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A/CN.4/SR.2331

Summary record of the 2331st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1994, vol. I

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).

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,[2] A/CN.4/460,[3] 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[4] (*continued*)

3. Mr. PELLET said that he was not opposed to the idea of an international criminal court, and that he believed that the perpetrators of serious crimes which affected all of mankind should be punished on behalf of the international community and on the basis of international law. The problem was one of the utmost gravity and the Commission should avoid taking decisions that would merely soothe its conscience at little cost. That was what it would be doing by creating a top-heavy mechanism based on a treaty ratified only by "good States", which would be unlikely to have recourse to it, since they would have nothing to reproach themselves with, and it would be useless because it would never be called upon to try any criminal, but would have to stand by helplessly while massacres or wars of aggression were being perpetrated. Clearly, that was not the intention of the Working Group, whose draft had its merits and undoubtedly went in the right direction, in particular because it departed to some extent from the "model" of a permanent Nürnberg Tribunal. The three main criticisms that could be addressed to the Working Group were, first, that the proposed draft statute was not sufficiently internationalist or, rather, not sufficiently universalist; secondly, that it gave too prominent a place to inter-Statism in an area where individuals and the international community were, or should be, face to face; and, thirdly, that it was far too complex, especially with regard to the jurisdiction of the tribunal. Those three points were so closely linked that they could not be dealt with separately. He would therefore make a few comments on the issues of greatest concern to him, namely, the method of establishment of the tribunal and its relationship to the United Nations, the jurisdiction of the tribunal and, lastly, some aspects of its operation. First, however, he pointed out that, in French, it was the word *cour* that should be used to designate the proposed judicial system as a whole and the word *tribunal* that should be used to designate the judicial organ. The point was not without importance because, in French, a court (*cour*) was a higher organ than a tribunal.

4. With regard to the question of the establishment of the tribunal and its relationship to the United Nations, he found the draft somewhat inconsistent. The Working Group stressed the need for a link with the United Nations and proposed two alternatives to that effect in article 2 (Relationship of the Tribunal to the United Nations), only to dismiss the first one implicitly by going on to refer to the specific rights and obligations of the "States parties to the Statute", which necessarily implied that the statute would be a treaty. Article 7 (Election of judges) and article 13 (Composition, functions and powers of the Procuracy), paragraph 2, for example, were totally incompatible with the establishment of a tribunal that would be a judicial organ of the United Nations. It would be quite unacceptable if only a few States had the right to elect the judges or the procurator of a subsidiary organ of the General Assembly or other organs of the United Nations. The first alternative was precisely the one he preferred because the point was to bring to justice the perpetrators of international crimes which threatened the international community as a whole and it would therefore not be right if a mere handful of States, however virtuous, were endowed—or endowed themselves—with jurisdiction of their own. The Working Group was aware of the problem, since, in articles 25 (Cases referred to the Court by the Security Council) and 29 (Complaint), it provided for the possibility that the Security Council could refer matters to the court and that possibility would even be open to States which were not parties to the statute if the rather obscure commentary to article 29[5] was to be believed. As a lawyer, he was somewhat perplexed, for, in his view, a treaty concluded between only a few States could not modify the powers of the Security Council under the Charter of the United Nations and he found it regrettable that only a few States should be called on to punish crimes of concern to mankind as a whole. Those problems could be solved by opting for the alternative which made the tribunal a subsidiary organ of the General Assembly or a joint subsidiary organ of the General Assembly and the Security Council. Contrary to what sometimes had been said, that would enable the tribunal to benefit from the moral authority of the United Nations and really to become the judicial organ of the international community as a whole, rather than of a small group of States. All States had a "direct interest", to use the wording of the commentary to article 38 (Disputes as to jurisdiction),[6] in having those responsible for a war of aggression, a genocide or a crime against humanity brought to justice. Moreover, the General Assembly was fully entitled to establish a judicial organ, as ICJ had affirmed in its advisory opinion of 13 July 1954[7] and as provided in Article 22 of the Charter of the United Nations. In so doing, it would be well within the limits of its mandate, since Articles 10 and 11 of the Charter gave it general competence in respect of all matters within the scope of the Charter and it was not irrelevant to recall in that connection that one of the purposes of the United Nations was to promote respect for human rights and fundamental freedoms. If it was considered that the tribunal should also be an instrument of the Security Council, it would have to be established by a joint resolution of the General Assembly and the Council. True, the General Assembly could not oblige the Member States of the United Nations and, *a fortiori*, States which were not members to refer matters to the court or to hand over criminals to the court, but it

[2] Ibid.

