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Summary record of the 2330th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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clare whether or not he was guilty of a crime of aggression. Furthermore, as he had stated on other occasions, even if the Council had not determined the existence of an act of aggression in a particular case, but a claim in that connection had been referred to the Procuracy, it should be possible to request the Council to determine whether the act of aggression reported in the complaint had indeed been committed without reference to the complaint itself. Another problem could then arise if the Council was not willing to pronounce on the matter: what should the Procuracy do if evidence was available to it which, in its view, justified the adoption of certain measures? That was a delicate question to which there was no immediate answer, but which the Commission should nevertheless ponder.

48. As consideration of the draft statute proceeded, other problems of the same kind would arise. The Commission would have to pay the closest attention to them before it could in all honesty recommend the draft to the General Assembly for its decision as to the action to be taken on it. The time had come for the Commission to give serious consideration to all those issues in the context of a frank and open dialogue during which the problems could be pinpointed, if not solved. Lastly, without wishing to minimize the value of working groups, he would stress the importance of the work carried out in plenary.

49. Mr. ARANGIO-RUIZ, referring to the question of the distinction between an act of aggression and a war of aggression, said that it was ambiguous, to say the least, to speak of factual or legal differences. Obviously, a simple attack by a State or by a group of persons on another State was less serious, factually, than a war of aggression. The main question was whether there were differences between the two in law. That would depend on the degree of gravity of the act committed, which would be assessed by reference to a pre-established threshold beyond which the act in question would be treated as a crime. Once a crime of aggression had been determined, the legal consequences would be different according to whether it was a simple act of aggression or a war or a series of wars of aggression. The distinction between aggression and a war of aggression could therefore not be reduced to mere factual or legal differences, since, in the two cases, both factual and legal aspects would have to be taken into consideration.

The meeting rose at 12.45 p.m.

2330th MEETING

Wednesday, 4 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

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

Draft Code of Crimes against the Peace and Security of Mankind (*continued*) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8[1], A/CN.4/460,[2] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT[3] (*continued*)

1. Mr. CRAWFORD said that the Commission's work in preparing the draft statute for an international criminal court had proceeded on the basis of six propositions. First, the court should be established by a statute in the form of a treaty agreed to by States parties. Secondly, at least in the initial phase of its operations, the court should exercise jurisdiction only over individuals, as distinct from States. There was no disagreement on those two propositions. Thirdly, the court's jurisdiction should relate to specified international treaties in force defining crimes of an international character: there was general agreement that it should not be limited to the Code of Crimes against the Peace and Security of Mankind. Fourthly, the court was seen as a facility for States parties and as supplementing existing criminal justice systems and existing procedures for international judicial cooperation. It should not have compulsory jurisdiction in the sense of a general jurisdiction that a State party was obliged to accept. That proposition, too, had gained broad acceptance among States, though with some differences of nuance. Fifthly, the court should not be a full-time body but an available legal mechanism ready to be called into operation when required. General, though not universal, agreement had been reached on that point. Sixthly, the statute must guarantee due process and the independence and impartiality of the court's procedures. There was no disagreement on that point. Those six principles could well be supplemented and modified, but they already provided criteria for assessing the draft articles.

2. The Commission was envisaging an entirely new system: there had never before been an international criminal court, and the process must be taken step by step. Law libraries throughout the world were full of schemes for an international criminal court, but none had proved acceptable, for reasons that hinged on the unwillingness of States to establish sweeping new procedures that might have unpredictable effects. The Commission was habitually a modest body, but it might have to be even more modest than usual in the present case.

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[1] Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

[2] Ibid.

[3] *Yearbook . . . 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

3. The proposed court outlined in the draft might not be an ideal solution, but the important thing at present was to get agreement on a widely acceptable, flexible and effective body capable of trying the most serious international offences in accordance with well-defined standards of due process. If that meant that proposals had to be more limited in scope than the Commission might like, so be it. The call for caution had been sent out by a wide range of countries in the Sixth Committee's debates. Some countries, while supporting the basic approach adopted in the draft statute, wanted a more restricted list of offences to fall within the jurisdiction of the court. Many had expressed concern over the vagueness of the category of "crimes under general international law". States that would go considerably further than the scheme set out in the draft articles were definitely in the minority.

