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Summary record of the 2333rd meeting

Topic:
Other topics

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2333rd MEETING

Friday, 6 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. He, 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.

Welcome to Mr. Qizhi He

1. The CHAIRMAN congratulated Mr. He on his election and, on behalf of the Commission, extended a cordial welcome to him.

2. Mr. HE said that he was honoured to be elected to such an august body as the International Law Commission and that he intended to do everything he could to contribute, in concert with the other members, to the codification and progressive development of international law.

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*)

3. Mr. VARGAS CARREÑO said that the debate on what was certainly a complex topic had been fruitful, but had also revealed that there were obstacles to be overcome in order to complete the drafting of the statute for an international criminal court.

4. The first obstacle was the result of pressure from the fact that the General Assembly had requested the Commission to complete its work on the subject, if possible, at the current session. The second related to the fact that the question of an international criminal court had originally been linked to the elaboration of the draft Code of Crimes against the Peace and Security of Mankind[4] and that it had subsequently been decided, for understandable considerations of method and expediency and, indeed, for political reasons, to examine it separately as a matter of urgency. The statements that had been made on the draft statute, particularly those on the key articles 22 to 26, which some had regarded as unsatisfactory, showed that there were more drawbacks than advantages to such a split.

5. Moreover, the precedent of the establishment 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[5] welcomed by the vast majority of the international community, had unquestionably influenced the work of the Commission. Although the precedent was useful, the International Tribunal could not conceivably serve as a valid model for all of the cases that the international criminal court would have to hear.

6. In those circumstances, how could the Commission reconcile pressure to be expeditious with the care that had to be taken to draft an instrument that would be useful, effective, viable, well established and acceptable to the majority of States?

7. The first problem that arose involved the instrument through which the court was to be established and was clearly related to the court's jurisdiction *ratione materiae* and the nature of its jurisdiction. Obviously, from the point of view of legal technique, it would be best if the court were established by an international treaty concluded within the framework of the United Nations. An alternative might be to set up the court by a resolution of the General Assembly, which might be confirmed by a resolution of the Security Council. That was a valid option, provided that the court had jurisdiction only for trying and sentencing persons who had committed very serious crimes prejudicial to mankind as a whole. That would be true in only two instances: in the case of genocide and in the case of an aggression previously determined by the Security Council in accordance with Chapter VII of the Charter of the United Nations. Concerning genocide, for example, the vast majority of States would appear to agree that the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide, as defined in its articles II and III, were rules of *jus cogens* and that genocide generally constituted a threat to the peace or a breach of the peace authorizing the Security Council to adopt measures that it deemed appropriate, as it had done in establishing the International Tribunal.

8. Reasons of efficiency also argued in favour of that option and were related to the compulsory nature that the court's jurisdiction must have in those two cases. Normally, the nationals of a State who had committed genocide or launched an aggression would not be brought before the court by that State, which might not even have ratified the Convention on the Prevention and Punishment of the Crime of Genocide. In those two very seri-

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

[2] Ibid.

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

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

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

ous situations, the court should therefore have compulsory jurisdiction and must be able to act on the initiative of the Security Council. Otherwise, what would happen if, in several years' time, the painful events in the former Yugoslavia were to repeat themselves in some part of the world and the statute drafted by the Commission could not be applied because the State concerned had not recognized the court's jurisdiction in accordance with one or the other of the wordings of article 23 of the statute (Acceptance by States of jurisdiction over crimes listed in article 22)? Would the Commission not be discredited if the Council was again required to draft a new statute to deal with that particular situation, which the statute prepared by the Commission was unable to resolve?

9. In that connection he referred to the situation in a number of Latin American countries in the 1970s and part of the 1980s, when serious human rights violations (disappearances, summary executions, torture) had been committed and the victims had been unable to turn to the Inter-American Commission on Human Rights, which had lacked a conventional basis because it had been established by a resolution of the Meeting of Ministers of Foreign Affairs of the Member States of OAS, and they had been unable to petition the Human Rights Committee, which had been established under the International Covenant on Civil and Political Rights and whose jurisdiction had not been recognized by the persons responsible for the violations.

10. For all those reasons, he thought that the court should be established by a resolution of the General Assembly and its jurisdiction confined, at least for the time being, to genocide and aggression, which must be determined by the Security Council as provided in article 27 of the draft statute (Charges of aggression). That would leave time to consider the difficult problems raised by the inclusion of other crimes in the draft statute and would enable the Commission to fulfil its mandate by adopting the draft statute for the future court at the current or the next session.

11. Jurisdiction for the other crimes referred to in articles 22 (List of crimes defined by treaties) and 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) of the draft statute and other crimes that had not yet been included, such as torture, should be the subject of a convention or an international treaty concluded within the framework of the United Nations; establishing the jurisdiction of the court, in principle, on a voluntary basis, and following the proposed model, such an instrument would define crimes against the peace and security of mankind in a code. That was one of the priority tasks that the Commission must set itself for the years to come. The method used for articles 22 to 26 of the draft statute was therefore a good starting-point, although certain elements had to be improved.

12. In any event, the point was that, as indicated in the commentary to article 29 of the draft statute (Complaint),[6] the court must be a facility that would be available to the States parties to its statute and to other States, in order to prevent persons responsible for, or who had participated in, serious international crimes from enjoying immunity. In that sense, the establishment of a court mandated to try crimes other than genocide and aggression should not mean that States would be released from their obligation to try or to extradite persons accused of committing crimes against international peace and security. The establishment of an international criminal court by no means implied that the State had to waive the exercise of its jurisdiction. Consequently, the court's jurisdiction for trying the crimes listed in the Code of Crimes against the Peace and Security of Mankind should be residual compared to that of national courts. Hence, the regime to be defined in the statute should be regarded as adding to the regime based on the option between trial and extradition; referral to the court would then be one of the options open to the State in exercising its jurisdiction over a given crime under a treaty or general international law.