[3] Ibid.

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

[5] Ibid., p. 112.

[6] Ibid., pp. 117-118.

[7] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 47.

certainly could establish a court that would be at the service of States.

5. Turning to the question of the court's jurisdiction and applicable law, he said that he was one of those who had no objection to the Security Council's playing a role in that area, provided that it was not just any role, and, on that point, he considered the draft statute to be at once too vague, too timid and too bold. Although he agreed that aggression must first be determined, pursuant to article 27 (Charges of aggression) he did not see on what basis the Security Council might submit to the court any of the crimes listed in article 22 (List of crimes defined by treaties) or article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22), paragraph 2 (*a*), as indicated in article 25, because, unlike the General Assembly, the Security Council did not have general jurisdiction and had decision-making power only by virtue of Article 25 and Chapter VII of the Charter of the United Nations. It could submit a case to the court only in the event of a threat to peace, a breach of the peace or an act of aggression. He therefore did not think it appropriate that the Council's possibilities of bringing cases before the court should be broadened in that way. However, nothing should prevent the Council—and from that point of view the draft statute was too restrictive—from referring a crime to the court by virtue of that decision-making power if the punishment of that crime was necessary for maintaining peace and even from asking the court to prosecute certain persons, whether named or not, for an international crime.

6. With regard to referral by States, he found that the system imagined by the Working Group and described in articles 22, 23 (Acceptance by States of jurisdiction over crimes listed in article 22), 24 (Jurisdiction of the Court in relation to article 22) and 26 was unnecessarily complicated. The distinction drawn between the crimes listed in article 22 and those referred to in article 26 was superfluous. On the other hand, any confusion between the jurisdiction of the court, applicable law and referrals to the court must be avoided if consistent results were to be achieved. First of all, it must be borne in mind that the objective of the exercise was to create an international criminal court empowered to try, on behalf of the international community, persons responsible for particularly heinous crimes against humanity. Moreover, but that was a different problem, the Tribunal could also judge certain persons responsible for crimes that States, for very understandable reasons of security and efficiency, could not or did not want to try themselves, such as drug traffickers or certain terrorists. In the first hypothesis, it would therefore be enough to list all the acts that the court would be required to try; that list would not, in fact, be very long: it essentially involved genocide, crimes against humanity and grave violations of the law of armed conflict, aggression and, probably, apartheid. Any State should be able to refer those cases to the court and there would then be a danger of excessive reserve rather than abuse, since States were usually reluctant to play the role of prosecutor. For that reason, it would even be good if the Prosecutor, having learned about a crime of that type, could submit it to himself. It could also be envisaged that States should be able to bring other crimes before the court that were not necessarily of concern to the entire international community, but only to certain States that wanted to be able to have an international criminal justice department. The States concerned could recognize the court's jurisdiction in an international convention or in the framework of bilateral agreements or by virtue of additional protocols to the conventions listed in article 22.

7. As to applicable law, the Working Group recognized in article 26, paragraph 2 (*a*) that the court had jurisdiction in respect of international crimes that were crimes "under general international law". The reference to the conventions cited in article 22 was thus not only superfluous, but even constituted an unfortunate retreat compared to positive law. The Nürnberg Tribunal had tried criminals on the basis of the general principles of law "recognized by civilized nations", not on the basis of conventions. Since 1945, the law had been strengthened and custom had been added to the general principles of law. Security Council resolution 808 (1993) of 22 February 1993 creating 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[8] had also not based applicable law on existing conventions.[9] The emphasis on the treaty-based nature of the court's jurisdiction was thus a most regrettable step backwards. That might also mean that the person responsible for an act of genocide committed in a State that had not ratified the Convention on the Prevention and Punishment of the Crime of Genocide would not be punished. In his view, the concept of international legality on which the draft statute was founded and which derived from paragraph (4) of the commentary to article 33 (Notification of the indictment)[10] and from article 41 (Principle of legality (*nullum crimen sine lege*)), subparagraphs (*a*) and (*c*), was very narrow because international legality was not simply a sum of conventions; international custom and *jus cogens* in particular were its basic elements. Article 15 of the International Covenant on Civil and Political Rights provided a more internationalist and much less restrictive vision. Moreover, the list of conventions contained in the draft statute was very questionable. There was no reason to exclude, for example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was referred to only in article 26.