4. A primary issue of substance was that of the court's jurisdiction. There was a close link between articles 22 (List of crimes defined by treaties) and 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) and the principle of *nullum crimen sine lege* set out in article 41. For crimes defined by the treaties listed in article 22, there was no jurisdictional requirement that the State of which the accused was a national should be a party to the treaty. Once the requirements spelled out in article 24 (Jurisdiction of the Court in relation to article 22) for acceptance by States of jurisdiction were met, the court had jurisdiction over the crime in relation to the accused, and the only issue was whether the *nullum crimen sine lege* principle applied. But in accordance with article 15 of the International Covenant on Civil and Political Rights, that principle was not infringed when the act in question was a crime under general international law. In principle, general international law could be used in a supplementary way in relation to crimes under article 22. The combination of the jurisdictional provision and the *nullum crimen sine lege* principle could allow general international law to supplement the crimes defined under article 22 if they were crimes under general international law.

5. If one accepted the argument he had just outlined, then the controversial provision on crimes under general international law set out in article 26, paragraph 2 (*a*), could apply only to crimes not defined in article 22, in other words, to undefined international crimes. A widely held view was that there were only two such crimes: aggression and crimes against humanity. He would be most reluctant to leave out of the draft the category of crimes against humanity. Admittedly, most acts committed during international armed conflicts that could qualify as crimes against humanity were already covered by article 22. So were some, but not all, of those committed in internal armed conflict—acts amounting to genocide, for example. However, many of the worst crimes against humanity occurred in internal armed conflict or in internal civil strife. He could, on the other hand, understand the concern of some States about the licence the draft articles appeared to give the court to define new crimes under general international law. If the court did so, the *nullum crimen sine lege* guarantee would not prevent a conviction, since it, too, referred to crimes under general international law. So there was an area of uncertainty in that regard.

6. The situation now was different from that at the time of the Nürnberg Tribunal. In 1945, not even genocide had been defined as an international crime. Since then, enormous efforts had been made to delineate international crimes in treaties, whereas the customary law process had been largely bypassed. That created real difficulties of definition for the "additional" crimes under general international law. It was true that there were strict jurisdictional requirements for crimes under general international law in article 26, paragraph 3 (*a*), but those requirements were themselves likely to prevent the trial of persons for crimes against humanity committed in internal armed conflict or civil strife. Perhaps Mr. Bowett's suggestion (2329th meeting) of limiting the coverage of article 26, paragraph 2 (*a*), to acts of aggression was the only solution. The Commission should none the less consider ways in which, consistent with the structure of the draft, it could include the category of crimes against humanity committed in internal conflicts.

7. The Working Group on a draft statute for an international criminal court would also have to examine, *inter alia*, the list of treaties in article 22. The main, if not the only, addition to the list suggested in the Sixth Committee was the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In that connection, the Commission might wish to reconsider its earlier view that the Convention was in fact one aimed at the suppression of a particular crime. Some delegations had favoured reducing the list by leaving out, for example, the conventions dealing with terrorism, such as the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention). Personally, he would be opposed to such deletions. The court might well be the appropriate or even the only possible forum for the trial of State officials charged with aircraft hijacking or with the bombing or destruction of civil aircraft.

8. As to the need for a list of treaties in relation to article 26, paragraph 2 (*b*), failure to enumerate the major multilateral conventions aimed at the suppression of a particular crime to be covered by that article constituted a clear anomaly. A list could readily be drawn up and would be comparatively short. Obviously, it would include the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which in any event was the main reason for including that category of crimes in the statute. Clearly, the way should not be left open to include any convention concluded by more than a few States dealing with almost any topic, even on a regional basis and without any of the requirements of generality and general acceptance that ought to be found in the jurisdictional provisions of the statute. The list, like the one in article 22, should be confined to major multilateral conventions aimed at the suppression of crimes on which there was general consensus. With such a list it would be convenient to separate the two parts of article 26—crimes under general international law and crimes under conventions aimed at the suppression of a particular crime—for they had little in common with each other and required separate consideration.

