

Document:-  
**A/CN.4/SR.2375**

**Summary record of the 2375th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
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was not opposed to the idea of replacing the reference to article 20 with a list of subparagraphs (b) to (e).

41. Members' reservations with regard to article 23 were reflected in the commentary.

42. The CHAIRMAN said that he took it that the Commission agreed to adopt part three, it being understood that all members' reservations were adequately reflected in the summary records and in the commentary.

*Part three, as amended, was adopted on that understanding.*

#### PART FOUR (Investigation and prosecution)

43. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said a number of editing changes had been made in article 26, paragraphs 1, 4 and 5, and article 27, paragraph 1, in order to meet the procedural points rightly raised by Mr. Robinson (2361st meeting).

44. Mr. PAMBOU-TCHIVOUNDA, referring to article 31, paragraph 3, said that he would like clarification as to who would pay the costs of the persons designated to assist in a prosecution.

45. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the costs might be paid by the court or a contribution might be made by the State. The Working Group had felt that maximum flexibility was needed on that point.

46. Mr. PELLET said that he had a strong reservation about the system provided for in article 31, an article which should be deleted.

47. After a discussion in which Mr. CRAWFORD (Chairman of the Working Group), Mr. ROBINSON, Mr. TOMUSCHAT, Mr. PELLET and the CHAIRMAN took part, Mr. CRAWFORD (Chairman of the Working Group) suggested the following new wording for article 31, paragraph 1: "The Prosecutor may request a State party to make persons available to assist in a prosecution in accordance with paragraph 2". Consequently, in paragraph 3 "designated" should be replaced by "made available"; the title of the article would also have to be altered.

48. The CHAIRMAN said that he would take it that, subject to the reservations stated by members, the Commission agreed to adopt part four as amended.

*It was so agreed.*

*Part four, as amended, was adopted on that understanding.*

#### PART FIVE (The trial)

49. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that in article 35 the notion of admissibility had been introduced in place of the notion of the discre-

tion of the court. In article 38, paragraph 1, the powers of the trial chamber were now stated without reference to other bodies, and minor consequential changes had been made to the rest of the article. He wished to stress that article 42 was based on a strong majority view in the Working Group. A number of minor drafting changes had been made in article 45.

50. Mr. PELLET said article 33, subparagraph (c), should be deleted, as should article 35, subparagraph (a), for the commentary was ambiguous, and the paragraph appeared to overlap with article 26. He also maintained his strong reservation about the trust fund referred to in article 47, paragraph 3 (c).

51. After a discussion in which Mr. BOWETT, Mr. PELLET, Mr. ROBINSON, Mr. ROSENSTOCK and Mr. CRAWFORD (Chairman of the Working Group) took part, Mr. PELLET withdrew his proposal to delete article 33, subparagraph (c).

52. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that, if article 35, subparagraph (a) was deleted, then subparagraph (b) would have to be deleted as well. The purpose of article 35 was to avoid unnecessary prosecutions and it did not overlap with article 25 or article 26.

53. After a show of hands, the CHAIRMAN said that the Commission appeared to be opposed to the proposal to delete article 35, subparagraph (a). He would take it that, subject to the reservations stated by members, the Commission agreed to adopt part five.

*Part five, was adopted on that understanding.*

*The meeting rose at 1.05 p.m.*

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## 2375th MEETING

*Thursday, 21 July 1994, at 3.05 p.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

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

[Agenda item 4]

**REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (continued)**

1. The CHAIRMAN invited the Commission to continue its consideration of the revised report of the Working Group on a draft statute for an international criminal court (A/CN.4/L.491/Rev.2 and Corr.1 and Add.1-3).

**PART TWO (Composition and administration of the court) (concluded)**

2. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court), reporting on the consultations on the points left pending since the preceding meeting, said that, in the French version of article 6, paragraph 2, the words *et aptes* should be deleted. The last part of article 12, paragraph 4, should be reworded to read: "... on the basis that they are willing to serve as required" and the last part of article 13, paragraph 2, should be reworded to read: "... on the basis that the Deputy Registrar is willing to serve as required".

3. The CHAIRMAN said that he would take it that the Commission agreed to adopt part two as amended.

*It was so agreed.*

*Part two, as amended, was adopted.*

**PART SIX (Appeal and review)**

4. Mr. PELLET, referring to article 48, said that the words "on grounds of procedural unfairness" were awkward and should be replaced by the words "on grounds of procedural error". It was also inappropriate to introduce the idea of unfairness in article 49.

