, the Prosecutor and Deputy Prosecutor would not be elected by the Court. It might, however, be appropriate for the Prosecutor to appoint the staff of the Procuracy, in consultation with the Bureau of the Court: unlike some members of the Working Group, he believed that consultations would serve as a necessary check on the possible biases of the Prosecutor, thereby ensuring the independence and impartiality of the Procuracy.

40. Part 2, dealing with jurisdiction and applicable law, was, as rightly recognized by the Working Group,

[7] Ibid., p. 16, para. 104.

the core of the draft Statute. That part, and the articles on the jurisdiction of the Court in particular, would determine whether States accepted or rejected the idea of an international criminal court. The universally recognized principles of *nullum crimen sine lege* and *nulla poena sine lege* called for precise definitions of punishable crimes and their penalties. The conventions referred to in the draft articles did not set out penalties and, accordingly, the Working Group had incorporated in the draft statute a provision to that effect.

41. He had no objection to the idea of two strands of jurisdiction referred to in paragraph (1) of the commentary to article 22. He wondered, however, whether the Court's jurisdiction should not be restricted to the most serious international crimes, the ones which destroyed the very foundations of civilization, namely, the crimes listed in the draft Code of Crimes against the Peace and Security of Mankind. The Commission should give full consideration to that issue at the next session. He himself was doubtful about the wisdom of extending the Court's jurisdiction to crimes other than the most serious. States tended to be most unwilling to waive their criminal jurisdiction and it was only in connection with serious international crimes, where the action of individual States was of practically no value, that States might be willing to accept the jurisdiction of an international criminal court. In his view, the Court's jurisdiction should be restricted, at least for the time being, to those crimes listed in the draft Code of Crimes against the Peace and Security of Mankind, something which would also serve to make the Code a meaningful legal instrument.

42. Alternative A for article 23 reflected the view, widely held in the Commission, that being a party to the statute did not mean that the State accepted *ipso facto* the Court's jurisdiction; under alternative A, a State party could, by making a declaration, accept the Court's jurisdiction for one or more of the crimes listed in article 22. At the same time, he agreed that being a party to the statute would be more meaningful if such status automatically conferred jurisdiction on the Court for the crimes listed in article 22, as provided for in alternatives B and C. Alternative A was none the less the more realistic formulation and would probably encourage States to become parties to the statute, while alternative B or C might dissuade States from doing so. At present, acceptance by States should prevail over other considerations.

43. Article 24 defined which States were required to give consent to the Court's jurisdiction in relation to the crimes listed in article 22. The main emphasis was on the consent of the State on whose territory the alleged offender was found. Consent by the suspect's State of nationality or by the State on whose territory the crime was committed was not necessarily required: the Court could operate most effectively in regard to accused persons who were actually before it and, consequently, jurisdiction should be linked to a procedure that would generally ensure the transfer of alleged offenders to the Court. At the same time, prosecution and a fair trial would be impossible without a proper investigation, which often required the close cooperation of the suspect's State of nationality or of the State on whose territory the crime was committed. The importance of acceptance of the Court's jurisdiction by States in those two categories should not be overlooked and, in fact, specific provision to that effect had been made in the draft statute for an international criminal court.[8] Moreover, the Special Rapporteur had endorsed such an approach in his report. The issue was complex and merited further consideration.

44. The issue of whether international organizations should have the right to submit cases to the Court needed to be examined carefully. Article 25 wisely and realistically restricted itself to the possibility of submission of cases to the Court by the Security Council, which was expressly provided for in article 29. Those two articles had the merit of sparing the Security Council the need to set up an ad hoc tribunal in the future.

45. Article 27, which dealt with charges of aggression, was in line with General Assembly resolution 3314 (XXIX), containing the Definition of Aggression. The draft Code of Crimes against the Peace and Security of Mankind, provisionally adopted on first reading at the forty-third session,[9] included a provision which was similar to article 27.

46. In respect of article 30, on investigation and preparation of the indictment, he agreed that the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation. Furthermore, since the rights of the suspect and those of the accused did differ in some respects, it was important to have separate provisions on them. The Commission needed to re-examine the last sentence of paragraph 1 of article 30, which provided that, at the request of the complainant State or the Security Council, the Bureau would have the power to review the decision by the Prosecutor not to proceed with a case. Some members of the Working Group had legitimately thought that such a provision might compromise the independence of the Prosecutor. He himself did not yet have a clear position on the matter.