13. The question of the relationship between national courts and the international criminal court had not been sufficiently developed in the draft statute. One way of building up the court, at least at the outset, would be to give it advisory jurisdiction to enable it to help national courts interpret the treaties that provided for the punishment of international crimes or the future Code of Crimes against the Peace and Security of Mankind. That would be an extremely useful exercise which the Working Group might wish to analyse in the light of the experience of the Inter-American Court of Human Rights. It was important, at least initially, for the court to be kept informed of certain situations, for instance, when national courts applied as internal law the provisions of international instruments that defined crimes against the peace and security of mankind, such as the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

14. With regard to the organization of the court and to procedure, he, like other members of the Commission, considered that a 12-year term of office for the judges was much too long. It might be better to reduce it to nine years, or six years; and, in the latter case, the term of office should be extended only once. Article 51 of the draft statute (Judgement), whereby the judges would not be able to submit individual or dissenting opinions, was contrary to the practice followed in other international courts. It would therefore be advisable to make express provision in the draft statute for that facility, which could be important in the event of an appeal. As to judgements by default or *in absentia*, whereby an offender would not go unpunished, the proposed wording of article 44 of the draft statute (Rights of the accused) seemed to be both satisfactory and balanced in that it would allow the court to go ahead with the trial in the absence of the accused if such absence was deliberate.

15. Mr. BENNOUNA said he agreed that the discussion on the draft statute for an international criminal

[6] *Yearbook... 1993*, vol. II (Part Two), p. 112.

court was productive, useful and of great interest. He would deal with the basic issues involved in the formulation of the draft and with its general structure, leaving it to the Working Group to tidy up the wording.

16. First of all, he was concerned to note that there was no agreement on the model to be adopted before tackling the technical provisions. It was above all important to situate the draft in its true context. The future court was one of the means envisaged for giving effect to the Code of Crimes against the Peace and Security of Mankind and guaranteeing its credibility. Its establishment now came within the realm of what was possible. There was therefore an essential link between the definition of crimes and their punishment. However, the draft under consideration seemed to ignore the Code of Crimes against the Peace and Security of Mankind totally. In his view, the Working Group should now review the draft statute in the light of the forthcoming consideration on second reading of the draft Code of Crimes against the Peace and Security of Mankind, which, for instance, also determined the applicable law.

17. The second problem related to the modalities for the establishment of the court and its statute. Much had been and would be said on the matter, but the Commission should not dwell on it unduly. In the end, it would be for the United Nations and the political bodies to determine how the court should be established. What was involved in the final analysis, was a political decision. Several possibilities could be envisaged, but they all had to come within the framework of the Charter of the United Nations. It was not the business of the Commission to legitimize the creeping jurisdiction assumed by the Security Council, which inevitably caused legal writers some concern. Chapter VII of the Charter did not permit everything and the Council was not a legislative body. It was not enough to say that the Council took a decision under article 25 of the statute (Cases referred to the Court by the Security Council); the Charter also had to be respected.

18. In that connection, he referred to an article by Mr. Bowett in which he analysed the line of reasoning followed by ICJ in the Lockerbie case between the Libyan Arab Jamahiriya and the United States of America.[7,8] ICJ had concluded, in that case, on the basis of Articles 103 and 25 of the Charter of the United Nations, that, in the event of a dispute, a decision of the Security Council would prevail over any other treaty right or obligation. Mr. Bowett demonstrated that that was not so, since it was incorrect to equate a Council decision with a Charter treaty obligation. The obligation to accept and apply Council decisions might be a treaty obligation, but a Council decision *per se* was not a treaty obligation. Council decisions were binding only in so far as they were in accordance with the Charter; they could not create totally new obligations that had no basis in the Charter, for the Council was an executive organ, not a legislature. He agreed with that point of view. In the Lockerbie case, the Security Council had assumed certain powers which were not conferred on it by the Charter and it was clear that, to allow it to refer to the court not only situations, but also specific individual cases, in other words, to name criminals who could be tried by the court, would be in violation of the Charter. It was apparent from the existing wording of article 25 of the draft statute that the court would have jurisdiction to hear certain cases on a mere referral by the Council and, although paragraph (2) of the commentary to the article[9] stated that the Council could not refer a "case" in the sense of a complaint against named individuals, paragraph (3) of the commentary to article 29[10] stated that, in the light of the primary responsibility of the Council for the maintenance of international peace and security under the Charter, the Council would also be entitled to invoke the tribunal and initiate criminal proceedings with respect to international crimes under conventional or customary law. That meant that the Council could ask the tribunal directly to prosecute certain criminals. If that were allowed, there would be confusion as to the respective roles of the Council and the court. It must not be forgotten that the Council was a political organ, whereas the court was a judicial organ. The functions of prosecution could therefore not be entrusted to the Council, particularly since its five permanent Members had a right of veto, which meant their nationals could not be prosecuted.