9. The difficult task of establishing an international criminal jurisdiction for a range of offences involved no less than three problems: jurisdiction *ratione materiae* (which crimes?), jurisdiction *ratione personae* (which accused persons?) and the problem of choice of jurisdiction (an international criminal court or an available national court?). Each problem had to be dealt with adequately. That would inevitably lead to a rather complex scheme, but it should at least be clear. On the third issue, the choice of forum, the draft articles, at present, did not go far enough and did not give sufficient guidance. The Working Group ought to consider whether the international court should not have power to stay a prosecution on specified grounds, a power that existed in many national jurisdictions. The grounds might include, say, the existence of an adequate national tribunal with jurisdiction over the offence or the fact that the acts alleged were not of sufficient gravity to warrant trial at the international level. Failing such power, the court might be swamped by peripheral complaints involving minor offenders, possibly in situations where the major offenders were going free. Some capacity to deal with problems of that kind had to be provided. It was not sufficient for such considerations to be taken into account by the prosecutor since this would raise problems of accountability. The international court was intended to supplement, rather than replace, existing national criminal jurisdictions, and a suitable provision would help to give effect to that principle.

10. On the question of the relationship between the court and the Security Council, he agreed that the Council should not act as a prosecutorial or fact-finding agency in relation to the function of referral bestowed upon it by article 25 (Cases referred to the Court by the Security Council). The precise relationship between a referral under that article and the role of the prosecutor needed to be spelt out. There was also a need to ensure a clear distinction between the roles of the Security Council in relation to matters of international peace and security and of the court in relation to crimes allegedly committed by accused persons.

11. Although many national jurisdictions, including his own, deprecated them, trials *in absentia* were undoubtedly permissible with appropriate safeguards under human rights law. On the other hand, the issue of whether trial *in absentia* should be allowed in an international court raised a serious question of policy that should be kept separate from the question of the rights of the accused. An international court whose main or sole task was the trial of accused persons in their absence would be transformed into a mechanism of denunciation and would be brought into disrepute if none of its sentences were ever executed. Appropriate ways had to be devised of preventing any system of trial *in absentia* from being abused. At the previous session, a provision that would have excluded trial *in absentia* except in very limited circumstances had been omitted from the draft by the Working Group without, however, anything being substituted for it.[4] As the European Court of Human Rights had repeatedly made clear, most recently in *Poitrimol* v. *France*,[5] there was a need for a mechanism for regulating *in absentia* trials, providing for notification, and so forth. The draft, as it stood, addressed neither the issue of policy nor that of human rights, and the Working Group would have to grapple with that problem.

12. In the Sixth Committee it had been suggested by one delegation that the rules of procedure and proof should be set out in detail in the articles. On balance, he thought that was not desirable, not only because it would require a great deal of time and expertise but also because some flexibility should be provided in respect of many procedural rules. On the other hand, he agreed that the draft articles should spell out the main rules governing evidence and procedure on issues of principle, such as trial *in absentia* or the disclosure of prosecution evidence to the accused.

13. The Commission should try to complete the drafting of the statute at the present session but should on no account prejudice the quality of its work. If agreement could not be reached on all issues during the present session, the Commission would still have achieved remarkable progress over the past three years or so. Lastly, in view of the close connection between the various issues involved, the Working Group should not break up into subgroups as it had done in 1993. The Working Group, whose continuation he strongly supported, should work on the text as a whole and he would be happy to assist in that endeavour.

14. Mr. MIKULKA, referring to the court's jurisdiction *ratione materiae* said he fully agreed with Mr. Bowett's view (2329th meeting) that the list of treaties to be included in article 22 should be left to a decision of the future diplomatic conference, since the question of extending or restricting the list was basically one of political choice. On the other hand, the inclusion or omission of a provision such as the one contained in draft article 26, paragraph 2 (*a*), although it too might seem largely political at first glance, would have major repercussions on the court's operation and usefulness and it therefore deserved careful study by the Commission.

15. If the court was designed as a body operating exclusively on the principle of conferred jurisdiction whereby the initiation of proceedings was limited to States parties to the statute, jurisdiction *ratione materiae* could be confined to crimes by individuals as defined by international conventions and no major difficulties would be created. That, however, was not the case. A major exception to the principle of conferred jurisdiction lay in the Security Council's right to refer a case, or rather a situation, to the court. Nevertheless, while the Security Council's decision to make a referral could serve as a substitute for the consent of the State concerned in establishing the court's jurisdiction *ratione personae*, it could not serve as a substitute for the consent of that State to become party to one of the conventions listed in article 22. The fact that a State was not party to one of those conventions meant that acts by individuals under its jurisdiction could not be considered

[4] In this regard, see the commentary to article 44 (*Yearbook... 1993*, vol. II (Part Two), p. 120).