47. In paragraph (4) of the commentary to article 37, the Working Group invited the Commission and the General Assembly to comment on the issue of how members of the Chambers of the Court were to be selected. While the article did not make any express provision to that effect, the commentary presented three alternatives: selection of judges by the Bureau, selection based on the principle of rotation, and selection based on objective criteria set forth in the rules of the Court. To his mind, the second and third methods were the most worthy of consideration, the first being too subjective. In considering that issue, the Commission should bear in mind the methods used by ICJ for selecting judges.

48. Article 38 dealt with challenges to the Court's jurisdiction by States parties and by the accused. In his opinion, to avoid unnecessary interference with the Court's normal functioning, the right to challenge its jurisdiction should be accorded only to States having a direct interest in a particular case, although that right might theoretically be granted to other States, for example, all of the States parties to the Statute. In reality, it would be very rare for a State not directly interested in a

[8] See *Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953* (*Official Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645)), annex.

[9] See footnote 1 above.

case to challenge the Court's jurisdiction; in such cases, the accused would in all likelihood also challenge the Court's jurisdiction. It was therefore of paramount importance that the accused should be guaranteed the right to challenge not only the Court's jurisdiction at any stage of the trial but also its jurisdiction and the adequacy of its indictment at the pre-trial stage. If impartiality was to be ensured, such challenges should be decided not by the Bureau but by a chamber established at the pre-trial stage. He could hardly endorse the view that the limited institutional structure of the Court could not, in financial terms, afford hearings on pre-trial challenges. While financial considerations were certainly important, they should not prejudice the impartiality of the Court or the rights of the accused.

49. Article 40, dealing with fair trial, emphasized due regard for the protection of victims and witnesses. In that regard, he wondered whether the article should not make explicit provision for the immunity of witnesses from prosecution for any incriminating testimony about conduct in which they themselves were involved, as was provided for in the statutory acts of some States. With the exception of the provision relating to trials *in absentia*, article 44 reflected the fundamental rights of the accused set forth in article 14 of the International Covenant on Civil and Political Rights. He had always maintained that the right to be present at the trial was a fundamental right of the accused, but had recently had second thoughts on the matter. The failure of the accused to appear might be a deliberate attempt to escape justice and it might also be the result of refusal by the State concerned to surrender the accused, which was particularly true of cases of aggression in which high-level State bodies were criminally responsible. Requiring the suspect to be present under such circumstances meant either that the accused had to be brought before the Court by armed force directed at the State concerned, on order of the Security Council, which would no doubt result in harm being done to innocent victims, or that no trial could be held at all, which would result in a loss of authority and prestige for the international system of criminal justice. Furthermore, trials *in absentia* might have a deterrent effect. In view of those and other considerations set out in paragraph (3) of the commentary to article 44, he believed that the Commission should give serious consideration to the advantages and disadvantages of trials *in absentia*. Such trials would, of course, give rise to provisional judgements and, should the accused appear before the Court at a later stage, the case would be reopened and a new trial would take place.

50. As to the *non bis in idem* rule (art. 45), he agreed with the position taken by the Working Group that the Court should not be allowed to review the trial proceedings of national courts, for such a review would be an encroachment on State sovereignty. Rules of evidence were very complex but the statute should nevertheless include some basic provisions, and the provisions in article 48 represented a very minimum in the matter. In particular, he welcomed the provision on the inadmissibility of evidence obtained directly or indirectly by illegal means.

51. Concerning judgement, article 51 made no provision for the possibility of separate or dissenting opinions, although, in a judgement pronouncing an accused person guilty, such opinions could be extremely important to the defendant for the purposes of appeal against the conviction. On the other hand, a dissenting opinion in the case of a judgement of acquittal could have a devastating effect on the psychology of the acquitted person and on his life and career in society. On balance, the Working Group had been right in its decision.