19. He noted that the model followed for the draft statute was that of ICJ, which provided for accession to the Statute and then acceptance of jurisdiction by the States parties in each specific case. That model was, however, not suited to the needs of an international criminal court, first of all, because the court would have to try extremely serious crimes which must be clearly defined. Article 22 should therefore be amended by reducing the number of crimes it listed and indicating only those crimes which concerned all States and for which all States were prepared to impose penalties. Care should also be taken not to give States parties, as did article 26, paragraph 2, the possibility of referring to the court crimes that were not covered by the statute, so as not to bring before an international criminal court matters that should be dealt with only in hearings at the national level. The possibility should, however, be envisaged of States referring cases like the one concerning the incident at Lockerbie to the court. In such a case, an international criminal court could certainly settle a dispute between States. For the other types of crime, the States concerned should settle their disputes by agreement.

20. Lastly, he again underlined the benefits of the discussion and expressed the hope that the Working Group would revert to the question of the structure of the draft statute in the light of the comments made.

21. Mr. MIKULKA said he would like to explain, for Mr. Bennouna's benefit, that he had not referred to Article 25 of the Charter of the United Nations in order to defend the proposition that the Security Council could adopt decisions that would not comply with the Charter,

[7] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 114.

[8] "The impact of Security Council decisions on dispute settlement procedures", *European Journal of International Law*, Law Books in Europe, vol. 5, No. 1 (1994), pp. 89 *et seq.*

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

[10] Ibid., p. 112.

but to contrast the right of the Council to refer a situation to the court and a similar right that would be conferred on the General Assembly. Obviously, the decisions taken by the Security Council must comply with the Charter. He had in fact referred to Article 25 to underline the difference that existed between the Council and the Assembly, whose decisions were not binding on States even if they were in conformity with the Charter, and to mark his disagreement with Mr. Mahiou's suggestion (2332nd meeting) that the General Assembly should be given the possibility of bringing certain situations to the attention of the court like the Council.

22. Mr. EIRIKSSON said that the debate was certainly the most interesting that had taken place in plenary for some years. It none the less seemed to him that the draft statute which had been submitted struck the right balance to allow work on the question under consideration to proceed, and even to be concluded, at the current session. It was therefore important not to depart from the general structure of the draft on jurisdiction, even if some choices still had to be made and some articles, in particular articles 22 and 27, had to be significantly amended. Without seeking to complicate matters unduly, it would, in his view, be desirable to incorporate a provision in the draft giving the court the possibility of exercising some discretion in deciding whether or not to take up a case even when that case clearly fell within its jurisdiction; it would then deal solely with the most serious crimes, would not encroach on the functions of national courts and would be sufficiently realistic to adapt its case-load to the resources available. That was, of course, a highly sensitive matter, but some benefit might be derived in that regard from the recent revision of the mechanism of the European Court of Human Rights. It would also be a good way of dealing with the question of trials *in absentia*.

23. He also thought that the Commission should not take up again the link between the statute of the court and the Code of Crimes against the Peace and Security of Mankind. Unlike Mr. Calero Rodrigues (2330th meeting), he did not believe that the Commission's work on the two subjects would proceed in parallel fashion in the coming two years. Moreover, it would be advisable to consider an evolutionary clause whereby jurisdiction could be extended more generously than was the case under article 21, paragraph (*b*), of the draft statute (Review of the Statute) concerning instruments to be adopted in the future. Those instruments should, incidently, themselves have a clause conferring jurisdiction on the court. As to the crimes under general international law referred to in article 26, paragraph 2 (*a*), the Working Group should try to replace the general definition proposed in that subparagraph by definitions of three crimes—namely, aggression, genocide and crimes against humanity—that were not covered in the treaties listed in article 22. The treaties referred to in article 26, paragraph 2 (*b*), should be clearly listed, and the list expanded gradually, using the evolutionary clause mentioned earlier.

24. With regard to article 25 and the possibility that the Security Council might submit cases to the court, he believed that the question must be given more in-depth consideration. It might be difficult to specify in the draft statute whether the Council could refer situations only, or individual cases as well, to the court. In any event, he did not believe that the possibility of referring cases to the court should be extended to the General Assembly. For article 23, he preferred an alternative that provided for an "opting out" procedure. Article 41, which dealt with the principle *nullum crimen sine lege*, should in his view, be revised to conform to the other articles on jurisdiction and, of course, adapted to any change in the system.

25. With regard to articles 19 and 20, he did not really understand the distinction between the rules of the tribunal and the internal rules of the court. He nevertheless thought that those articles could be developed a bit further, particularly where they dealt with rules of evidence, by drawing inspiration from the rules recently adopted by the International Tribunal. He was also of the opinion that the link between the court and the United Nations should not be referred to directly in the draft statute and that the Commission should simply set out its views and even recommendations in its report. He would not shy away from an amendment to the Charter of the United Nations or a provisional relationship and he strongly urged Mr. Mikulka to develop his ideas on that subject further to enable the Commission to draft a recommendation.

26. Mr. ARANGIO-RUIZ, noting that the idea of an international criminal court to be established by a resolution of the General Assembly or another United Nations body had been raised again, emphasized that the functions of the court and its auxiliary institutions meant that it could not be set up as a subsidiary body of any other body. That meant that it could not be established in any way other than by an amendment of the Charter of the United Nations or by a treaty. The second solution seemed to be the most practical one.