[5] European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 277, *Judgment of 23 November 1993* (Registry of the Court, Council of Europe, Strasbourg, 1994).

crimes by virtue of that treaty, even if in all other respects those acts fitted the treaty definition of an international crime. Accordingly, those acts would not fall among crimes within the court's jurisdiction *ratione materiae* and the Council would not be able to refer them to the court. The Council's decision might replace the consent of a State, but not a rule of (treaty) law which was necessary for an act to be qualified as an international crime. Otherwise, the *nullum crimen sine lege* principle would be seriously violated.

16. If the court's jurisdiction *ratione materiae* was limited to treaty-defined crimes, the Security Council might well find it was powerless to refer to the court horrifying situations or acts clearly constituting crimes under general international law simply because the State in question was not a party to the treaty which defined the crimes. That was why article 25 spoke of cases referred to the court by the Security Council under article 26, paragraph 2 (*a*), as well as under article 22. The provision in article 26, paragraph 2 (*a*), could bear some textual improvement and should, in his view, be placed in article 22 as paragraph 2, but the idea that crimes under general international law fell within the jurisdiction *ratione materiae* of the court should certainly be maintained.

17. Mr. VILLAGRÁN KRAMER said he agreed that it was not essential for the work on the statute to be completed in 1994: the main thing was to resolve the major problems connected with the statute. If that could be done at the present session, then the Commission should feel well satisfied, but it should not regard prompt submission of the draft as more important than quality.

18. A number of articles deserved special consideration in the light of comments made by Governments in the debates in the Sixth Committee, and those received from Governments (A/CN.4/458 and Adds.1-8).

19. Article 2 (Relationship of the Tribunal to the United Nations) set out the possible relationship between the court and the United Nations. From the debate in the Sixth Committee, one could conclude, first, that Governments were concerned about that relationship and wanted the Commission to elucidate its nature, and secondly, that the options for such a relationship could not go beyond what was set out in articles 25 and 27 (Charges of aggression). Those articles envisaged interaction between the Security Council and the court, but perhaps States would welcome further clarification from the Commission.

20. Two proposals had been made in the Sixth Committee, one being that relations between the United Nations and the international criminal court could be structured in accordance with Article 57 of the Charter of the United Nations, along the lines of those of the Organization and the specialized agencies. That had only one drawback, namely, under Article 63, paragraph 1, of the Charter, the Economic and Social Council would be responsible for working out the terms for such a relationship, for subsequent approval by the General Assembly.

21. The second suggestion made in the Sixth Committee, and which was quite interesting, was that the international criminal court could be subsidiary to ICJ. If Article 92 of the Charter identified ICJ as the principal judicial organ of the United Nations, that meant there was room for other, subsidiary legal bodies. The Working Group should, in his view explore the type of interrelations to be established between the court and the United Nations, for that would resolve a number of institutional questions.

22. As to article 7 (Election of judges), he agreed with some representatives in the Sixth Committee that the period of 12 years initially envisaged for the term of office of judges was too long. It would be more reasonable to provide for a term lasting seven or nine years. Again, the likelihood that an accused person might reject a given judge under article 11 (Disqualification of judges) and, by recurrent rejections, ultimately disqualify the entire court, must be obviated by setting a limit whereby an accused person could reject only two judges, for example.

23. The most important aspect of the matter of jurisdiction was the relationship between article 22 and article 26. The Commission had proposed a harmonious structure, and that harmony must be preserved. On the other hand, new factors that arose as work progressed could not be ignored. The first was the non-international conflicts that formed the subject-matter of the Protocol additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Most observers were deeply distressed by the dimensions taken on by internal conflicts, particularly in Africa and Central America. In the past 50 years, the world had seen many such conflicts, which had international implications, and the question was how to handle them within the evolving international legal system. His view was that article 26 of the draft could be interpreted as applying to internal conflicts. Some representatives in the Sixth Committee had suggested incorporating Protocol II in article 22 of the draft. He was not sure whether such a course was feasible, but it merited consideration.

24. The idea had also been advanced in the Sixth Committee that the list of treaties should be supplemented by the inclusion of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. He sympathized with the idea, but it would entail technical difficulties. Incorporation of those treaties in article 22 would mean that, if a country had ratified one of them, the court's jurisdiction would be extended. Among the alternatives proposed for article 23 (Acceptance by States of jurisdiction over crimes listed in article 22), the second was the most attractive because it linked ratification of treaties to the jurisdiction of the court, whereas the first alternative left the acceptance of jurisdiction up to the State.