52. In the matter of applicable penalties, the principle *nulla poena sine lege* required that the statute should at least provide a general range of terms of imprisonment for the crimes it listed. Paragraph 1 of article 53 attempted to meet the requirements of that important principle of criminal law. However, for the sake of uniformity of penalties for the same crimes, the Court should determine the appropriate punishment in a particular case without having regard to the penalties provided for by the national laws of the States indicated in paragraph 2 of article 53, despite the fact that the commentary made it clear the Court was free to consider the relevant national law of the States in question, but was not obliged to follow the law of any one of them.

53. On the subject of appeal and review, he shared the concern of some members of the Working Group about allowing the Prosecutor to appeal against a decision of the Court, notably on acquittal. In the interest of a fair trial, however, exceptions should be made in very limited circumstances so as to allow the Prosecutor to appeal against a decision of the Court as indicated in paragraph (3) of the commentary to article 55. He did not approve of the idea of appeal chambers. Since trials were conducted in Chambers, appeals should be heard by the Court in plenary, except for the judges who had participated in the contested judgement of the trial Chamber.

54. Lastly, he considered the draft Statute, which was of a preliminary character, to be a remarkable achievement. It would serve as a useful basis for further work on the subject.

55. Mr. YANKOV proposed that the following text should be added to the report of the Commission:

> "The Commission considered that the report of the Working Group represented a substantial advance over last year's report on the same topic presented to the forty-seventh session of the General Assembly, in 1992. The present report placed the emphasis on the elaboration of a comprehensive and systematic set of draft articles with brief commentaries thereto. Though the Commission was not able to examine the draft articles and proceed to their adoption at the current session, it felt that, in principle, the proposed draft provides grounds for their examination by the General Assembly at its forthcoming forty-eighth session.
>
> "The Commission welcomed comments by the General Assembly and Member States to specific questions as well as to the draft articles as a whole. These comments certainly would provide guidance for the subsequent work of the Commission with a view to completing the elaboration of the draft statute at the forty-sixth session of the Commission, in 1994, as contemplated in its plan of work."

56. The following footnote would be attached to the words "specific questions", at the beginning of the second paragraph: "See list of specific draft articles to

which the Commission would seek the comments by the General Assembly and Member States."

57. The CHAIRMAN invited the Commission to consider the procedural proposals by Mr. Crawford and Mr. Yankov.

58. Mr. CRAWFORD said that the two proposals were not different in principle and, that they could be conveniently combined. He noted that the proposal by Mr. Yankov implied that the Working Group's report would be attached to the report of the Commission for the present session.

59. Mr. BENNOUNA said that the excellent report under consideration was suitable for transmittal to the General Assembly, with the formula proposed by Mr. Yankov, which he fully endorsed. If it was successful it would help to remedy a gap in international law in the world of today: namely, the absence of an international criminal court capable of solving certain deadlocks in international relations. The draft would offer a court made to measure for States which, for one reason or another, were unable to settle certain questions that arose in the relations between them.

60. With some reservations he could support the draft, the essential element of which was to be found in Part 1, in which he strongly favoured the second alternative of article 2 (Relationship of the Tribunal to the United Nations). The formula "The Tribunal shall be linked with the United Nations . . ." was preferable, for the Tribunal could not be "a judicial organ of the United Nations". An organ of the United Nations could not create a "judicial organ of the United Nations" by means of a resolution.

61. With reference to article 9, further thought should be given to the problem of how to ensure the independence of the judges when the judges did not hold permanent office. The issue was tied in with the provisions of article 17 (Allowances and expenses), in particular. The proposed formula regarding the relationship between the statute and the Code of Crimes against the Peace and Security of Mankind, and with a list of crimes, was provisionally acceptable but the question should be examined in greater depth, inasmuch as the statute of the Court departed from the Code of Crimes and was becoming an autonomous instrument. Furthermore, the question would have to be looked at in conjunction with the work on State responsibility at the next session, with particular reference to article 19 of part 1 of the draft on State responsibility[10] and the distinction drawn between crimes and delicts—a distinction which was not found in the statute of the Court. He accordingly entered a reservation on that point.

62. In connection with article 25 (Cases referred to the Court by the Security Council), he totally disagreed with the idea of involving the Security Council with the Tribunal. The Security Council was a political body and its characteristics prevented it from interfering in the work of a judicial organ. For example, nationals of States possessing the right of veto in the Security Council, or persons protected by one of those States, would never be prosecuted. The Security Council, as a political body, took political steps, not judicial steps, for the maintenance of peace. Indeed, in the interests of the Security Council itself, its political character should be respected.