27. The United Nations Administrative Tribunal and the International Law Commission were both subsidiary bodies which operated in different ways and for different purposes within the United Nations system. The United Nations Administrative Tribunal dealt with the rights and obligations of United Nations staff, while the Commission made recommendations to the General Assembly on the rights and duties of States which did not have binding effect on those States. The decisions and recommendations of those two bodies affected States only in so far as they had an impact on the expenditure of the United Nations and the contributions required of the Member States. The situation would be completely different for an international criminal court, whose decisions would affect States more directly and more profoundly than even an arbitral tribunal with jurisdiction to settle inter-State disputes and more than ICJ itself, which had compulsory jurisdiction in certain areas of inter-State relations. There was thus an enormous difference between ICJ and the proposed international criminal court. The compulsory jurisdiction of ICJ affected States in their relations with one another as sovereign States. The jurisdiction of the international criminal court would affect States in the exclusive "control" that they exercised over their nationals and most particularly over their leaders or officials. The very fabric of States would be penetrated; there would be a break in the veil

of their sovereignty in that they would be sending individuals in high Government posts to the court for trial and possible sentencing. Those virtually surgical powers went well beyond the ones conferred, for example, on the Court of Justice of the European Union as the common judicial organ of member States of the Union. No lawyer seriously believed that the Court of Justice could have been established by a resolution of the Council of Europe.

28. It could, of course, be argued that a limitation of sovereignty, of the exclusive power of the State over its nationals, its residents and, mainly, its officials, would not be involved in the kind of cases that immediately came to mind when considering the establishment and functioning of an international criminal court. Occasions when an international criminal court would be called upon to operate would mainly be situations such as those in the territory of the former Yugoslavia, Somalia or Rwanda, namely, situations when, in addition to civil war, there was a high degree of uncertainty as to who was in charge. Whatever might be the situation in such exceptional cases, which even an international criminal court would undoubtedly be unable to resolve, what had to be borne in mind at all costs when considering the possibility ofsetting up a court by a resolution of the United Nations was that the individual who might be brought before the court, tried, condemned and compelled to serve a sentence could be a head of State, a prime minister, the supreme commander of the armed forces or the minister of defence of any given country. Even at the current time, specific cases in which the supreme authorities of a country might be subjected to proceedings before the international criminal court could be cited. It was easy to imagine, on the basis of existing situations, scenarios in which high-level officials or even the highest officials of a country could be brought before the court. Such procedures were envisaged, but only providing that States had been invited to put their signatures on the text of a treaty and to ratify it. Such a result could not be obtained through the adoption of a resolution by a body not empowered for that purpose—the General Assembly, for example. As to the Security Council, he believed it could do certain things if it was present in the field as a belligerent power, which, by analogy, would entitle it to behave like any other belligerent against members of opposing armed forces that were guilty of violating the rules of war.

29. He could not endorse an idea put forward by one member of the Commission who was in favour of the establishment of the court by a resolution of an organ of the United Nations rather than by a treaty. According to that view, the international criminal court should be seen as an institution of the international rather than the inter-State community, owing to the distinction between the international community of men, or what could be called the legal community of mankind, and the community of States. That approach seemed to suggest that placing the court at the highest level, as an institution of the legal community of mankind and not of the community of States, would facilitate, and be facilitated by, the establishment of the court through a resolution of an organ of the United Nations. It was hard to accept that thesis, which implied that the General Assembly or the Security Council were considered to be institutions of the community of mankind. Although the Charter of the United Nations began with the words: "We, the peoples of the United Nations . . .", those peoples had not been present at the signing of the Charter, unlike the peoples of the 13 original colonies of the United States of America at the time of signature, first, of the Articles of Confederation, and then of the Constitution. But the thesis cited above implied that the Assembly and the Council were not only invested with inter-State functions, but that they also exercised supranational functions. In his view, it was inconceivable that the General Assembly, which, rightly or wrongly, was not empowered to impose binding obligations on States except in some very limited and closely circumscribed areas of their inter-State relations, should be authorized to impose binding obligations on States in a matter implying the penetration of international institutions into the most jealously guarded areas of their sovereign functions. Only a treaty could achieve that result. With regard to the Security Council, in particular, he had already expressed himself as to the competence of that body to establish criminal tribunals. As he had stated in the course of the debate on the Draft Code of Crimes against the Peace and Security of Mankind at the forty-fifth session of the Commission, there was no provision in the Charter under which one could consider the Council to be empowered to establish tribunals of any kind. The only hypothesis by which a criminal tribunal could be established by a decision of the Council would be if the Council were directly engaged in military action against a State or a similar entity under Article 42 of the Charter, in order to maintain or to restore international peace and security. By analogy with the situation of a belligerent State, the Council would, in such a case, be entitled under general international law to set up ad hoc organs for the prosecution, trial and eventual punishment of the members of the opposing party's armed forces (or even civilians) accused of violations of the laws of war.

30. The Commission's essential function was the progressive development of international law, rather than its mere codification. His firm conviction on that point was in accordance with the opinion eloquently put forward by Mr. Brierly at the time of the drafting of the Commission's statute. That viewpoint explained the audacious nature of some of his own proposals, which had sometimes been criticized as revolutionary. But nothing would be more revolutionary than to attempt to establish an international court with criminal jurisdiction by assuming the existence of legislative or even constituent functions on the part of certain organs of the United Nations. The Commission must, of course, produce a draft statute for an international criminal court, and a good one, but it would seriously jeopardize the chances of such a draft becoming a part of international law if it did not do away with the idea that a supranational criminal court could be successfully set up by mere resolutions of the Council or the Assembly.

31. The CHAIRMAN, speaking as a member of the Commission, said he wished to make a number of comments on the item under consideration.