8. He found that the reference to "national law" contained in article 28 (Applicable law) was not justified, except in respect of article 26, paragraph 2 (*b*), as indicated in the relevant commentary. In any case, if national law was to play a role, the exclusion of national judges from the Chambers of the court, as provided in article 37 (Establishment of Chambers), would be highly debatable. Lastly, the terms used in the draft statute must be as "international" as possible, that is to say, they must be applicable in all cases. Some of them were not: for example, the expression "enter a plea of guilty or not guilty" in article 39 (Duty of the Chamber), paragraph 3, and in article 49 (Hearings), paragraph 1, was totally

[8] Hereinafter referred to as the "International Tribunal".

[9] See also Security Council resolution 827 (1993) of 25 May 1993.

[10] *Yearbook... 1993*, vol. II (Part Two), p. 115.

incomprehensible for a Latin jurist or, at any rate, for a French one.

9. Recapitulating the points he considered to be most important, he said that, in his opinion, the court should be a subsidiary organ of the General Assembly or a joint subsidiary organ of the General Assembly and the Security Council. It should thus be created not by a treaty, but by a resolution; that resolution should confer general jurisdiction for the most serious crimes which were an affront to the conscience of the international community as a whole and which were defined by general international law; the court should also be largely open to States that wished to appeal to it for trying persons responsible for certain crimes, on the basis of a bilateral agreement between the States concerned or a multilateral convention; it should also be possible for the Security Council to refer cases to the court when it was acting within the framework of Chapter VII of the Charter of the United Nations and it considered that the punishment of certain crimes would be likely to contribute to the maintenance of international peace and security.

10. He had some comments to make on the operation of the tribunal. First of all, the balance struck between the permanent nature of the tribunal and the intermittent nature of its meetings was a good one, but he did not think an annual allowance had to be paid to the President if he did not exercise his functions on a full-time basis. Secondly, the organ in charge of prosecution should be a collegial, rather than an individual organ, that is to say, a procuracy as provided for in article 5 (Organs of the Tribunal), subparagraph (*c*), and not a prosecutor, as indicated in article 13. Thirdly, the title of article 34 (Designation of persons to assist in a prosecution) might well encourage the "infiltration" of certain States in the tribunal. The commentary on the article seemed to be more sensible in that regard than the article itself. Fourthly, like the majority of the members of the Working Group, he thought that dissident or individual opinions should be excluded; that was an important point in criminal matters. Fifthly, the provision of article 44 (Rights of the accused), paragraph 1 (*h*), was reasonable and much better balanced than the position set forth in paragraph (2) of the commentary to that provision.[11] Article 14 of the International Covenant on Civil and Political Rights did not at all exclude trial *in absentia* because, although an accused had the right to be present at his trial, he did not have the right to prevent the trial from taking place by deliberately not appearing.

11. In conclusion, he admitted that he had some reservations about an international criminal court because he feared that it would serve no purpose. However, he would take a more internationalist view of it than the Working Group, whose approach was much too inter-Statist, especially with regard to heinous crimes against humanity. He also thought that the jurisdiction of the court was both too far-reaching and too restricted and, in any case, not adapted. Owing to those differences of opinion on basic points, he did not want to be a member of the Working Group at the present time. However, if the Working Group considered that a compromise was possible on one question or another, he would make a point of participating in its work on an occasional basis.

12. Mr. ARANGIO-RUIZ said that, in his view, a court was an instrument of the law and of the law alone; it could therefore not be an instrument of the General Assembly, the Security Council or any other political body.

13. Mr. PELLET said that he regarded the distinction between law and politics as wholly academic: the law was an instrument of the international community and of States, and States were essentially political entities. There was no reason why they could not be provided with a legal instrument to enable them to find legal solutions to political problems both in the General Assembly and in the Security Council. After all, that was precisely what frequently happened when States brought a case before ICJ.

14. Mr. YANKOV said that he would confine his observations to the question of jurisdiction and applicable law and would start with some general remarks.

