Document:-
A/CN.4/SR.2332

Summary record of the 2332nd meeting

Topic:
<multiple topics>

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

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.

ernment of States that had severed their ties with that community. The usual method of treaty-making was not suitable in the most serious cases when a trial of those responsible was essential in the interests of justice.

4. The Commission must offer the international community, and specifically the General Assembly, a model to show how the tribunal could be established without any State being able to prevent its becoming operative *vis-à-vis* its own nationals. Naturally, there were many ways in which an individual could be brought within the jurisdiction of the court, but the State of nationality continued to occupy an important place, in fact and in law.

5. Like Mr. Pellet, he wondered whether the General Assembly and the Security Council could not act jointly in creating the tribunal as a subsidiary organ. Although the General Assembly could not vest the tribunal with powers with respect to States and individuals, the Security Council could do so under Chapter VII of the Charter of the United Nations. Another, sounder, way of anchoring the tribunal in the Charter would be to amend the Charter; one article would suffice, and the statute of the court could then become an integral part of the Charter, like the Statute of ICJ. That method would have the advantage of producing a binding effect on all States Members of the United Nations as soon as two thirds had notified their agreement. Admittedly, the five major Powers would first have to give their agreement, but it was hard to conceive of an international court that did not command their support. He was not suggesting that his proposal should replace the 1993 draft statute[5] but rather that it should be put to the General Assembly as an alternative which reflected the community philosophy of which the tribunal was an offshoot.

6. Although the thinking behind articles 22 to 28 was correct, the drafting was too cumbersome and complex and should be reviewed. In particular, it should be imbued with the quality of intellectual accessibility. There was one major technical defect in the text: the court's jurisdiction *ratione materiae* should be clearly distinguished from the rules establishing the way in which jurisdiction could be conferred on the court. Article 22 (List of crimes defined by treaties) and article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22), paragraph 2, formed one set of rules and should be brought together. On that point he agreed with Mr. Mikulka (2330th meeting) and Mr. Pellet.

7. There had been two different interpretations of article 22, one given by Mr. Crawford and one by Mr. Mikulka. According to Mr. Crawford (ibid.), treaty membership was irrelevant, the sole intention of article 22 being to provide that in trials of, for instance, cases of genocide, the relevant definition should be the conventional one. That interpretation, however, was not confirmed either by the wording of article 22 or by the commentary. He did not see how a State which was not a party to the Convention on the Prevention and Punishment of the Crime of Genocide could possibly refer to that Convention in its declaration under article 23 (Acceptance by States of jurisdiction over crimes listed in article 22). After all, the crimes defined in the various conventions listed in article 22 were of an entirely different character. In some instances, such as genocide and war crimes, a customary rule ran parallel to the treaty rule, but in most instances that was not so. Also, Mr. Crawford's interpretation was not consistent with the principle *nullum crimen sine lege* as formulated in article 41, which made it abundantly clear that, in the case of article 22, it was the treaty rule that would constitute the basis for imposing punishment on the accused; were it otherwise, the expression "unless the treaty concerned was in force" in subparagraph (*a*) would make no sense.

8. Article 26, paragraph 2 (*a*), with its reference to general international law, was therefore necessary, though it could become a dangerous stumbling block. States might refrain from accepting the statute and from conferring jurisdiction on the court because of what was concealed behind the cloak of general international law. It would then fall to the court to determine which crimes existed under general international law. Governments might feel that judges had too much political discretion as a result. He for one would be happy with a court that had jurisdiction solely with regard to genocide, war crimes, crimes against humanity, and drug-related crimes. Aggression had virtually never been dealt with in a juridical forum. What point was there in attempting to do the impossible?

9. He was not totally convinced of the logic that distinguished between the two categories of treaties covered, respectively, by article 22 and by article 26, paragraph 2 (*b*), and would reserve judgement on that issue.

10. One unavoidable question was whether article 22 should be made open-ended by incorporating a reference to multilateral treaties on international crimes. Some quality control was needed, however, for not every treaty could come within the purview of the court's jurisdiction. There should be some core element in the statute which States would automatically accept when they ratified that instrument. He would suggest just one crime for the purpose: genocide. If States were not even prepared to allow the court to try cases of genocide, the whole undertaking might as well be scrapped. He would further suggest that there should be a separate article on genocide: to combine two crimes in one provision, as occurred in article 22, seemed almost offensive.