32. With regard to the title of the future international court with jurisdiction in criminal cases, he supported the Working Group's proposal that the term "tribunal" should be used for the entire structure made up of three

23. Referring to paragraph (2) of the commentary to article 25,[7] he said that, unlike other members of the Commission, he had no difficulty with the powers to be given to the Security Council to refer a situation for investigation by the court's procuracy. Such powers were appropriate as long as the procuracy's right to formally try a case before the court was subject to consent on the part of the State concerned, in accordance with articles 23 and 24. Under the Charter of the United Nations as currently worded, it was not within the Security Council's powers to refer a case to the tribunal. Yet article 25 of the draft statute could be interpreted to mean that the court had jurisdiction "under the authority of the Security Council", and the article should therefore be re-examined very carefully. The Security Council had powers only to deal with situations that threatened international peace and security and to seek advisory opinions from ICJ, powers that could not be stretched to permit it to bring formal criminal cases against individuals. The International Tribunal could not—and was not expected to—serve as a precedent. A judicious interpretation of the powers of the Security Council was essential in order to protect its vital function of preserving international peace and security and to ensure wide recognition and respect from the international community.

24. He experienced no difficulty with article 27 (Charges of aggression), but would suggest that the procuracy might also be given the right to refer charges of aggression to the Security Council through the Secretary-General, to gain the benefit of its guidance at times when the Security Council did not have the option of considering the same issue. When the Council was unable or unwilling to decide on a claim of aggression in a given case, the tribunal would be well advised not to entertain charges of aggression against an individual in the same case.

25. Jurisdiction should be based on cooperation among the States concerned, which would mean that the court could not act if the States concerned were willing and able to exercise their own jurisdiction over the offence. He would add, unlike Mr. Bowett (2329th meeting), that that should be the case as a basic principle, and not as a matter of first instance. Any abuse that States were likely to commit must be dealt with as a matter of State responsibility, with appropriate remedies.

26. The statute should be further elaborated to provide for the right of the requested State to refuse to surrender the accused or render judicial assistance by virtue of the sovereign discretion of the State, a principle well recognized in international law and in bilateral and multilateral treaties on extradition and mutual judicial assistance. Due regard must be paid to the laws and regulations of the State of nationality of the accused in matters of evidence and sentencing.

27. The court's jurisdiction should be available to all States equally under a given set of conditions, and not be subject, either directly or indirectly, to discrimination, which would be the case if the Security Council was granted the right to bring cases directly before the court under its own authority, without first dispensing with the right of veto enjoyed by some States.

28. In the final analysis, the international criminal court would be acceptable to most States only if it was designed to deter crimes committed wantonly, without regard for the integrity and human rights of victims and innocent civilians, no matter what the provocation. It would be acceptable only as an option for prosecution when the States concerned were not willing or able to do so, and only if careful provision was made against its being used to serve narrow political or sectarian interests—in other words, as a political tool. The court and its statute should not be seen as a way of pursuing political goals. The draft statute in its present form certainly was not open to such criticism, but further efforts must be done to make sure that such accusations could never be levelled. He had no doubt that the Working Group would achieve that aim.

29. Mr. de SARAM said that he was mindful that specific questions and details of drafting were to be considered in the Working Group, rather than in plenary debate, and his observations would therefore be of a general nature. Members of the Commission had before them the comments made in the Sixth Committee (A/CN.4/457, sect. B), and the comments of Governments on the report of the Working Group on a draft statute for an international criminal court (A/CN.4/458 and Add.1-8) in its present form. Affording Governments the opportunity to comment on the draft statute at an early stage in its preparation had been a very useful approach. Adequate consultations with and among Governments would be necessary if wide agreement on the statute, particularly the more problematic aspects, was to be achieved. It would also be useful if Governments were furnished a similar opportunity to make further comments on the draft statute at a later stage, when it was refined still further but before it was finalized and submitted for adoption by the General Assembly. If the statute of the court was to be commended to States by the General Assembly, and the court was moreover to be a meaningful institution within the international community, it was essential that the statute be so formulated as to receive the widest possible adherence; and, considering matters in that perspective, there were a number of fundamental matters of form and substance that still needed to be fully addressed.

30. While a number of comments had already been made in the debate on the important subject of the jurisdiction of the court, it had to be remembered that in preparing a statute for an international criminal court the Commission was in fact formulating an instrument for the establishment of what would be a new intergovernmental institution. Thus, aside from the subject of jurisdiction, there were a number of organizational matters for which provisions would need to be considered; and it was to some of those matters that he wished to refer.

31. First, the question of the general structure or pattern of the statute (the manner in which the provisions of the statute should best be divided into chapters and subchapters) would have to be fully considered.

32. The expression "tribunal", which was widely used in practice to denote an exclusively adjudicatory body,

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

was used in the draft statute to include the court, the procuracy and the registry. This had been found to be disconcerting by some as it seemed inconsistent with what was generally viewed as a fundamental requirement in criminal justice systems: that judicial and prosecutorial authorities ought to be separate and distinct from one another in status, function and in the public perception. In the absence of a better expression, the term "tribunal" might have to be retained, but a clear distinction must be drawn between the court and the procuracy in terms of their status and functions.

33. In establishing the tribunal as the overall entity, with the court, the registry and the procuracy as sub-entities, the draft statute needed to provide (in the appropriate chapters and subchapters) for such matters as: the structure, composition, responsibilities and essential administrative procedures of the sub-entities. As now worded, it did not do so, and many provisions on those matters were scattered throughout the draft.