5. The CHAIRMAN said that he would take it that the Commission agreed to adopt part six as amended.

*It was so agreed.*

*Part six, as amended, was adopted.*

**PART SEVEN (International cooperation and judicial assistance)**

6. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court), introducing the changes made by the Working Group to part seven of the draft statute, drew attention in particu-

lar to article 54, which had formerly been article 21, paragraph 3.

7. Following a discussion on the concept of custody as introduced in article 54 and of its precise content, the different situations to which it could apply and the problems of translating it into other languages, in which the CHAIRMAN, Mr. CRAWFORD (Chairman of the Working Group), Mr. PELLET, Mr. TOMUSCHAT, Mr. ROSENSTOCK, Mr. CALERO RODRIGUES and Mr. MAHIOU took part, the CHAIRMAN suggested that the translation into French of the word "custody", as contained in the International Covenant on Civil and Political Rights, namely, *détention*, should be used and that an explanation of the concept should be included in the commentary to the article.

*It was so agreed.*

8. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) proposed that the words "requested by the Court" at the end of article 53, paragraph 6, should be replaced by the words "necessary to ensure that the accused remains in its custody or control pending the decision of the Court".

*It was so agreed.*

9. Mr. PELLET said that article 56 seemed to involve too many formalities, since it limited the possibilities of cooperation by requiring, for example, a declaration or an arrangement. Instead of the words "States not parties to this Statute may assist ...", he would have preferred the words "The Court may request the States not parties to assist ...".

10. Mr. YANKOV said that the wording proposed by Mr. Pellet was too vague. If there was to be cooperation, it could not be achieved in the abstract. In his view, the modalities should be spelt out, particularly since the words "or other agreement with the Court" at the end of the article precluded any risk of limitation.

11. Following a discussion in which Mr. CRAWFORD (Chairman of the Working Group), Mr. ROSENSTOCK, Mr. GÜNEY, Mr. BOWETT, Mr. ROBINSON, Mr. MAHIOU, Mr. AL-BAHARNA and Mr. CALERO RODRIGUES took part, the CHAIRMAN noted that the majority view was that article 56 should remain as drafted.

*It was so agreed.*

*Part seven, as amended, was adopted.*

**PART EIGHT (Enforcement)**

12. Mr. PELLET said that he did not understand the meaning of the expression "recognition of judgements" in article 58. In his view, it would be clearer to provide that the States parties undertook to accept the legal consequences of the judgements of the court so far as they were concerned.

13. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that recognition of judgements was a civil

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

law concept. Although the statute dealt with criminal matters, provision should be made for States to be under some form or other of obligation to recognize that a person had been found guilty, regardless of the consequences.

14. The CHAIRMAN said that article 58 was the outcome of a compromise which had been obtained only with great difficulty in the Working Group. Many members had raised objections, but the majority in the Working Group had finally supported its wording.

15. Mr. ROSENSTOCK said that the objections raised in the Working Group and in plenary should be reflected in the commentary.

*Part eight was adopted.*

#### ANNEX

*The annex was adopted.*

*The draft statute for an international criminal court, as a whole, as amended, was adopted.*

#### DRAFT COMMENTARIES TO THE ARTICLES OF THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

16. The CHAIRMAN invited the Commission to consider the draft commentaries contained in the revised report of the Working Group on a draft statute for an international criminal court (A/CN.4/L.491/Rev.2 and Corr.1 and Add.1-3).

17. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) proposed that the secretariat should be requested, in consultation with the Chairman of the Working Group, to incorporate the necessary changes in the commentaries to reflect the decisions on the articles of the statute taken at the preceding meeting. Once the draft commentaries had been adopted, the secretariat would replace the term "Working Group" by the word "Commission".

*It was so agreed.*

18. Mr. PELLET said that he would like his many reservations on the various provisions of the statute and his objection to article 22 to be reflected not only in the relevant summary records, but also in the report of the Commission.

*Commentaries to the preamble and parts one to three  
(A/CN.4/L.491/Rev.2/Add.1)*

Commentary to the preamble

*The commentary to the preamble was adopted.*

Commentary to part one

19. Mr. PELLET said that the commentary to article 2 involved two problems of translation. In paragraph (2), the words "One view" were translated into French by the words *Un membre*. In paragraph (7) of the commentary to that article, the words "overall willingness of States" were rendered by the words *les États sont tous*

*disposés*, whereas what was meant was a large or very large number of States, not all States. Also, paragraph (2) of the commentary to article 4 stated that the court *est censée bénéficier*, whereas it should have stated *la Cour doit*.

20. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) proposed that Mr. Pellet's proposed change should also be incorporated in the English version of paragraph (2) of the commentary to article 4 by replacing the words "The Court is intended" by the words "The Court should".

*It was so agreed.*

Commentary to part two

21. Mr. de SARAM proposed that the end of the last sentence of paragraph (2) of the commentary to article 12 should be deleted and that it should end with the words "or any other source". As the prosecutor was independent, he could not act as a representative of the international community or even of States parties.

*It was so agreed.*

Commentary to part three

22. Mr. EIRIKSSON said that, in his view, paragraph (3) of the commentary to article 21 should be amended to take account of the importance which was attached in that article to genocide and which was the main difference as compared to the corresponding provision of the draft statute at the forty-fifth session in 1993.<sup>4</sup> He therefore proposed that the following sentence should be added after the first sentence: "First, it treats genocide separately (see para. (6) below)". The second sentence would start with the following words: "Secondly, it focuses, in paragraph 1 (b), on the custodial State ...". The third sentence would be reworded to read: "Thirdly, that subparagraph requires acceptance by the State on whose territory the crime was committed, thus applying to all crimes, other than genocide, the requirement in the 1993 draft statute for crimes under general international law". The last sentence would start with the following words: "Fourthly, it also requires, in such cases, the acceptance ...".

*It was so agreed.*

23. Mr. EIRIKSSON, referring to the second sentence of paragraph (1) of the commentary to article 23, proposed that the word "instead", in the fifth line, should be deleted and that the phrase "for example, in circumstances where it might have authority to establish an ad hoc tribunal under Chapter VII of the Charter of the United Nations" should be placed at the end of the sentence, the word "it" in that phrase being replaced by the words "the Council".

*It was so agreed.*

24. Mr. PELLET, referring to paragraph (15) of the commentary to article 20, said that, in his view, the sixth

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

sentence, starting with the words “Also such a listing”, should be amended. The view it reflected was too unilateral, inasmuch as multilateral treaties merely codified principles of customary international law.

25. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) proposed that the sentence should be reworded to read: “Also such a listing raised the difficult question as to the relationship between multilateral treaty norms and customary international law.”

*It was so agreed.*

26. Mr. PELLET said that, in his view, the commentary to article 22 was not nearly “incisive” enough compared to the debates that had taken place in the Commission. The Chairman of the Working Group had stated that he was going to amend the commentary. It was to be hoped that, when he did so, he would note that several members of the Commission had expressed reservations on article 22 itself and that he would indicate the reasons for those reservations, as well as the fact that one member had stated that he could not agree to the article, since, in his view, it would enable States to have the benefit of being parties to the statute without really assuming any obligations.

27. Mr. MAHIU, noting that the members of the Commission had been opposed to paragraph 3 of article 23, proposed that the words “Some members of the Working Group” in paragraph (13) of the commentary to that article should be replaced by the words “Several members of the Commission”.

*It was so agreed.*

28. Mr. ROBINSON said that the Commission had adopted a compromise proposal on article 20 in which it had been decided not to refer expressly to crimes under general international law. He noted, however, that the commentary to article 20 had not been amended accordingly.

29. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that Mr. Robinson’s point was well taken. He proposed that, to take account of that point, the side headings before paragraph (3) and paragraph (18) of the commentary to article 20 should be deleted and that, in paragraph (18), the words “The bulk” should be replaced by the words “The remainder”.

*It was so agreed.*

*Commentaries to parts four and five (A/CN.4/L.491/Rev.2/Add.2)*

Commentary to part four

30. Mr. PELLET said that he was surprised to find a reference to Article 100 of the Charter of the United Nations in paragraph (2) of the commentary to article 31. That reference seemed to confirm the position which he had taken in the matter, but which had been criticized by members of the Commission. He was surprised at such a lack of consistency.

31. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal

court) proposed that the last sentence of paragraph (2) of the commentary to article 31 should be deleted.

*It was so agreed.*

Commentary to part five

32. Mr. MAHIU said that it would be advisable, with regard to the applicable law, the subject of article 33, to refer in the commentary to the link between the draft statute and the draft Code of Crimes against the Peace and Security of Mankind, as in the commentary to article 20. He therefore proposed that a new paragraph (4) should be added to the commentary to article 33, reading:

“(4) As in the case of article 20, several members noted that a link should be established between the draft statute and the draft Code of Crimes against the Peace and Security of Mankind, since, in their view, the law to be applied by the Court should derive from the Code.”