11. The order of the draft articles should be rearranged. Specifically, articles 22 to 28, which constituted the draft's centre of gravity, should follow immediately after article 5 (Organs of the Tribunal). Organizational matters could be dealt with thereafter. Of the two different models the Commission might wish to follow—ICJ and the International Tribunal—the latter clearly seemed preferable.

12. While he agreed that trials *in absentia* might be legally admissible, he nevertheless considered that, politically, they were extremely unsound, for the court would then degenerate into a paper institution processing one case after the other, to no practical effect.

13. Mr. BENNOUNA asked whether Mr. Tomuschat considered the Commission could make a proposal to the General Assembly that would be contrary to, or not in conformity with, the Charter of the United Nations, such

[5] See footnote 3 above.

as a proposal to provide for a new jurisdiction or to extend the jurisdiction of an organ of the United Nations. Also, did Mr. Tomuschat think that the Commission could propose to the General Assembly a revision of the Charter?

14. Mr. TOMUSCHAT said that, obviously, the Commission could not make proposals that were not in conformity with the Charter of the United Nations, but he did not think his own proposals were not in accord with the Charter. It was all a question of the interpretation of the powers of the General Assembly and the Security Council. Two years earlier no one would have dreamt that the Security Council could have jurisdiction to establish an international tribunal. None the less, despite some reservations all of the 15 States on the Council had approved the draft put forward by the Secretary-General and the feeling had been that it was fully in conformity with the Charter.

15. The Commission would not make an actual proposal to the General Assembly concerning an amendment to the Charter of the United Nations. It would merely point out that there were various ways of bringing a statute of the court into effect. The General Assembly could study the possibility of amending the Charter with a view to providing the court with a solid legal base, and that would have the advantage of making the court an organ of the United Nations. As already pointed out, the court could not be created by just a few States: it had to be an organ of the international community and it therefore had to have an organic link with the United Nations. All the legal possibilities should therefore be explored.

16. Mr. CRAWFORD said that, as far as the relationship between the court and the United Nations was concerned, there seemed to be a world of difference between the establishment of an international tribunal by the Security Council for a given situation under Chapter VII of the Charter of the United Nations and the establishment of an institution with general powers. As matters stood, the powers of the Security Council seemed to extend to the creation of ad hoc tribunals in situations where it deemed such a course necessary in order to maintain or restore international peace and security. Possibly the court should be created through some combination of Security Council and General Assembly resolutions and a treaty that would establish the future obligations of States. Resolutions in themselves would not be enough, however.

17. It was not so much the question of the relationship with the United Nations that should preoccupy the Commission as the issues so ably raised by Mr. Tomuschat. The main thing was to produce a defensible structure. If States did not accept that structure, then the issue of the relationship with the United Nations would not arise. If they did, then the issues could probably be resolved, as they had been in the case of the United Nations Convention on the Law of the Sea. There were various models of relationships with the United Nations and the categories were not closed.

18. Mr. Sreenivasa RAO said that the draft statute prepared by the Commission had captured most of the main elements involved, but some key provisions called for close examination. The Commission, as an expert body, had a duty to the General Assembly and to the international community to give careful consideration to comments by Governments and not to be distracted by an artificial sense of urgency. The establishment of the International Tribunal meant that its experience, procedures and practices would provide the International Community with valuable pointers in achieving its own goals.

19. The first task was to prepare a statute for a permanent court to try individuals accused of committing crimes which, in the view of the international community: (*a*) posed a threat to international peace and security; (*b*) were contrary to good order and the well-being of the international community; and (*c*) shocked the judicial conscience of mankind. In its present form, the draft statute did not meet those tests for, under its terms, the court would not sit on a permanent basis, the judges being called upon to perform their tasks only as and when they were required to do so. In that sense, they were more in the nature of experts than judges. In his opinion, the matter required immediate rectification in the interests of the objectivity of the proposed tribunal.