34. In its present form, the draft statute gave rise to some uncertainty as to the identity and functions of the States parties. If the tribunal was to be established by treaty, States parties to the treaty would also, presumably, be States parties to the statute. That point must be made explicit. The States parties would have to meet regularly for administrative and budgetary purposes, yet the draft statute contained no provision for a general deliberative body. If that was not to be done in the statute itself, the treaty establishing the statute should, of course, provide for the States parties to convene at appropriate intervals.

35. The comments in the Sixth Committee and those received from Governments showed that many specific points relating to the structure and organization of the court, procuracy and registry would need further review. Considering and deciding on those issues would be a time-consuming process.

36. The tribunal as a whole, as well as each of its principal organs, would need to maintain formal and informal cooperative relations on a number of administrative, operational and other matters with other entities: States parties, and possibly States not parties to the statute, and organizations like the United Nations. It might prove necessary for the tribunal and its principal organs to conclude agreements for such purposes; and the statute should include an appropriate general section allowing for the conclusion of such agreements.

37. A matter to which consideration was not given, due to time constraints at the previous session of the Commission, but to which statements in the Sixth Committee and Governments, in their comments, had drawn attention as a consideration of importance, was that of the funds and other resources that would be required for the establishment, maintenance and the various operational and administrative requirements of an institution such as the tribunal. An early identification, at least in general terms, should be possible of cost-components: such international institutional and other administrative requirements that should be permanently in place; and the facilities (investigatory, prosecutorial, judicial, incarceration) that would need to be available for use when necessary. If the tribunal was to be established as a principal or subsidiary organ of the United Nations, its funding would be carefully examined in the Fifth Committee of the General Assembly. If it was established by treaty, the funding provisions would be among the most important ones and would have to be satisfactorily drafted. If the Commission did not feel competent to consider the financing, it should at least, in the commentaries to the articles, propose how the question might be studied. However, whether such a tribunal were established as a principal or subsidiary organ of the United Nations or as a treaty body, it would be essential, having in view the importance of ensuring the objectivity and integrity of the tribunal, and of the public perception thereof, that it should have independent financial viability and that, accordingly, its funding ought, to the greatest extent possible, be self-sustaining.

38. Moreover, having regard to the extraordinary nature and significance an international criminal tribunal would have in the public perception, and the extent to which its standing within the international community would depend on its receiving the widest possible support, it seemed necessary that the statute should only enter into force after a very substantial number of States from all regions of the world had become parties—and only after the number of parties were such as to ensure the clear financial viability of the tribunal.

39. Before commenting on the question of jurisdiction, he wished to express his reservations with respect to a point made by another member to the effect that the General Assembly, acting under Article 22 of the Charter of the United Nations, which authorized the creation of subsidiary organs by the Assembly, might establish the court as a subsidiary organ. He was inclined to take a different view of such a matter, in the absence, as he saw it, of a necessary implication empowering the Assembly to do so. He did not consider that the advisory opinion of ICJ on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*[8] could be viewed as an authority for the proposition that the Assembly might establish an international criminal court as a subsidiary organ. ICJ, in that case, had considered the much narrower and quite different question of whether the Assembly's authority to regulate relations between the United Nations and its staff, and to establish regulations for the purpose (having in view also the jurisdictional immunity which the United Nations enjoyed under the terms of the Charter) implied for the Assembly the competence to establish a tribunal, of, in effect, a judicial nature, to adjudicate disputes arising out of contracts of service of United Nations staff. He was, of course, also of the view that it would be inappropriate for the Security Council to establish a court of the nature now being considered by the Commission. He would also agree that the most appropriate manner in which a court of the nature presently being considered by the Commission might be established, though such a modality might be considered too unrealistic at the present time, was by amendment of the Charter.

40. As to the important and difficult subject of the jurisdiction of the court, he was of the view, having regard to the overall consideration that the statute should be

[8] *I.C.J. Reports 1954*, p. 47.

components, namely, the court, the procuracy and the registry. The title was broadly in keeping with the practice which had developed following the Second World War and using it would make a clear distinction between ICJ in The Hague and the international criminal court.

33. Secondly, he knew full well that it would not be easy to try to establish the court by a special treaty, but he nevertheless believed that that approach was the most appropriate for establishing and adopting the statute of the future international criminal court, while not excluding the adoption by the General Assembly of resolutions to open the treaty for signature. Other methods could be envisaged, but they would either be too complicated, requiring the amendment of the Charter of the United Nations, for example, or they might give rise to disputes about the legitimacy of the new body.

34. His third comment related to the draft articles on the jurisdiction of the future court, particularly its jurisdiction *ratione materiae*. The Working Group should try to simplify the articles, which were too complicated, as much as possible or, at least, make them more accessible and comprehensible. He endorsed the general premise that the court should have permanent jurisdiction which would be subsidiary in relation to that of national criminal courts. He nevertheless agreed with the members of the Commission who thought that efforts should be made to define a "core" of the most serious crimes for which the States parties to the statute would be bound by stronger obligations, owing to their status as parties to the statute. That might constitute the part of the court's jurisdiction which had been described as "inherent", with the crimes most likely to be within such jurisdiction being those of the Nürnberg "triad". With regard to other, relatively less serious crimes, the approach could be more flexible, as in the current draft. Any other solution would place crimes that were absolutely not comparable for the international community on an equal footing, such as the crime of aggression and crimes connected with the hijacking of aircraft.