15. In the first place, he agreed with Mr. Pellet that the existing mechanisms for the settlement of disputes relating to peace and security, including the judicial institutions, were basically adapted to inter-State conflicts and based on the concepts of sovereign States and of inter-State relations, whereas, at the present time, and perhaps for some time to come, peace and stability were more threatened by internal disputes involving ethnic, political, religious and human rights issues than by the traditional issues of a *casus belli*. The Secretary-General of the United Nations himself had in fact recognized, in a lecture delivered at Laval University in Quebec, Canada, that the United Nations was faced every day with internal conflicts, civil wars, secessions, partitions, ethnic confrontations and tribal struggles which were a threat to international peace and imperilled the rights of individuals; and he had also said that it was up to the Organization to invent new responses and to find new solutions. On another occasion, in a report entitled "Agenda for Peace", the Secretary-General had recognized that

> there is no adequate mechanism in the United Nations through which the Security Council, the General Assembly or the Secretary-General can mobilize the resources needed for such positive leverage and engage the collective efforts of the United Nations system for the peaceful resolution of a conflict.[12]

16. In his own view, it was necessary to take cognizance of the implications of such new situations for the settlement of disputes and the mechanisms used to protect international peace and the security of mankind. In the case of the future court, it would be necessary, in the context either of the consideration of the substantive provisions of the statute or of judicial or procedural law, to envisage such other dimensions—the "non-State" dimensions of those new phenomena.

17. In that connection, the example of the International Tribunal was of particular interest. The Commission should not fail to take account of the problems encountered by the International Tribunal when it came to

[11] Ibid., p. 120.

[12] Document A/47/277-S/24111, para. 40.

examine not only the substantive law, as contemplated by the draft Code of Crimes against the Peace and Security of Mankind,[13] but also the judicial or procedural law, since, in many respects, that tribunal would set a precedent for the establishment of a permanent international criminal court. The success or failure of the International Tribunal could have a direct impact on the viability of the new court.

18. His second general comment concerned the fact that he could not agree that the statute of the court should be established by a resolution of the General Assembly or the Security Council. The creation of an international criminal court should be based on the most reliable legal foundations known, namely, an international treaty. Care should be taken not to agree, on grounds of expediency, that such a court should be set up as a subsidiary body or by resolution, the worst possibility being a resolution adopted by consensus which merely concealed differences of view. The statute should be carefully drafted and should provide a firm legal basis for the judgements delivered against the perpetrators of international crimes, and in all circumstances.

19. Thirdly, the draft Code and the draft statute should be based on the principles *nullum crimen sine lege* and *nulla poena sine lege*. That would first require well-elaborated substantive legal provisions which were recognized by the international community as a whole or at least by a significant majority of States.

20. In principle, according to the overwhelming jurisprudence of criminal law which he endorsed, substantive law had to precede judicial or procedural law. It was common knowledge, however, that views differed on that important issue and, in his opinion, the Commission should try to find a solution that would bring the viewpoints closer together. Such a solution might lie in accelerating the work on the draft Code of Crimes against the Peace and Security of Mankind with a view to introducing greater precision into the definition of crimes, at the same time as the consideration of jurisprudence and the applicable law. In the latter connection, draft article 22 was of particular interest, although most of the treaties it listed did not contain any precise definitions of crimes and did not expressly provide for any penalty or sanction against individuals. Furthermore, even the Code would be an imperfect instrument so far as the substantive law was concerned in that it could not define all the components of the crime or prescribe the penalties applicable, as was the case in internal criminal law. In that matter, the international criminal court should have a certain discretion, based on the relevant treaties to determine both the applicable law and the modalities of the judicial proceedings.

21. In his view, substantive law should, above all, not be confused with procedural law, even if the distinction could not be as clear-cut as in internal law owing to certain characteristics peculiar to the international legal order.

22. Turning to the articles set forth in part two (Jurisdiction and applicable law), he noted that the two main criteria on the basis of which the crimes covered by the treaties listed in article 22 were regarded as crimes under international law were, first, the fact that those crimes were themselves defined by the treaty in question in such a manner that an international criminal court could apply basic treaty law to the crime dealt with in the treaty and, secondly, the fact that the treaty created, with regard to the crime it defined, either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility that an international criminal court could try the crime, or both. He would again point out in that connection that he did not exclude a power of discretion for the court based more on the common law system than the civil law system. He trusted, however, that an effort would be made to draw up a list of crimes themselves.

23. So far as article 23 was concerned, he would prefer alternative A. Article 24, relating to the jurisdiction of the court in relation to article 22, was acceptable, subject, perhaps, to some drafting improvements which could be decided by the Working Group. With regard to article 25 and relations between the court and the Security Council, he was of the opinion that the provisions of the Charter of the United Nations with respect to the powers of the Security Council should be strictly observed. The Security Council could not act at one and the same time as judge and as the body that implemented its own decisions, as had sometimes occurred with unfair results, to say the least. In article 26, concerning jurisdiction *ratione materiae*, he would like the emphasis to be placed on conventional law, since it was inconceivable, at least for a lawyer trained in the civil law, that customary law could provide a reliable legal basis for judgements delivered in criminal cases. The jurisdiction of the court with respect to an act characterized as a crime under internal law could be exercised only under the conditions laid down in article 26, paragraph 2 (*b*), and in cases where the national law was in line with conventional law in the area concerned.