20. While he was in favour of a list of crimes that would satisfy the *nullum crimen sine lege* principle and would form the basis of the court's jurisdiction, he considered that the list should include not only the crimes referred to in article 22 but also aggression, trafficking in narcotic drugs and genocide. In addition, it should be possible to amplify the list by means of international protocols, on the understanding that the statute would be agreed upon in the form of an international treaty. The relationship of the statute to the United Nations was a separate matter which required further reflection.

21. More important was the fact that the court's jurisdiction should be directly linked to the draft Code of Crimes against the Peace and Security of Mankind.[6] In that respect, he agreed that the court without the Code—and the Code without the court—would be akin to a sovereign without a territory and vice versa. Any artificial separation of the two would fail to do justice to the Commission's work and to the international community's aspirations to establish an international criminal justice system which was as nearly complete as possible.

22. A related issue concerned the circumstances in which the court should exercise jurisdiction. Like some other members, he believed that jurisdiction should be based on the express consent of the State or States concerned, as provided for in alternative A of article 23 and in article 24 (Jurisdiction of the Court in relation to article 22), paragraph 2. As to the crime of genocide, assumption of jurisdiction by the court, as provided for in article 24, paragraph 1 (*b*), might involve an amendment of the Convention on the Prevention and Punishment of the Crime of Genocide; and if that were expressly proposed, it would help to avoid legal controversy before the proposed tribunal in the future.

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

such as to receive the widest possible acceptance within the international community, that the provision presently contained in the statute that would allow a State not party to the statute to accept the jurisdiction of the court ad hoc with respect to a particular crime might need to be reconsidered. While such a provision, from one point of view, might be thought to be a reasonable proposal, there was also the practical consideration that there was a very real possibility that it might operate as a substantial disincentive to widespread adherence to the statute.

41. The question of the subject matter jurisdiction of the court, or in other words the categories of crime that were to be brought within the court's jurisdiction, was a difficult and fundamental question that raised several issues which were clearly not simple to resolve. A great deal of effort had gone into the formulation of articles 22, 25 and 26, yet the approach proposed in the three articles gave rise to a number of difficulties. Was it appropriate to assume that States parties to the treaties listed in article 22 would consider referring the crimes covered by such treaties to the international criminal court? Only two of the treaties there listed envisaged such a court (the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid) and provided for the possibility of there being an international criminal court. Were some of the acts covered by definitions of crimes in the treaties listed in the article of such a magnitude as to be more appropriately dealt with by the international criminal court than by a national court already possessing jurisdiction over the act in question? Would the list of treaties in article 22 and the invocation of general international law under article 26 meet the criminal law requirements regarding precision that were epitomized in the principles *nullum crimen sine lege et nulla poena sine lege*? Would it not be sensible, at least at the initial stage of the court's existence to limit its subject-matter jurisdiction only to those crimes as to whose magnitude and gravity there would be a consensus in the United Nations. In this connection, chapter II, section A, of the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993),[9] is informative. Mr. Calero Rodrigues had pointed out that the Commission must not foreclose the possibility of the draft Code of Crimes against the Peace and Security of Mankind providing a channel through which questions of jurisdiction *ratione materiae* could be considered.

42. The process by which an accused in a particular case is made subject to the jurisdiction of the court is made conditional on the prior consent of States having national jurisdiction in the case. Yet the provisions defining the States whose consent would be necessary (arts. 24, 25 and 63) were intricate in the extreme. It might be necessary to simplify them. One would also have to consider how the statute could be made to conform with the obligations of States under extradition agreements.

43. As to the provisions of articles 24 and 27, which contain references to the Security Council, they would have to be considered very carefully. Article 24 in particular, which proposed that the court be accorded jurisdiction over cases referred to it on the authority of the Council, must be carefully reviewed in the light of such matters as the relevant provisions of the Charter of the United Nations; the inequality of the relationship between the Permanent and other Members of the Council in its decision-making procedures; the fact that differences of views among members might inhibit the Council from reaching decisions, along with whether the General Assembly ought to be granted a supplementary role when such differences arose and whether the fact that the decision-making process in the Council and in the Assembly was subject to considerations that should not be factors in any criminal justice system and therefore rendered those organs inappropriate for criminal justice purposes. While he readily understood the premises underlying article 27, a further look should be taken at the article's implications.