35. His position on the question of crimes under general international law was likewise determined by the desire to pinpoint a group of particularly serious crimes in respect of which the optional nature of acceptance by States of the court's jurisdiction would be limited. He shared the view that, after the Nürnberg and Tokyo trials, it would be inappropriate, if not dangerous, to cast doubt on the possibility of punishing the perpetrators of the most serious international crimes simply because no treaty definition of those crimes existed at present; to do so would be tantamount to challenging the very existence of the court. Moreover, a reference to general international law did not mean only customary law. General international law had been customary when neither the Charter nor many universal conventions had existed. Today, however, it included not only customary norms, but also those contained in treaties of a nearly universal nature.

36. He was also convinced that rapid completion of work on the draft Code of Crimes against the Peace and Security of Mankind would help to solve the problems connected with the jurisdiction *ratione materiae* of the court. In any event, a reference to the Code should be incorporated in the statute of the court, if only by way of reaffirming that the Code was to see the light of day some time in the future. He did not, however, think it appropriate to make the fate of the court and its statute dependent on the progress the Commission made on the Code. In concrete terms, that meant that the Commission had to assume the onerous task of including not only procedural rules, but also basic rules, in the draft statute.

37. With regard to the court's internal and procedural rules and the rules of evidence, he agreed with other members of the Commission that the statute should contain only essential provisions, leaving it to the court itself to draw up detailed rules, subject, possibly, to their being submitted for the approval of the States parties to the statute.

38. Referring to the discussion of articles 25 and 27 on the relationship between the court and the Security Council, he said that the Working Group would have to review those articles, although, in his view, the general approach they reflected was the right one.

39. He had been convinced by Mr. Mikulka's argument that the General Assembly was not competent to bring cases before the court. The Security Council was, of course, competent to do so in some cases, but it went without saying that both the Council and the Assembly had to act within the limits of the powers conferred on them by the Charter.

40. Reserving the right to make more specific proposals during the consideration of the draft articles in the Working Group, he recalled that the General Assembly's instructions on the question of the completion of work on the draft statute were couched in rather flexible terms: the Commission had to complete its work during the current session or the next one. He nevertheless thought that both the Working Group and the Commission should do everything in their power to ensure that work on the draft statute was completed at the current session.

41. Mr. THIAM (Special Rapporteur) said that he did not want to enter into the theoretical debate on realism versus idealism, which was so inherent in the development of international law that, whatever the topic, the Commission's work could only be a compromise between those two schools of thought. It was more to the point to study the specific provisions of the draft statute proposed by the Working Group. With regard to the way in which the court was to be set up, the proposal for establishment by a resolution dated back to the origins of international criminal law, but, in so far as the exact legal effect of United Nations resolutions was still unknown, it might be wiser to reconcile the two proposals by having the General Assembly adopt a resolution recommending the adoption of the statute of the court by treaty. As to the organization of the court, he had tried unsuccessfully to convince the Working Group that it would not be good to place the powers of prosecution and investigation in the same hands, namely, those of the procuracy. In criminal matters, there was always a balance to be struck between the various organs of a court and between the rights of the prosecution and those of the defence. The problem was all the more serious in that, according to the proposed text, the procuracy was to be composed only of a prosecutor and a deputy prosecu-

tor. How were those two officials to perform the important administrative duties of running the procuracy and conducting investigations at the same time? Short of establishing a separate investigatory body, which would be the best solution, the procuracy should at least be enlarged. A concern to make savings was entirely justified, but it should not take precedence over the proper administration of justice.

42. With regard to the jurisdiction of the court, he agreed that the proposed provisions lacked clarity and rigour. To take just one example, article 22 related to crimes defined by treaties and article 26 to crimes under general international law. Yet article 22 expressly referred, *inter alia*, to the crime of genocide, and that seemed to suggest that genocide was not a crime under general international law. In general, he also had some misgivings about the rules requiring that the jurisdiction of the court should be conferred on it by States. States always tended to protect their own and there was thus a risk that the rules would quite simply prevent the court from functioning. It would be better to assume that jurisdiction was conferred on the court by any State which became a party to the treaty establishing the court and, possibly, to make a distinction between two categories of crimes, those for which conferment of jurisdiction would be compulsory and those for which it would be optional. There would also be a risk of preventing the court from functioning if it was denied the right of trial by default, which some members seemed to confuse with trial *in absentia*. If trial by default were ruled out, a person could avoid prosecution simply by refusing to appear, since, as the text now stood, all that the court could do was to verify that notification of the indictment had been duly delivered.

43. Submission of cases to the court was a right that belonged to States, but legal entities, such as an association for the protection of human rights, should also be able to refer matters to the court. The Security Council was also a legal entity which would, although it was political in nature, be able to exercise the right of referral without in any way undermining the court's jurisdiction or independence. The question did arise, however, whether that right could be extended to the General Assembly. If the risk of excessive politicization, which some members feared, was mitigated by the requirement of a qualified majority, there seemed to be no reason why the Assembly should not be able to bring certain cases before the court. With regard to the applicable law, it should be recalled that some members of the Commission had categorically refused to envisage the adoption of a code unless a court was established for the purpose of implementing it. That showed to what extent there was a close, historic and legally well-founded link between those two elements, in the sense that a court could not very well be established without it being made clear what law it was supposed to apply. It was not enough to state, as was done in articles 22 and 26, that crimes defined by such and such a treaty came under the jurisdiction of the court: those crimes had to be defined with precision. There again, the Commission could proceed restrictively by listing only a few crimes that supposedly represented a threat to the peace and security of mankind or it could draft a genuine international criminal code. It was that work of precise definition that had delayed the drafting of the Code of Crimes against the Peace and Security of Mankind. Much had already been done in that regard, but what needed to be done now was to choose from among the results of that difficult first process in order to arrive at a sound code, pruned of all the political and ideological concepts that still weighed it down.