25. Articles 22 and 26 contained a number of elements that were reminiscent of the Commission's work on article 19 of part one of the draft on State responsibility.[6] In that article, the Commission had established definitions

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

of international crimes, and those definitions should be kept in mind in the current drafting efforts. Article 19 characterized as an international crime a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression; a serious breach of an international obligation of essential importance for safeguarding the right to self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination; and a serious breach on a widespread scale of an international undertaking of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid.

26. Those notions had been further refined since 1979, but the initial objective had been to identify the most essential elements of an international crime. Whether or not that terminology was reproduced in the draft statute, the Working Group would do well to determine whether it should envisage only very serious breaches of obligations or a whole range of crimes. Article 26 of the statute in its present form would only allow for consideration of serious breaches under general international law. That seemed to be the trend in its work at the moment, but the Commission should be fully aware of that evolution and make sure that that was its intention.

27. On the role of the Security Council, Mr. Bowett's comments (2329th meeting) had brought a useful note of clarification. When the provisions of the Charter of the United Nations on the act of aggression had been studied in the past, it had usually been from a regional standpoint and the language of the Charter had proved to be lacking in clarity. The Security Council was empowered to determine only when an act of aggression had occurred, but there were many events leading up to the act of aggression, including the first use of force. For example, in 1969 Salvadoran nationals had been expelled en masse from Honduras and El Salvador had engaged in reprisals involving the use of force. OAS had responded by calling on the Government of El Salvador to withdraw its armed forces to its own side of the border. The incident showed that supranational bodies had the power to induce a State to put an end to its illegal acts so that it would not be deemed an aggressor; if it was so deemed, then sanctions provided under the Charter of the United Nations and in regional security mechanisms would be applied.

28. What course, therefore, should the Commission take? It could not restrict the Security Council's ability to characterize something as an act of aggression or to refer a case to the court if it saw fit. What the Commission could do, however, was to make sure that a situation that might be defined as aggression simply in order for the court to judge the guilty parties would not be brought before the court again and again. For example, in some countries in Africa, Asia and Latin America the leaders of small armed groups often considered themselves to be little Napoleons and frequently provoked border skirmishes. Incidents of that kind were so numerous that, if they were allowed onto the agenda of the future international criminal court, on the grounds that they qualified as the first use of force, the court's case-load would soon become crushing. In reality, those were fairly superficial incidents that did not amount to acts of aggression.

29. He agreed with Mr. Crawford that the human rights treaties did not limit or prohibit trials *in absentia*. What they did do was establish conditions that must be fulfilled in order for such trials to be held. Such conditions included the accused person's being informed of the opening date for the trial and his or her right to appear at the trial at any time if he or she so desired. Eventually, all trials *in absentia* reached a stage when the principle of due process came into play. He favoured instructing the Working Group to find an acceptable formulation for preserving the concept of trial *in absentia*.

30. Mr. KABATSI said that the prospects for setting up the international criminal court had never been better. The establishment in 1993 of the 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[7] was a highly favourable factor. The Commission's draft statute for an international criminal court had been well received by the General Assembly and the numerous replies by Governments also indicated broad acceptance. The present discussion showed that very few areas of controversy remained, and it was reasonable to hope that the Working Group would produce a final draft, preferably, although not necessarily, during the present session.

31. An international criminal court that was expected to deal decisively with offenders who threatened international peace and security as well as the conscience of mankind could not be limited exclusively to crimes defined as such by treaty provisions. Clearly, the crimes listed under article 22 did not cover all violators. In his view, it would therefore be a serious mistake to delete article 26, especially paragraph 2 (*a*). Aggression not only threatened a stable world order but also frequently entailed many other crimes, particularly crimes against humanity. The statute would be incomplete if the provision in article 26, paragraph 2 (*a*), was omitted.

32. The court should be empowered to try individuals accused of committing crimes against humanity in the course of internal conflicts. The difficulty of bringing the perpetrators to book so long as the Government responsible for the crimes remained in power should not be overrated. It was extremely important that the perpetrators should know that justice would catch up with them sooner or later. He accepted the view that it should be the role of the Security Council to identify a situation of aggression and to bring it before the court, all further action being left to the prosecutor and the court. He also agreed that accused persons should have the right to enter a plea of self-defence. Lastly, the Commission should not, in his view, recommend the holding of trials *in absentia*. Apart from its human rights implications, such a provision would cast doubt upon the court's status as a world body. Since the crimes dealt with by the court would not be subject to any statute of limitations, there would be no harm in deferring the trial until it could be

[7] See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

held with the accused in attendance, thus ensuring that full justice was done.