44. Mr. MAHIOU said there had been a number of answers to the question of the status of the court, some of them idealistic, others practical. An idealistic approach advocated by Mr. Tomuschat was that the court would be the equivalent, inits own domain, of ICJ. That would, of course, require revision of the Charter of the United Nations, but since the idea of changing the composition of the Security Council had been raised, and the Charter had to be revised for that purpose as well, it might be possible to kill two birds with one stone.

45. Two other solutions presented themselves: establishing the court by treaty or by a resolution of the General Assembly. After hearing Mr. Pellet's comments (2331st meeting), he had initially thought that the second solution might be the best. Achieving the adoption of a resolution by the General Assembly would be accomplished more readily and more easily than drafting a treaty and ensuring widespread ratification. On second glance, however, that solution became less attractive. The functions of the General Assembly, as outlined in Articles 10 to 13 of the Charter of the United Nations, were essentially to make recommendations: the Assembly rarely had the power to take decisions. The value of a recommendation as a sound basis for establishing an institution had frequently been called into question. Admittedly, there were precedents—the Assembly had already established subsidiary organs by recommendation, notably the United Nations Administrative Tribunal. Yet the court being envisaged by the Commission would need more sweeping powers than would a subsidiary organ of the Assembly, an organ which, under Article 22 of the Charter, was described as being "necessary for the performance of its [the General Assembly's] functions". That seemed to imply that the work of the subsidiary organ had to be an extension of the functions of the Assembly. Those functions were essentially to regulate international affairs, and not to pronounce sentence in legal cases. The whole question was quite complex and called for much more scrutiny.

46. Even if it was decided to establish the court on the basis of a General Assembly resolution, the question of its jurisdiction then arose. Would States that had not voted in favour of the resolution be subject to the court's jurisdiction? And if the question of State consent to

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

jurisdiction was to be raised, then why not revert to the idea of establishing the court by adopting a treaty? The Working Group might also consider the possibility of both an Assembly resolution and a convention: the Assembly might, for example, recommend to all States the ratification of a convention. In any event, a decision on the matter should not be deferred too long.

47. The present text of part two of the statute was indeed excessively complex. A more straightforward approach should be followed, making it perfectly clear that States could not escape responsibility for certain crimes, and those crimes should be listed without any ambiguity. In that connection, the issue of the connection between the court and the Code of Crimes against the Peace and Security of Mankind could hardly be sidestepped. True, the Commission's work on the draft Code was at present running a little late and the emphasis had shifted to the preparation of the statute. However, the work being done on the court might actually help to advance the work on the draft Code, so that it was not unreasonable to hope that the Commission, by the end of its present term, would be able to submit both the draft Code and the draft statute to the General Assembly.

48. The draft statute erred in that it sought to cover too many crimes; a more realistic idea would be to pinpoint a hard core of crimes on which all States could agree. In the absence of agreement on a minimum number of crimes, there would be little point in having a court at all. Nevertheless, the door should be left open to the possibility of including crimes other than those forming part of the "hard core" list.

49. As to article 25, the authority of the Security Council was unquestionable in all matters pertaining to Chapter VII of the Charter of the United Nations, but he agreed with Mr. Crawford that the powers of the Security Council should not be extended beyond those limits. The General Assembly should have the power to refer to the court situations falling outside the purview of Chapter VII, including certain situations relating to international peace and security. He saw no reason why the General Assembly should be precluded from bringing before the court situations under Articles 33 and 55 of the Charter, and thought that article 25 of the draft statute should be improved accordingly.

50. On the question of the court's status (art. 4), he saw no inconsistency in the fact that the court would be permanent and the fact that it would sit only intermittently. The term of office of judges (art. 7, para. 6) should be reduced from 12 years to 9 and the square brackets in article 41 (*a*), on the principle of legality, should be deleted. Lastly, with reference to article 44 (Rights of the accused), paragraph 1 (*h*), he agreed with other members that the International Covenant on Civil and Political Rights did not prohibit trial *in absentia*. The accused certainly had the right to be present at the trial, but if he chose not to avail himself of that right, he could be tried in his absence.