63. Mr. GÜNEY said that he would not enter into details, since he had been a member of the Working Group and some—but not all—of his views had been taken into account in the report.

64. He unreservedly supported the procedural proposals made by Mr. Crawford and Mr. Yankov to the effect that the Commission should take note of the Working Group's report. It should be specified that the report had faithfully followed the guidelines adopted at the previous session and also that the Commission had to complete the work on the Court at its next session.

65. Mr. PELLET said that the draft statute had the merit of coherence, but it could not, of course, be accepted as it stood. That was not in itself important, because the Commission was not called upon at the present stage to adopt the statute. He himself agreed with the proposal that the Commission should take note of it.

66. However, he had some remarks to make on a number of points which were of concern to him. He would point out that, as a matter of terminology, the term *cour* was used in the French version where the term *tribunal* should be used, and vice-versa. That terminological confusion should be remedied.

67. The statute had been praised for flexibility in regard to the functioning of the Court but in his opinion it was not flexible enough and further work should be done in that direction.

68. With regard to article 22 (List of crimes defined by treaties), he was not satisfied with the explanations given in paragraph (1) of the commentary, nor had he been further enlightened on that point by the explanations given by the Chairman of the Working Group. As he saw it, two notions must be distinguished, on the one hand, international crimes and, on the other, crimes against the peace and security of mankind. Only international crimes could be tried at the international level. Surely, the Court was competent to judge the most serious crimes, which meant crimes against the peace and security of mankind.

69. The International Criminal Court would not provide a suitable forum to judge equally and jointly all international crimes. Thus, as regards drug-related crimes, the work was highly specialized and besides, a quantitative problem would arise. Such crimes would give rise to a large number of cases while cases of aggression, which caused very difficult problems, would on the contrary be few in number. Trial by chambers would not provide a sufficient solution. Article 26, paragraph 2 (*b*), attempted to solve the matter with the aid of the very subjective criterion of "exceptionally serious crimes"—a criterion which applied to other offences as well. The formula was practically meaningless. He was strongly in favour of the establishment of an international court to deal with drug-related crimes, but the Working Group's solution for the problem of such crimes was not adequate.

70. Article 22 represented a great step backwards in another respect. He felt strongly that, in 1993, it was wrong to give pride of place to treaties in the definition of inter-

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[10] For the texts of articles 1 to 35 of part 1 provisionally adopted on first reading at the thirty-second session, see *Yearbook... 1980*, vol. II (Part Two), pp. 30 *et seq.*

national crimes. For example, the crime of genocide existed independently of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. As long ago as 1945, international crimes had been held punishable independently of any definition by treaty.

71. In that connection, a serious difficulty was created by the reference in article 26, paragraph 1, to "crimes not covered by article 22" and by the distinction drawn with regard to States not parties to treaties which established international crime. The commentary to article 26 was inadequate on that point. The position, surely, was that international custom constituted the heart of the law in the matter of international crimes. The question, for example, of whether a particular State had or had not signed the Convention on the Prevention and Punishment of the Crime of Genocide was irrelevant for the purpose of determining whether that State had committed the crime of genocide, which was punishable under customary international law.

72. He had reservations about article 28 (Applicable law), which provided little or no guidance on the respective roles of treaties, international custom, the rules and principles of general international law and, particularly, national law. Greater precision was needed in those matters. Articles 25 and 27 on the role of the Security Council introduced a useful idea, which he himself approved. It was necessary, however, to specify that the Court was bound by the Definition of Aggression adopted by the General Assembly—a point which was not clarified either by article 25 or the commentary thereto.

73. He welcomed the Working Group's position on judgement *in absentia*, as seen from paragraph 1 (*h*) of article 44 (Rights of the accused). That provision was, of course, taken from article 14 of the International Covenant on Civil and Political Rights. In that connection, he drew attention to the erroneous interpretation of that article of the Covenant, in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993),[11] according to which judgement *in absentia* was prohibited by article 14. In fact, that article merely stated the right of the accused to be present at his trial but did not rule out judgement *in absentia* in the event of deliberate absence. The commentary should draw attention to that mistaken interpretation.