33. Mr. RAZAFINDRALAMBO said that he accepted the explanations provided in paragraphs (1) and (2) of the commentary to article 25[8] and was pleased to note the view of the Working Group expressed at the end of paragraph (2) of the commentary, namely, that the Security Council would not normally be expected to refer to the court a case in the sense of a complaint against named individuals suspected of crimes under articles 22 or 26 but would more usually refer a situation of aggression. In that connection, he also endorsed the provision contained in paragraph 4 of article 13 (Composition, functions and powers of the Procuracy). In order to avoid all ambiguity with regard to the role of the Council in relation to the court, he wondered whether article 25 of the draft ought not to specify that the jurisdiction of the court was not subject to acceptance by any State, since the terms of Article 24 of the Charter of the United Nations would apply to Council action. With regard to article 27, Mr. Bowett (2329th meeting) was right to say that determination by the Security Council of the existence of an act of aggression was a necessary formality.

34. As for the distinction drawn between an act of aggression and a war of aggression, he agreed with Mr. Thiam (ibid.) that the difference between the two was only slight. In that connection, he drew attention to the definition provided in article 24 of part one of the draft on State responsibility.[9] Lastly, he wondered whether the Working Group should not reconsider paragraph 2 of draft article 24, since acceptance of the jurisdiction of the court by a State when one of the State's leaders was accused of a serious crime was unlikely to be forthcoming. In such a case, the credibility of the court would be seriously undermined. He reserved the right to speak again on the subject of the statute at a later stage.

35. Mr. CALERO RODRIGUES noted that the debate had focused on part two of the draft statute of the Working Group (Jurisdiction and applicable law), which the Group itself had referred to as the central core of the statute.

36. Earlier in the meeting, the debate had been about a definition of jurisdiction *ratione materiae*. He hoped that the Commission would consider the question of the conditions for the actual establishment of jurisdiction and the role of States in that regard, a separate, important, matter that deserved thorough debate.

37. The basic approach adopted in part two was questionable. Actually, it had been rightly pointed out that the approach had been approved two years previously, yet approval had been arrived at hastily, without time to discuss the subject properly. Insufficient attention had been given to the relationship between the substantive law to be applied by the court and the procedural law represented by the statute. The Working Group had found it necessary to go into substantive law to decide which law the court should apply, but there was a vagueness about the rules of substantive law which the Working Group had sought to dispel. The problem was that substantive law should not be confused with the procedural law currently embodied in the statute.

38. The approach adopted was to refer to existing written law, such as treaties (art. 22) and general international law (art. 26). Existing treaties defined crimes that should fall within the jurisdiction of the court, but the definitions were often vague and it was difficult to decide which treaties should be included in the draft. As to crimes under general international law, it was doubtful whether customary law could provide a firm basis for a definition of crimes with the precision that was required in criminal law. An effort must be made to draw upon both sources—existing treaties and general international law—in order to draft adequate provisions that the court could apply. It was not possible for the Working Group to deal with that question thoroughly.

39. Such an effort was being made by the Commission in the draft Code of Crimes against the Peace and Security of Mankind. The draft Code would be a compilation, consolidation and codification of existing law, perhaps with some additions or progressive development. With the Code, there would no longer be a problem about which treaties to choose or the vagueness of customary law, and adequate provisions of substantive law would exist, enormously facilitating the work of the court. The Commission should continue that effort and bring the draft Code to a speedy conclusion. The draft adopted on first reading was only a rough one and could be improved, and it was to be hoped that the Special Rapporteur's twelfth report on the topic (A/CN.4/460) would help in that regard.

40. It was argued that the Code and the court should not be linked because the task was difficult and time-consuming and that it was necessary to put the court into operation as a matter of urgency. He disagreed. The court would not be effective without a proper definition of the law it was to apply. Such a definition did not exist, and the Code alone could provide it without too much delay.