51. Mr. GÜNEY said that the relationship of the proposed court to the United Nations should be determined as a preliminary question within the framework of article 2. A decision in that regard would help to resolve a number of matters which as yet remained unregulated, such as the financing of the tribunal and the recruitment of its personnel. In defining the relationship between the court and the United Nations, full account should be taken both of the moral authority, credibility and universality of the future court and of its independence, impartiality and objectivity.

52. Endorsing the realistic and pragmatic approach adopted in article 4, which provided that the tribunal should sit when required to consider a case submitted to it, he said that, in the long term, a court remaining permanently in session might be envisaged with a view to encouraging the development of criminal law and ensuring uniformity of case-law. Article 7 (Election of judges) should provide for equitable geographical representation so as to ensure that the main legal systems were duly represented. Some limitation should be placed on the right of the accused to request the disqualification of a judge (art. 11, para. 3) in order to avoid abusive requests for disqualification on spurious grounds.

53. As to part two of the draft statute, dealing with jurisdiction and applicable law, the present structure of article 22 containing the list of treaty-defined crimes falling within the court's jurisdiction *ratione materiae* had been widely accepted. In his view, all anti-terrorist conventions of a universal nature should be included in the list, and he agreed with Mr. Crawford (2330th meeting) about the need to add the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The jurisdiction of the court should be limited to the most serious crimes which offended the conscience of the international community. In any event, the list of crimes used to define the jurisdiction of the court should not be regarded as exhaustive and it should always remain possible for States to agree to add further treaties which had not yet been drafted or had not entered into force at the time of the statute's adoption.

54. He agreed with other members that a link should be established between the court and the Code of Crimes against the Peace and Security of Mankind. In his opinion, the reference to drug-related crimes and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, now figuring in article 26, paragraph 2 (*b*), should be transferred to article 22. In regard to article 25, the role of the Security Council should be confined to determining situations that might require the judicial intervention of the court. Lastly, he noted that the inclusion in article 26 of a paragraph extending the court's jurisdiction to crimes under general international law not covered by article 22 had been viewed as necessary by several delegations in the Sixth Committee because it made sure that serious crimes universally condemned by the international community but not yet defined by treaty would not go unpunished.

55. Mr. ROSENSTOCK stressed the need to strike a balance between ideal solutions and those which States could actually accept, whether in the form of a treaty or in any other form. Consistent with the approach adopted

in article 27, and bearing in mind the complex nature of the Security Council's involvement in efforts to deal with a multiplicity of conflicts around the world, it might be prudent to accord a similar role to the Security Council in all situations inherently involving international peace and security. Some of the reasons adduced by Mr. Bowett (2329th meeting) with regard to aggression, such as the risk of mischievous or harassment-type litigation, was perhaps even greater in other areas relating to international peace and security, such as grave breaches of the Geneva Conventions of 12 August 1949. A further look at the consent requirements might also be prudent in that context.

56. One of the few points on which he disagreed with Mr. Mahiou was the suggestion that the role assigned to the Security Council in article 27 should be extended to the General Assembly. It was important that the organ entrusted with a role of that kind should be able to act with legal effect, and he failed to see how the General Assembly could have any such role, as legal consequences could not flow from a recommendation.

57. Attention should be paid to the relationship between the regime now being set up and existing regimes designed to facilitate international legal cooperation, including bilateral and multilateral extradition regimes and, as appropriate, status of forces agreements. In that context it should be recalled that a key aspect of the Commission's basic approach, and one which had received wide endorsement by States, was that of envisaging the court as a facility for States parties to the statute—a supplement rather than a substitute for national trial-based systems. A prosecute or extradite obligation might be regarded as not necessarily satisfied by surrendering the accused to an international criminal court. Consideration might also be given to the question whether the State of custody should be barred from opting to extradite to a requesting State with which it had a relevant treaty relationship. Another question was whether, in the context, say, of status of forces agreements, renunciations of jurisdiction might not be rendered meaningless by incidental consequences of the statute currently being elaborated.