24. With regard to aggression, the Commission must go no further than what was provided in article 27, namely, that for international crimes and in conformity with Articles 24 and 39 of the Charter of the United Nations, the Security Council had no power other than that of first determining that the State concerned had committed the act of aggression which was the subject of the charge. That was the key to the relationship between the Security Council and the new court. As he had stated before, he could not agree to a court that would be merely some sort of subsidiary body of the General Assembly or the Security Council because he saw a need for the separation of powers and leeway for the court to exercise its judgement. With the exception of jurisdiction *ratione materiae*, he saw no difference between ICJ and the international criminal court from the standpoint of status and respect for the law. Yet ICJ had been established by the Charter of the United Nations and its Statute was an integral part of the Charter.

25. Lastly, he thought that the Code of Crimes against the Peace and Security of Mankind should be added to the list in article 28 because he could not imagine the establishment of an international criminal court without

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

the Code. Indeed, the idea of a court had been the result of the work on the draft Code.

26. Mr. BOWETT said he took a particular interest in two specific issues: the drafting of the tribunal's rules, which were the detailed rules governing the procedure to be followed and the rules of evidence to be applied in any trial, and the court's capacity to waive its jurisdiction in favour of a national court. On the first issue, article 19 of the draft statute (Rules of the Tribunal) stipulated that the court itself could draw up the tribunal's rules. A number of Governments considered, however, that they could not take a position on the statute before they knew the content of the rules and some had proposed that the Commission itself should draft them. In his opinion, that solution was hardly realistic, for the Commission was not equipped for such a task. Mr. Crawford (2330th meeting) had proposed that the statute should include a number of basic provisions that would subsequently be supplemented by more detailed rules, but that did not solve the problem of who would draft the supplementary rules. The General Assembly should be asked to choose between the solution proposed by the Commission, namely, the drafting of the tribunal's rules by the judges, and the appointment of a group of experts to be responsible for drafting the rules.

27. On the second issue, if it was agreed that the court could waive its own jurisdiction in a case in favour of a national court that would be ready and willing to rule on it, there would have to be a mechanism enabling the court to monitor the proceedings in the national court, either by having the right to appoint an observer to that court, or by requiring that it should report on the results of the trial. If those results were not satisfactory, the tribunal would so indicate to the General Assembly, assuming that it would be required to report annually to the Assembly on its activities. Clearly, the court must use sparingly the option of "ceding" jurisdiction to national courts, whose earlier results might not always have been satisfactory.

28. Mr. YANKOV said he agreed that pragmatic solutions must be sought, as long as they were in harmony with the principles of law. For several years, the Commission had been working on the draft Code of Crimes against the Peace and Security of Mankind and it had the resources required to draft the rules to be applied by the tribunal, including calling on experts to do so.

29. Mr. BOWETT explained that his comment had dealt only with the drafting of a detailed set of rules governing the procedure to be followed and the rules of evidence to be applied by the tribunal. The Commission was made up of international law experts who were not necessarily all experts in criminal procedure. In his view, it was necessary to avoid the error committed by the International Tribunal, which had drafted rules with which Governments seemed to be far from satisfied.

30. Mr. ROSENSTOCK said he was not sure that the appointment of a group of experts by the General Assembly would be the best solution. It might be appropriate to give judges on the court the responsibility for drafting the rules, on the understanding that they would be approved by a two-thirds majority of States parties, although States would not be able to amend the rules. That would take account both of the wishes of Member States and of the fact that judges were in the best position to draft the tribunal's rules.

31. Mr. THIAM said that it was necessary to choose the lesser of two evils. Although the rules drafted for the International Tribunal appeared not to have been satisfactory to Governments, the court itself still had to work out its own procedures. Outside experts were not necessarily better qualified than judges to find a solution that would satisfy the majority of States.

32. Mr. YANKOV said that he had referred to substantive law and the Commission's competence in that area, and not to procedural law, an area in which he had no more expertise than anyone else. The proposal made by Mr. Rosenstock might make it possible to break the deadlock over the rules of procedure.

33. Mr. EIRIKSSON pointed out that the draft statute already contained a number of provisions, including those on the rights of the accused, which were similar to the rules of procedure now under discussion. It would be possible, as Mr. Crawford had suggested, to include a number of general rules in the draft statute that would serve as something like safeguard clauses. At all events, the Commission, at this stage, must avoid bringing up the relationship between the tribunal and States parties.