41. It was unrealistic to assume that the court would be endorsed by States once the draft statute was sent to the General Assembly. In his view, the Commission should rise to the occasion and create a better, more useful and permanent instrument, even if it took longer to do so. The international community wanted a court with power to deal with all crimes committed around the world. That would not be possible if too many restrictions were placed on the court's jurisdiction. The prospects of a permanent court with an independent jurisdiction were remote, but it was better to work towards that goal than to propose an ineffective instrument. The Commission must meet its responsibility as the main codification body of the United Nations. An institution was needed to make sure that criminals who had not been tried by national courts did not enjoy impunity—an institution that could thus act as a genuine deterrent. States must not be able to interfere with the trial of their nationals.

42. He had little hope of changing the prevailing view in the Commission, but the report should indicate that there was a dissenting opinion. It might be decided to include in the draft a reference to the possibility of replac-

[8] *Yearbook . . . 1993*, vol. II (Part Two), p. 109.

[9] See footnote 6 above.

ing the current provisions of articles 22 and 26 by the provisions of the Code if such an instrument came into being, because the Code would cover crimes under existing instruments and also crimes under general international law. For example, article 22 of the draft statute listed a number of instruments. It spoke of the Geneva Conventions of 12 August 1949 for the protection of victims of war and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). Abuse of the symbol of the Red Cross was a grave breach of the Protocol. Surely, that should not come under the court's jurisdiction, which should cover only exceptionally serious violations of the Geneva Conventions and the Protocol. Again, article 22, paragraphs (*c*) to (*h*) concerned terrorism. In the draft Code, there would be a single provision on terrorism, in which that crime was defined. One possibility would be to prepare an alternative text on the basis of the Code.

43. Mr. PAMBOU-TCHIVOUNDA said he endorsed the method of an exchange of views that had taken place the previous day on the report of the Working Group on a draft statute for an international criminal court. Regrettably, more time could not be allotted to a discussion of the subject in plenary, but it was to be hoped that the Working Group would quickly re-examine the draft articles and that they could then be reviewed and improved upon in plenary. Such a review would be necessary because the plenary would have had the time to discuss the sixth report of the Special Rapporteur on State responsibility (A/CN.4/461 and Add.1-3)[10] and to debate the twelfth report of the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind. Those two reports would have an impact on the Commission's perception of the shape of an international criminal court.

44. The drafting of the requisite instrument of the court must be placed in its initial context: the current concerns of humanity must be addressed. One difficulty, however, was to relate the present exercise to any of the questions included in the Commission's programme of work. Everyone was aware of the limits of the undertaking which the partisans of the creation of ad hoc courts by the Security Council would not fail to exploit. In some sense, the Commission was making itself the ally of the adversaries of the progressive development of the law.

45. It was disconcerting to find that, so far as the questions of jurisdiction and applicable law were concerned, the draft statute was a great mix as to both substance and form. That prompted certain questions. What benefit, for instance, would a State party to a treaty covered by article 22 derive from becoming a party to the statute of the court? Was it certain that such treaties would stipulate that their application would require recourse to some international machinery for prosecution? Moreover, the jurisdiction it was hoped to vest in the Security Council in such cases could be called into question at any time, since any State could all too easily invoke the authority of the Charter of the United Nations. The Council could not serve as a super-prosecuting authority, however, nor as a mere officer of the court. All those questions merited reflection.

46. It was also essential to make just and proper use of the principle *nullum crimen sine lege*, which was more a norm of clarification than one of characterization. Article 26 did not seem to reflect the basic purpose of that principle. It was as though the article contemplated the case of an individual—a "Superman" perhaps—who waged war, on his own, against a State: that would be the sort of person who would then be regarded as the perpetrator of an act of aggression. He had some doubts on that score and wondered in particular whether the possibility that States could be brought to justice on the basis of such responsibility should be disregarded or, on the contrary, taken into account in the future work on the draft Code of Crimes against the Peace and Security of Mankind.

47. Mr. FOMBA said he wondered whether a list of crimes defined by treaties, as provided for in article 22, was the best solution. It would, of course, have the advantage of legal certainty and would be in keeping with the principle *nullum crimen sine lege*, but there was a risk that, as the universal legal conscience evolved, it could not readily be encapsulated in space and time. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, referred to in paragraph (4) of the commentary to article 22, provided an illustration of the limitations to such an approach. Also, the express reference to the treaty as the sole legal basis could not conceal the fact that there was no well-established hierarchy of norms in international law.

48. With regard to article 25, the Security Council should have the right to refer cases to the court, given the essential role it played in the regulation of international policy, but its task should be confined to the legal characterization of situations of aggression, as provided for under Article 39 of the Charter of the United Nations.