58. The Working Group might keep in mind the overall objective of seeking to supplement, and not to preempt, national jurisdiction. The question arose whether article 63 (Surrender of an accused person to the Tribunal), paragraph 6, provided adequate protection for a State which was investigating a situation but which had not yet made an accusation or taken the accused into custody. The supply to the procurator on a confidential basis of information concerning such a situation would be a valid basis for at least a finite period of delay. A further point was whether judges should not be specifically elected to appeals chambers and sit as appellate judges, rather than follow the system that was set out in article 56 (Proceedings on appeal). In short, should not the model of the International Tribunal be followed? Studies had suggested that a system in which trial judges rotated onto and off appellate chambers might result in greater collegiality than was desirable and in each watching out for the interests of the other in expectation of being extended similar courtesies. Moreover, further details about the requisite qualifications would appear to be necessary if the Commission was specifically aiming at trial judges, for whom criminal trial experience would seem to be indispensable, as opposed to appellate judges, for whom broader experience might be acceptable.

59. The court should be given some discretion in certain circumstances to decline to accept a particular case on specific grounds—for instance, that it did not consider the case of sufficient gravity to merit a trial at international level or that the existing national tribunals could handle the matter expeditiously. Such discretion on the part of the court might mitigate the concerns raised with regard to the inclusion in article 26, paragraph 2 (*b*), of crimes under national law, such as drug-related crimes and, for that matter, the "terrorism" conventions in article 22. It might be necessary to address the role of national law in greater detail, for with the possible exception of genocide, national law was likely to be an essential part of the directly applicable law, in view of the generality of the definitions.

60. Trial *in absentia* was a matter of policy more than anything else. There were ways of envisaging trial *in absentia* that did not violate fundamental human rights instruments. However, it was difficult to see what trial *in absentia* achieved and, indeed, its drawbacks had already been commented on. If a person was convicted *in absentia*, the conviction had no "bite" until he was taken into custody and, once he was in custody, another trial was needed. The second trial would confirm or overrule the results of the first, but either way, it was difficult to see how it was better than an indictment and the holding of the trial, if and when the person surrendered to custody. The person's inability to expose himself to a jurisdiction in which he would be taken into custody and handed over would be the same, whether in the case of indictment or conviction *in absentia*. In short, trial *in absentia* was not a good idea because of the highly dubious nature of any practical consequence stemming from a conviction *in absentia*, as opposed to an indictment.

61. Lastly, with regard to the problems raised by Mr. Crawford's reading of ways to deal with suspected lacunae, if the Commission deleted the reference to "general international law" in article 26, paragraph 2 (*a*), very little would be lost by such a minor drafting change.

62. Mr. CALERO RODRIGUES stressed that account must also be taken of dissenting views if a useful instrument was to be produced.

63. He agreed in part with Mr. Pellet (2331st meeting) who, pointing to a number of shortcomings in the text in his usual abrasive fashion, had said that the draft statute was insufficiently international and too *étatiste* and that it was very weak with regard to jurisdiction. Indeed, the court had no inherent jurisdiction, for jurisdiction must always be conferred on it by States. That approach was too narrow. At issue were crimes that offended the conscience of mankind, yet a variety of procedural obstacles had been placed in the way of the court's judging such crimes. If an international criminal court was to be established, it was difficult to conceive of States being given the power to interfere with its taking action.

64. That was all a consequence of the system adopted for defining crimes, especially in article 22. The end result was unsatisfactory. There was no point in a State being a party if it did not accept the court's jurisdiction. If a suspect went to the territory of a State of which he was a national, that State could block the action of the court for a crime under article 22. Under article 26, if the suspect was in any State other than the State of his nationality or the State in which the crime had been committed, that third State could decide that the court could not judge the case. Clearly, that was not justified.

65. It should be remembered that criminal law required precision, whereas customary law had none. It was difficult to admit that a mere affirmation that an act was a crime under international law meant the act could form a case to be tried in an international court. In his view, that situation could easily be remedied, and there he disagreed with Mr. Pellet: the draft Code of Crimes against the Peace and Security of Mankind would be just the place for a precise definition of crimes against humanity or crimes of aggression. The Code had begun as a substantive code of criminal law. At the time, the Commission had not known which jurisdiction would apply. The time was ripe to make the Code and the court complementary. Provisions under the Code could avoid all the complications created by articles 22 to 26. Even if some States still objected to the Code, they might be convinced if the Code and the court supplement each other.