74. Although his reaction to the work of the Working Group was on the whole positive, it seemed to him that the Commission was quite far from a consensus on certain important points. The best course, therefore, would be for the Commission to take note of the Working Group's report and to seek the Sixth Committee's views on the matter. Mr. Yankov's proposed text, with which he agreed, should be included in the Commission's report to the General Assembly. Furthermore, if a list of the main subjects on which the Commission would like to have the General Assembly's comments could be agreed before the end of the session, that should be indicated in a footnote. For his own part, he would like the questions of the applicable law, the definition of crimes, and judgement *in absentia* to be included in such a list.

75. His approach to the question of procedure was more robust than that of Mr. Crawford. His own proposal would be that the Commission should discuss the report of the Working Group paragraph by paragraph at its forty-sixth session in the light of the reactions in the Sixth Committee and that only thereafter should the report be referred back to the Working Group to produce a final report for consideration by the Commission.

76. Mr. TOMUSCHAT, congratulating the Special Rapporteur and the Chairmen of the Working Group and its three subgroups on their invaluable work, said that, while his main concern was that the statute of the proposed Court should be adopted as soon as possible, it would be unfortunate if it ultimately became clear, from the statements made by members, that the Commission was not in agreement on the substance of the articles. He therefore considered that Mr. Yankov's proposal, which he supported, should be adopted, although it should perhaps be recast somewhat. There was certainly not enough time to examine all the articles paragraph by paragraph.

77. The Working Group had adopted a prudent approach, in line with what had been decided at the Commission's previous session. States would, however, have to ratify the statute as a first step and would then have to submit to the jurisdiction of the Court. That would be a slow and difficult process and the statute might remain a dead letter, not just for years but for decades. In the circumstances, some thought should perhaps be given to the possibility of including a provision on an international criminal court in the Charter of the United Nations; that could perhaps be done in the context of the current review of the Charter. An indication should perhaps also be given, either in Mr. Yankov's proposal or in the report itself, to the effect that an amendment to the Charter was entirely feasible.

78. Mr. Pellet had argued that, by virtue of positive customary law, there now were, and there had been since 1945, a number of crimes that were punishable. In that connection, two options had been provided for in the draft Statute, under article 22 (List of crimes defined by treaties) and article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22). If priority was accorded to crimes punishable under international conventions, it was to give priority to the written law, which, in criminal matters, occupied a special place. It was always somewhat questionable to punish someone on the basis of customary law alone. Indeed, in 1945, that whole approach had been challenged, and the question had subsequently arisen whether the lessons of Nürnberg were really valid. There had been no practice since the time of the Nürnberg and Tokyo Tribunals, so there was every reason to be doubtful about the nature of positive law and of the Nürnberg principles. That was why reference was had in the first place to the written law, which was particularly legitimate, in criminal matters.

79. While he was in general agreement with the solutions at which the Working Group had arrived, he disagreed entirely with article 67, which accorded a certain importance to the State of imprisonment. In his view, the law of such a State should not have an influence on a sentence handed down by an international court.

80. Mr. THIAM (Special Rapporteur), referring to Mr. Pellet's remarks, said that he had himself raised the question of terminology at the outset, pointing out that a

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

court could not be placed in a position inferior to that of a tribunal. The point had been discussed at length, but the Working Group had taken the view that it was above all necessary, to define the terms, as indeed the Commission would have to do eventually.

81. He agreed with Mr. Pellet on the question of drug trafficking and had in fact stated in the Working Group that it was a ridiculous state of affairs that, although the Commission had been requested to set up a tribunal to deal with drug trafficking, the draft statute barely referred to the matter.

82. The questions of general principles and of custom had both been raised in his first report,[12] and discussed, but general agreement had never been reached on them. At the next session, therefore, an attempt should be made to reach agreement in particular on the applicable law. It was obviously not possible to disregard the general principles of law, any more than custom, and he had in fact placed the concept between brackets to prompt further discussion on the matter.

83. He agreed that the Working Group's report could not be discussed in detail at the present late stage in the session. Instead, at its next session, the Commission should start with a debate on the most important questions involved and should then set up a working group to consider the whole question in the light of that debate.