44. Mr. YAMADA expressed the hope that the Working Group would complete its task reasonably soon, so that the Commission might have ample time to consider the definitive draft statute and forward it with the commentaries thereto to the General Assembly before the end of the session, thus proving itself capable of meeting the international community's expectations. The establishment of an international criminal court differed from the Commission's traditional topics by its highly political aspects involving creative legislation. Many elements would have to be left to be decided by States. It might suffice for the Commission to present a framework of what, from the legal point of view, would be a desirable modality of an international criminal court. The fact that States were generally eager to preserve their sovereign rights made it necessary to adopt a realistic approach, but the establishment of such a court was none the less a kind of revolution and the Commission must therefore try to present a vision for the future.

45. On the basis of the assumption that the court was to be established by a treaty, he said that it should be left to States to decide whether the court should be a judicial organ of the United Nations or an independent institution linked to the United Nations. States should also be left to choose between the practical solution of a non-standing permanent body and that of a full-time body, the latter alternative being more desirable from the point of view of criminal justice. As to the rest of the articles of part one, the principles of independence and impartiality of judges were clearly established, but the power of judges to remove prosecutors from office, as provided in article 15 (Loss of office), paragraph 2, would certainly not contribute to the independence of the procuracy.

46. With regard to the jurisdictional provisions central to the statute, he generally agreed with the draft. The list of treaties in article 22 should be regarded as purely illustrative so as to accommodate future treaties or amendments to existing treaties relating to crimes against humanity. He wondered whether article 24 (Jurisdiction of the Court in relation to article 22), paragraph 2, which placed an undue restriction on the jurisdiction of the court and on its possibilities of effective action, was necessary. In current practice, a State did not have to seek the consent of other States in exercising its criminal jurisdiction. Why should it be otherwise for an international criminal court which took over that jurisdiction from a State? It would, of course, be necessary to obtain the cooperation of the State in whose territory the suspect was present, the State of which he was a national or the State where the alleged offence had been committed, but that was a matter of judicial assistance rather than of the court's jurisdiction. Article 53, paragraph 4, on the use to be made of fines paid should be deleted or transferred to the part dealing with miscellaneous or budgetary provisions. As to the rules of procedure to be applied, it would be better to state certain basic principles,

such as the right to a fair trial and the protection of the rights of the accused, without going into detail.

The meeting rose at 1 p.m.

2334th MEETING

Monday, 9 May 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, 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. HE said it was widely hoped that a new form of international criminal trial mechanism would be established to counter international criminal activities and to prosecute, try and punish the criminals concerned, thereby creating a deterrent and strengthening the cooperation of the international community in that area. Such a mechanism must take into account current international realities, particularly the question of how to supplement and coordinate the existing system of universal jurisdiction so as to guarantee broad acceptance of the court by States. On the whole, the draft statute for an international criminal court was an important step in that direction and he expressed appreciation to the Working Group for its achievement.

2. A number of differences on major legal issues had emerged in both the Commission and the Sixth Committee. Dealing with those problems was an important task for the present session.

3. He took the same view as many members of the Commission that the court should be established by concluding a special international convention. In view of the sensitive issue of national criminal jurisdiction, all States should be able to decide whether or not to accept the statute and the jurisdiction of the court.

4. Yet another important issue to be resolved was the relationship between the court and the United Nations. He shared the opinion that it was difficult to conceive of the United Nations having the competence to establish a permanent criminal court of a universal character. Formal incorporation of the court within the United Nations structure might also imply that States Members of the United Nations would be *ipso facto* parties to the court's statute. A court conceived as a permanent judicial organ of the United Nations lacked flexibility and, in that case, the wording in the second set of square brackets in article 2 (Relationship of the Tribunal to the United Nations) would be more practical. Obviously a close relationship between the United Nations and the court was indeed necessary and such an objective could be achieved through an appropriate arrangement.

5. He understood the reasons for separating the two strands of crimes as listed in articles 22 (List of crimes defined by treaties) and 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) but felt that the concept of "crime under general international law" as stated in article 26, paragraph 2 (*a*), was ambiguous, failed to meet the criterion of precision in international law and gave the court too much discretion. Actually, the crimes referred to in paragraph 2 (*a*) were serious, such as aggression as defined in the draft Code of Crimes against the Peace and Security of Mankind.[4] The draft Code would be considered on second reading at the present session—an important step towards the requisite precision in criminal law. In view of the basic reason for establishing the court, the jurisdiction *ratione materiae* would certainly include the crimes listed in the draft Code, but in accordance with the principle *nullum crimen sine lege* the court in the initial stage should only exercise jurisdiction over crimes as defined in international conventions, leaving aside for the time being the crimes enumerated in the draft Code or the so-called crimes under general international law. Once the draft Code was adopted and entered into force, the court could bring it within the court's jurisdiction *ratione materiae*. The appropriateness of the provision in paragraph 2 (*a*) might well need further consideration. Personally, he was very doubtful about the wisdom of extending jurisdiction to crimes other than those that were of a most serious nature.

6. Bearing in mind the realities of the criminal jurisdiction of States and the need for States to cooperate with the court, it was of great importance for the acceptance of the court's jurisdiction by States to be voluntary. A distinction must be drawn between acceptance of the statute and acceptance of the jurisdiction of the court. Acceptance of the statute should only mean undertaking certain obligations to offer judicial assistance and engage in financial cooperation, whereas acceptance of the

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