66. Mr. Sreenivasa RAO said that he questioned the assumption that, if a State had the right to refuse jurisdiction, it would invariably do so. Granting that right to States was merely recognizing certain realities. The proposed statute relied on a common commitment to overcome pressing problems. The international community was outraged by certain crimes and sought to create ways to deal with them. The right of refusal was inherent in all bilateral and multilateral arrangements, but that did not mean it was always exercised. Creating a court that could drag cases before it would frighten off States.

67. Restrictions did not mean that jurisdiction was thwarted. It only meant that jurisdiction must work within certain limitations. Indeed, the very presence of restrictions made it much more likely that States would be prepared to accept the statute than would otherwise be the case. Actually, the Charter of the United Nations would not have been adopted if the United Nations had been granted greater powers.

68. He welcomed the draft statute. Its advantages certainly outweighed any negative aspects it might have.

69. Mr. VILLAGRÁN KRAMER said he agreed with Mr. Rosenstock and with Mr. Calero Rodrigues on two particular points. Two years previously, when the Working Group had been set up, the possibility had been explored of establishing a court as a United Nations mechanism and he had been asked to examine such a trial mechanism linked to the United Nations. At the time, he had pointed out in the Working Group that the General Assembly did not have more powers than those assigned to it in the Charter of the United Nations and that it could not transfer to a jurisdictional organ more authority than it possessed. Secondly, an entity of the kind envisaged required a financial commitment, something that always implied a treaty or a protocol. Accordingly, the option of such an organ being created by the Assembly had been rejected as not viable. As to the Code of Crimes against the Peace and Security of Mankind, it was not a question of whether such an instrument was or was not inseparable from the court; the court was now being viewed in a different light than it had been several years ago.

70. He proposed a simple exercise: did international crimes exist independently of treaties or not and were there international crimes described in treaties that had not been ratified? If so, such crimes should be placed in a code. It would then be possible to define from the outset what was meant by war crimes, crimes against peace, crimes against humanity, and so on. That implied that the court would have jurisdiction to try crimes without the prior consent of States. It was only logical that, if international crimes did exist, a mechanism with the requisite jurisdiction must exist to try them. International treaties were another matter. The crimes defined therein would be crimes only for those States that had ratified the treaties. Thus, there would be a great difference between crimes committed under international law and acts characterized as crimes in certain treaties.

71. The fifth report of the Special Rapporteur on the topic of State responsibility[10] also contemplated international crimes that were serious violations of *erga omnes* obligations, provided that those obligations had been established to protect the interests of the international community as a whole. Hence, what the Commission was doing in the field of international criminal law would also be reflected in the law on the responsibility of States. Considerable progress had been made in overcoming that duality. It might be useful, in that context, to reverse the order of articles 22 and 26 of the draft statute and to give priority to customary law over the law of treaties. He had already discussed that possibility with Mr. Crawford.

72. Mr. MIKULKA said that he had been tempted by Mr. Pellet's proposal (2331st meeting) to consider the adoption of the statute in the form of two concurrent resolutions of the General Assembly and the Security Council and to conceive of the court as a subsidiary organ of both the Assembly under Article 22 of the Charter of the United Nations and the Council, under Article 29. After careful consideration, however, he had concluded that even such a procedure would not do away with the need for a treaty form of statute to be ratified by the States parties. Yet the adoption of the statute at a given stage by the two concurrent resolutions of the Assembly and the Council might have a certain merit.

73. It was hard to see how the court could be regarded as a subsidiary organ of the General Assembly, because a careful reading of Article 22 of the Charter of the United Nations showed that such a subsidiary organ could only be created for the purpose of the performance of the functions of the Assembly. It would be an excessive interpretation to say that the court should serve the performance of the functions of the Assembly. Con-

[10] *Yearbook... 1993*, vol. II (Part One), document A/CN.4/453 and Add.1-3.

versely, the court could function as a subsidiary organ of the Security Council for the purposes of the performance of its functions under Chapter VII of the Charter when the punishment of criminals was necessary in order to maintain international peace and security. The court could thus be considered to be a subsidiary organ of the Council under Article 29 of the Charter.