84. Mr. VILLAGRÁN KRAMER said that Mr. Yankov's clear proposal would facilitate the submission of the Working Group's report to the Sixth Committee and would thus enable the Commission to have the benefit of the very positive comments of Member States.

85. Nothing in the report of the Working Group was new. Everything had been discussed at the previous session. The parameters for a statute of the court had been established, and its possible structure agreed. The General Assembly had been consulted on the matters on which guidance had been deemed necessary, and had expressed its satisfaction. At the present session, the Working Group had also had before it a number of Security Council documents, and it had also considered the contributions of various distinguished jurists. It was therefore well aware of the limitations by which it was bound, as well as of the material available to it.

86. It was a matter of regret to him, however, that contributions had not also been forthcoming from certain members of the Commission, who had been absent from Geneva, particularly on the question of drug trafficking. In that connection, there was a problem for Latin American countries because the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances imposed an obligation on States to incorporate penalties in their domestic legislation. In the light of the maxim *nulla poena sine lege*, Latin American countries could not apply penalties that were not already provided for under their legislation. It was important therefore for them to be able to rely on penalties laid down in positive law. That kind of problem called for a solution.

87. The majority of the members of the Commission had served on the Working Group and were satisfied with its report. They believed that the report should be referred to the General Assembly so that the Commission could take account of the Assembly's comments and carry on with its work on the matter. As a member of the Working Group, he supported Mr. Yankov's proposal.

88. The CHAIRMAN said that the Commission might wish, at that point, to take a decision on Mr. Crawford's proposal, as amplified by Mr. Yankov's proposal. Any members wishing to make substantive statements on other aspects of the report could do so later. Accordingly, he would suggest that the Commission should take note of the report, annex it in its entirety to the report of the Commission to the General Assembly, and include in the latter report the paragraph proposed by Mr. Yankov.

89. Mr. CRAWFORD said that he agreed with Mr. Pellet's suggestion concerning procedure. As to Mr. Yankov's proposal, he proposed that, in the last sentence of the first paragraph, the words "grounds for their examination" should be replaced by the words "a basis for examination".

90. Mr. KOROMA, also referring to Mr. Yankov's proposal, proposed that the words "in detail" should be inserted after the words "the draft articles", in the last sentence of the first paragraph.

91. Mr. ROSENSTOCK said that he could agree to the procedure suggested by the Chairman and also to Mr. Yankov's proposal, on the understanding that agreement was reached on the footnote to that proposal concerning a list of specific questions.

92. Mr. PELLET said that he too could agree to the Chairman's suggestion, provided members would be free to speak on substantive aspects of the report later. There remained, however, the question of the footnote in Mr. Yankov's proposal. It was important, in his view, to pinpoint the main issues to which the attention of the Sixth Committee should be drawn. Members wishing to make proposals in that connection should, however, do so as quickly as possible, so that the proposals could be incorporated in the report.

93. Mr. YANKOV said that he agreed with Mr. Pellet on the need to pinpoint the main issues.

94. Mr. VERESHCHETIN said that, while he supported Mr. Yankov's proposal as amended, he doubted that there would be enough time to prepare a list of questions to which the General Assembly's attention should be drawn. In any event, the Working Group had already drawn attention to certain questions in the commentaries. He therefore proposed that the footnote should be deleted and that members of the General Assembly should be allowed to decide for themselves what was or was not important.

95. While he fully agreed that the Commission should hold a discussion at the next session on the report of the Working Group, it should not engage in a general debate again but should use the report as a basis for making specific drafting proposals with a view to settling the matter quickly.

96. Mr. BENNOUNA said he did not think that the Commission would have time to agree on a list of special questions before the end of the session because that would involve a substantive debate. He therefore sup-

[12] *Yearbook... 1983*, vol. II (Part One), p. 137, document A/CN.4/364.

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

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

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

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

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

It was so agreed.

The meeting rose at 6.10 p.m.

2326th MEETING

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

Chairman: Mr. Julio BARBOZA

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

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

[Agenda item 3]

Revised report of the Working Group on a draft statute for an international criminal court (*concluded*)

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

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

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

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

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

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

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

[3] Ibid.

[4] Ibid.