34. Mr. BENNOUNA said that the solution proposed by Mr. Rosenstock and Mr. Thiam would be a way of settling the dispute. However, another problem was even more important and that was the link established by the General Assembly between the court and the draft Code of Crimes against the Peace and Security of Mankind. The Commission could not draft the statute of a court that would make no reference whatsoever to the draft Code on which it had been working for many years and the Working Group had to give some thought to that problem.

35. Mr. Sreenivasa RAO pointed out that, if the rules of procedure were to be drafted by the court as soon as it was set up, the drafting would take place at a time when the number of States parties would be very small. It would be unfair if rules reflecting the positions of a minority of States were to be applied. Another possible solution would be to set up a working group responsible for proposing ideas and even drafting texts according to a timetable linked to the process of ratification. The judges would then have something to work on that was the outcome of broad consultations and the harmonization of various legal systems, a process which should be launched and completed without undue haste.

Organization of work of the session (*continued*)*

[Agenda item 2]

36. The CHAIRMAN suggested that, in accordance with the recommendation made by the Enlarged Bureau, Mr. Crawford should be appointed Chairman of the Working Group on a draft statute for an international criminal court.

It was so agreed.

* Resumed from the 2329th meeting.

37. Mr. BOWETT (Chairman of the Drafting Committee) announced that for the topics of "The law of the non-navigational uses of international watercourses" and "International liability for injurious consequences arising out of acts not prohibited by international law", the Drafting Group would consist of Mr. Al-Baharna, Mr. Calero Rodrigues, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Szekely, Mr. Villagrán Kramer, Mr. Yamada and Mr. Yankov. For the topic of "State responsibility", the Drafting Committee would be made up of Mr. Al-Khasawneh, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock and Mr. Tomuschat.

The meeting rose at 1.05 p.m.

2332nd MEETING

Thursday, 5 May 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: 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. 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. TOMUSCHAT said he did not altogether agree that the six propositions mentioned by Mr. Crawford (2330th meeting) had not been seriously challenged. Admittedly, the draft submitted to the General Assembly reflected current legal thinking, according to which there could be no other basis for the statute than an international treaty, but he wondered whether the Commission had not fallen into the trap of juridical orthodoxy. As an organ of the international community, the proposed tribunal, or court, would have power to impose sanctions for grave breaches of the basic tenets upheld by that community, and it would symbolize the discipline the international community would exercise when sovereign arbitrary acts were committed. Yet when it came to the establishment and jurisdiction of the tribunal, the Commission deferred to the traditional principle of State sovereignty, whereby States would be free to accept or reject the statute, and to submit or not to submit to the jurisdiction of the tribunal. The power granted to the Security Council under article 25 of the draft statute (Cases referred to the Court by the Security Council) departed somewhat from that general scheme, but an impartial reading showed that it would take effect only *vis-à-vis* such States as had accepted the statute.

2. It had been suggested that the whole undertaking should be viewed as a step-by-step process but he feared that prudence on the part of the Commission might lead the international community into an impasse. Was there really any incentive for States to ratify the statute and submit to the court's jurisdiction when that would inevitably mean putting on trial not only persons who came from States that were political foes but also accepting the same mechanism when it came to themselves? There would certainly be no rush of political outsiders to deposit instruments of ratification. It had taken 10 years for the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights to enter into force, and only two thirds of the nations of the world were now bound by them. Despite that undoubted success, it was a record that would be regarded as far from satisfactory in the case of criminal prosecutions. Events such as those now taking place in Rwanda called for a swifter response. One could hardly wait three decades for an international tribunal to become operative. In that connection, he read out an extract from a statement made by the representative of Venezuela on the occasion of the adoption of the statute 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[4] a statement underlining the urgency of the need for a permanent tribunal.

3. It could, of course, be argued that, in any serious crisis, the Security Council would invoke its powers under Chapter VII of the Charter of the United Nations, as it had done in the case of the former Yugoslavia, but such an attitude would suggest that the Commission did not believe in its own endeavour and regarded it as more of an academic exercise for political ends. He realized that in adopting his position—one supported by Mr. Pellet (2331st meeting)—he was departing from the well-trodden path. There was every reason to do so, since the court would have the function of enforcing the basic values of the international community against individuals who, more often than not, were members of Gov-

[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.

[4] Hereinafter referred to as the "International Tribunal". See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.