74. Naturally, the question then was whether the Security Council could create such a subsidiary organ before a situation that could be regarded as a threat to international peace and security arose. In his opinion it could, because Article 29 was not in Chapter VII but in Chapter V of the Charter of the United Nations. In other words, the subsidiary organ of the Council could be created, but it could not perform functions under Chapter VII before the Council established that a situation falling under Chapter VII existed.

75. The General Assembly had adopted many resolutions which had later been submitted to States for ratification. In such cases, the Assembly acted as a diplomatic conference by adopting the text and inviting States to ratify or accede to it. That gave a political significance to the act of adoption, especially if it was done in parallel fashion with resolutions in the Assembly and in the Security Council. Such a course might allow a start to be made on the process of technical preparation, which resembled the work of the preparatory conference pending the ratification of the United Nations Convention on the Law of the Sea. However, before the number of ratifications required for entry into force was reached, the entire mechanism could only be used by the Council, and again provided it was in response to situations that fell under Chapter VII of the Charter, for in that case, the Security Council's decision served as a substitute for the approval of States that was otherwise necessary to create the jurisdiction of the court. He none the less wondered whether a court that was a subsidiary organ of the Council and, at the same time, an inter-State body, was desirable.

76. Mr. Mahiou had proposed that the General Assembly should also have the possibility of referring a situation to the court. He (Mr. Mikulka) was not sure what the utility would be of such a possibility. It should not be forgotten that the court's jurisdiction was not only a conferred, but also a concurrent, jurisdiction. In other words, it did not mean that a case must automatically be judged by the court. A case that might be under the jurisdiction of the international criminal court could well remain in the national courts. If a State decided to put a case before the international criminal court, by so doing it renounced the jurisdiction of the national courts: clearly the case could not be heard in two different courts. On the other hand, if the General Assembly was to be authorized to refer a situation to the international criminal court, what would be the legal consequences for a State concerned? After all, it could not deprive a State of its sovereign right to continue to try the case before its own courts. Conversely, the Security Council could take action when a case specifically fell under Chapter VII of the Charter of the United Nations, thus substituting for the consent of a State concerned, which would otherwise be necessary. A Council decision that a case had to be judged by the international criminal court, not by national courts, must, of course, be warranted by the need to maintain international peace and security. Thus, Mr. Mahiou's proposal seemed to raise more problems than it solved.

77. Mr. MAHIOU asked Mr. Mikulka how he could arrive at different conclusions for two articles of the Charter of the United Nations, Articles 22 and 29, that were drafted identically and neither of which formed part of Chapter VII.

78. Mr. MIKULKA said that Article 25 enjoined States to carry out the decisions of the Security Council. Those decisions were binding on States. The function of the international criminal court as a subsidiary organ of the Council was to give effect to those decisions. The General Assembly did not have such powers. Thus, there was no reason to conceive the court as a subsidiary organ of the Assembly.

Organization of work of the session (*continued*)

[Agenda item 2]

79. Mr. CRAWFORD (Chairman, Working Group on a draft statute for an international criminal court) proposed the following composition for the Working Group: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Güney, Mr. He, Mr. Idris, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam (Special Rapporteur), Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer and Mr. Yankov. The Working Group was open-ended, of course, and the contributions of all members of the Commission would be appreciated.

80. Mr. BENNOUNA said that the activities of the Working Group might eventually be extended to include work in connection with the second reading of the draft Code of Crimes against the Peace and Security of Mankind. As Mr. Mahiou had just pointed out, a linkage would probably have to be established between the two facets of the topic, namely, the list of crimes and the means of punishing them. It would be in the interests of the Commission and the General Assembly if the work on both aspects could, at some point, be merged.

81. Mr. THIAM (Special Rapporteur) proposed that Mr. Fomba should be included among the members of the Working Group.

82. The CHAIRMAN invited the Commission to approve the list proposed by Mr. Crawford with that addition.

It was so agreed.

The meeting rose at 6.10 p.m.