49. A related question was whether the right of referral should be extended to the General Assembly. In his view, the answer was in the affirmative. First, the Assembly, as a plenary organ, was the most representative body of the international community; secondly, despite some improvement in the present climate, the possibility of the Security Council's action being paralysed was no mere fiction; and thirdly, under Article 12, paragraph 1, of the Charter of the United Nations, the Assembly had a residual jurisdiction. The third reason merited particular consideration.

50. So far as article 27 of the draft statute was concerned, it was only logical that it should be for the Security Council, or where necessary the General Assembly, to take cognizance of the commission of an act of aggression before the machinery for determining individual criminal responsibility was set in motion.

51. In short, he generally endorsed the Working Group's line of argument. With regard to the distinction made between "war of aggression" and "act of aggression", he would draw attention to the Definition of Aggression,[11] in which the word "aggression" appeared

[10] See footnote 1 above.

[11] General Assembly resolution 3314 (XXIX), annex.

seven times and the expression "act of aggression" nine times, but the expression "war of aggression" figured just once, in article 5, paragraph 2. The wording of that provision, however, merely indicated into which legal category a war of aggression fell; it did not allow for any clear distinction between a war of aggression and an act of aggression from the standpoint of legal characterization *stricto sensu*. Any difference between the two was more a matter of degree than of law.

52. Mr. IDRIS, noting that there were two "hard-core" issues, said that the first related to article 22, which was intended to form the basis of the court's jurisdiction. The article did not provide an exhaustive list of crimes and was silent about the status of the legal instruments to be concluded in the future. While an exhaustive list was not desirable, it was equally inadvisable to leave the article open to extension, since that would create a considerable degree of legal uncertainty. Such questions as the meaning of a reference to future treaties to be included in the list were perfectly reasonable, however, and should be addressed by a small body of the Commission.

53. In the absence of a Code of Crimes, article 22 would remain highly controversial; unfortunately, the revision of the list of crimes, as provided for in article 21, would not provide a solution. In that connection, the distinction drawn by the Working Group between treaties that defined crimes as international crimes and treaties that simply provided for the suppression of undesirable conduct which constituted crimes under national law should receive further attention.

54. Another highly controversial issue was the relationship between the Security Council and the international criminal court. The Council's power of referral should, in his view, relate not to a case against named individuals but to a specific case of, for instance, aggression, while the court should be responsible for the criminal investigation and the indictment. That, however, was not immediately apparent from the terms of article 25. The impression given was that the Council would be vested with powers additional to those granted to it under the Charter of the United Nations. The main point, of course, was whether the General Assembly should also have a power of referral. At all events, it would be extremely undesirable from the standpoint of their prestige and integrity, if the Council and the Assembly were to be affected by criminal procedures that were placed outside their purview.

55. The category of crimes under general international law, as referred to in article 26, paragraph 2 (*a*), still lacked precision and, if approved, would require realistic consideration by the Working Group.

56. He would suggest that, to facilitate the task of the Commission, a list of "hard-core" controversial issues should be established on which the Working Group could start work. Only thereafter should it proceed to deal with matters that would not require substantive debate either in the Commission or in the General Assembly.

Composition of the Planning Group

57. Mr. YAMADA (Chairman of the Planning Group) proposed, on the basis of consultations he had held, that the Planning Group should be composed of the following members: Mr. Al-Khasawneh, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Jacovides, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Yankov and, as an ex-officio member, Mr. Pellet.

It was so agreed.

The meeting rose at 1.05 p.m.

2331st MEETING

Thursday, 5 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

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

Filling of casual vacancies (article 11 of the statute) (A/CN.4/456 and Add.1-3,[1] ILC/(XLVI)/Misc.1 and Add.1)

[Agenda item 1]

1. The CHAIRMAN invited the Commission to hold a closed meeting in order to fill the casual vacancies created by the election of Mr. Koroma and Mr. Shi to ICJ.

The meeting was suspended at 10.15 a.m. and resumed at 10.40 a.m.

2. The CHAIRMAN announced that the Commission had elected Mr. Qizhi He and Mr. Nabil Elaraby to fill the casual vacancies created by the election of Mr. Shi and Mr. Koroma to ICJ at the forty-eighth session of the General Assembly. On behalf of the Commission, he would inform Mr. He and Mr. Elaraby of their election and congratulate them on it.

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[1] Reproduced in *Yearbook . . . 1994*, vol. II (Part One).