*It was so agreed.*

33. Mr. PELLET, noting that the commentary to article 33 was one of those the Chairman of the Working Group would have to recast, said it was to be hoped that, in doing so, he would also indicate that some members had expressed strong reservations about subparagraph (c) of article 33 and make it clear, in paragraph (3) of the commentary, that, in the view of some members, the references made by international law to national law did not require the court to apply provisions of national law. He might also wish to add that one member had regretted that the principle set forth in the last sentence of paragraph (3) of the commentary was not embodied in article 33 itself.

34. In his view, the idea expressed in paragraph (5) of the commentary to article 47 was unacceptable, even irrational. He therefore suggested that a sentence should be added to paragraph (5) reading: “Other members considered that, since the Court had jurisdiction only to try particularly serious crimes, that idea should not be adopted.”

*It was so agreed.*

### **Draft report of the Commission on the work of its forty-sixth session (continued)\***

#### **CHAPTER I. Organization of the session (A/CN.4/L.495/Rev.1)**

35. The CHAIRMAN invited the Commission to consider chapter I of the draft report (A/CN.4/L.495/Rev.1).

- A. Membership
- B. Officers
- C. Drafting Committee
- D. Working Group on a draft statute for an international criminal court

\* Resumed from the 2373rd meeting.

## E. Secretariat

## F. Agenda

Paragraphs 1 to 15

*Paragraphs 1 to 15 were adopted.*

*Sections A to F were adopted.*

## G. General description of the work of the Commission at its forty-sixth session

Paragraphs 16 to 19

*Paragraphs 16 to 19 were adopted.*

Paragraph 20

36. Mr. EIRIKSSON said that, in his view, paragraph 20 should give a more detailed account of the circumstances in which the Commission had provisionally adopted articles 11, 13 and 14 of the draft articles on State responsibility. It had been understood that the Rapporteur would add a sentence to that effect in the relevant part of chapter IV, but it would be advisable for that additional sentence also to be reflected in paragraph 20 of chapter I.

*It was so agreed.*

*Paragraph 20 was adopted on that understanding.*

Paragraph 21

*Paragraph 21 was adopted.*

*Section G was adopted.*

*Chapter I, as a whole, was adopted.*

## CHAPTER IV. State responsibility (concluded)\*\* (A/CN.4/L.497 and Add.1)

## B. Consideration of the topic at the present session (concluded)\*\* (A/CN.4/L.497 and Add.1)

## 2. PRE-COUNTERMEASURES DISPUTE SETTLEMENT PROCEDURES SO FAR ENVISAGED FOR THE DRAFT ARTICLES ON STATE RESPONSIBILITY (A/CN.4/L.497/Add.1)

Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

Paragraph 6

37. Mr. PELLET proposed that the words "and the commentaries thereto" should be added after the word "countermeasures" in the last sentence.

*It was so agreed.*

*Paragraph 6, as amended, was adopted.*

*Section B.2, as amended, was adopted.*

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

*The meeting rose at 6.05 p.m.*

\*\* Resumed from the 2369th meeting.

## 2376th MEETING

*Friday, 22 July 1994, at 10.10 a.m.*

*Chairman: Mr. Vladlen VERESHCHETIN*

*Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodriguez, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Güney, Mr. He, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.*

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

[Agenda item 4]

COMMENTARIES TO THE ARTICLES OF THE  
DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT  
(concluded)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft commentaries contained in the revised report of the Working Group on a draft statute for an international criminal court (A/CN.4/L.491/Rev.2 and Corr.1 and Add.1-3).

*Commentaries to parts six to eight and to the annex (A/CN.4/L.491/Rev.2/Add.3)*

Commentary to part six

*The commentary to part six was adopted.*

Commentary to part seven

*The commentary to part seven was adopted.*

Commentary to part eight

2. The CHAIRMAN suggested that the Commission should adopt the commentary to part eight, subject to consideration later on in the meeting of a new paragraph (3) for the commentary to article 58 to be introduced by the Chairman of the Working Group.

*It was so agreed.*

*The commentary to part eight was adopted on that understanding.*

Commentary to the annex

*The commentary to the annex was adopted.*

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*