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Summary record of the 2329th meeting

Topic:
<multiple topics>

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

2329th MEETING

Tuesday, 3 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Arangio-Ruiz, 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.

Statement by the Legal Counsel

1. The CHAIRMAN welcomed Mr. Hans Corell, Under-Secretary-General and new Legal Counsel of the United Nations, and expressed to him, on behalf of all the members of the Commission, their sincere congratulations on his recent appointment. The members of the Commission who had taken part in meetings of the Sixth Committee of the General Assembly had already had occasion to appreciate his qualities as a jurist and his sense of leadership as Legal Adviser to the Ministry of Foreign Affairs of his country, Sweden.

2. Mr. CORELL (Under-Secretary-General, the Legal Counsel) thanked the Chairman for his words of welcome. For several years, he had been following the work of the Commission and would endeavour to pursue the fruitful collaboration established with the Commission by his predecessor, Mr. Fleischhauer. He would comment on the work of the Commission at a later meeting.

Tribute to the memory of Mr. Eduardo Jiménez de Aréchaga

3. The CHAIRMAN said that he had the sad duty to remind the members of the Commission that Mr. Jiménez de Aréchaga, former President of ICJ and former member and Chairman of the Commission, had passed away on 4 April 1994.

At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Mr. Eduardo Jiménez de Aréchaga.

4. Mr. VILLAGRÁN KRAMER said he was all the more deeply affected by the death of Mr. Jiménez de Aréchaga because the man had succeeded in crystallizing the legal thinking of the South American continent. He recalled the contribution made by that brilliant author and professor to the study of the international responsibility of States and his ability, as a member of arbitral bodies, to find pragmatic and equitable solutions to very complex problems.

5. Mr. BOWETT, referring to the exceptional qualities of concentration, insight into legal problems, courtesy and humility of Mr. Jiménez de Aréchaga, said that with his death, he had lost a personal friend.

6. Mr. THIAM expressed great sadness over the death of a man who had been the beacon and pride of the third world.

7. Mr. YANKOV referred to the integrity and dignity of the man and the erudition of the jurist who had made outstanding contributions in many fields of international law. Mr. Jiménez de Aréchaga's death meant the loss of a dear friend.

8. The CHAIRMAN said he would transmit the Commission's condolences to the family of Mr. Jiménez de Aréchaga.

Organization of work of the session (*continued*)

[Agenda item 2]

9. The CHAIRMAN informed the Commission of the recommendations made by the Enlarged Bureau. It was recommended that elections to fill casual vacancies should be held on Thursday, 5 May 1994, at 10 a.m.

It was so agreed.

10. The CHAIRMAN said the Enlarged Bureau further recommended that, in order to take advantage of the presence of the Legal Counsel in Geneva, a meeting of the Planning Group should be scheduled for Wednesday, 4 May 1994, at 3 p.m.

It was so agreed.

11. The CHAIRMAN, referring to the consideration of agenda items, said that, in the light of paragraph 6 of General Assembly resolution 48/31, which requested the Commission to continue its work as a matter of priority on the question of a draft statute for an international criminal court with a view to elaborating a draft statute, if possible at the current session, the Enlarged Bureau recommended that the first week of the session should be devoted to a discussion of that subject in plenary. The topic of the law of the non-navigational uses of international watercourses would, in accordance with the recommendations of the Enlarged Bureau, be considered in plenary during the second week of the session, bearing in mind paragraph 8 of Assembly resolution 48/31, in which the Assembly had welcomed the Commission's decision to endeavour to complete in 1994 the second reading of the draft articles on the law of the non-navigational uses of international watercourses. The Enlarged Bureau also drew the Commission's attention to the fact that, in paragraph 8 of Assembly resolution 48/31, the Assembly also requested the Commission to resume at its forty-sixth session the consideration of the draft Code of Crimes against the Peace and Security of Mankind, and that would have to be borne in mind for the organization of work in future.

12. According to the Enlarged Bureau's recommendations, the topic of State responsibility would be consid-

ered in plenary during the third week of the session on the basis of the sixth report of the Special Rapporteur (A/CN.4/461 and Add.1-3).[1]

13. The Enlarged Bureau would in the near future draw up a programme of work for the remainder of the session and submit the relevant recommendations to the Commission in plenary.

14. If he heard no objection, he would take it that the Commission endorsed the recommendations of the Enlarged Bureau for the first three weeks of the session.

It was so agreed.

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

[Agenda item 4]

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

15. The CHAIRMAN recalled that the report of the Working Group on a draft statute for an international criminal court was set out in the annex to the report of the Commission on the work of its forty-fifth session.[4] Paragraph 100 of the report of the Commission[5] indicated that the Commission would welcome comments by the General Assembly and by Governments on the specific questions referred to in the commentaries to the draft articles and on the draft articles as a whole. He drew attention to the topical summary of the relevant debate in the Sixth Committee (A/CN.4/457, section B) and to the written comments of Governments (A/CN.4/458 and Add.1 to 8), which were available in all working languages.

16. Mr. BOWETT said that the summary of the discussion in the Sixth Committee and the written comments of Governments showed that, notwithstanding certain criticisms, the Commission's work had been well received.

17. The main problems related to the question of the jurisdiction of the court. Article 22 (List of crimes defined by treaties) had met with little opposition; the concept of a court based on treaties of that type was widely accepted. The list was not exhaustive and could be shortened or added to. Some representatives in the Sixth Committee had proposed, for example, the addition of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, but the decision on that score would have to be taken at the diplomatic level.

18. Article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) had met with more criticism because of uncertainty and hesitation about its paragraph 2 (*a*) dealing with crimes under customary international law. That paragraph had been criticized because it was vague and because it contravened the principle *nulla poena sine lege*. He was prepared to accept those criticisms in part, but only to the extent that they did not rule out the jurisdiction of the Court for crimes of aggression. It would be nonsensical to establish an international criminal court having no jurisdiction over the crime of aggression, which was the most serious of all international crimes and should form the very cornerstone of the jurisdiction of the new court.

19. However, he did not think that limiting paragraph 2 (*a*) to the crime of aggression would in itself remove the difficulties. First of all, it was not certain that there was a sufficiently precise definition of aggression. There was, of course, no treaty definition, but a number of instruments, the Charter of the United Nations foremost among them, did contain some relevant provisions. Thus, Article 2, paragraph 4, of the Charter placed a prohibition on the use of force which was of unquestionable relevance to the definition of aggression. In the past, a general prohibition of that type had been deemed sufficient by the Nürnberg Tribunal for the purpose of establishing its jurisdiction in respect of that crime. In fact, what article 6 (*a*) of the Charter of the Nürnberg Tribunal, annexed to the London Agreement[6] submitted to the jurisdiction of the Tribunal were crimes against peace, namely, the planning or waging of a war of aggression or a war in violation of international treaties, but it had gone no further in defining aggression. That had not stopped the Nürnberg Tribunal from affirming its jurisdiction in respect of the crime of aggression or the General Assembly in 1946 from enshrining the principles adopted by the Tribunal.[7] The main treaty underlying the London Agreement had, of course, been the 1928 Pact of Paris, known as the Briand-Kellogg Pact, which also contained no precise definition of aggression, but provided for an obligation to renounce war as an instrument of national policy. Furthermore, while the obligation imposed by the Pact applied only to the signatory States, the Nürnberg Tribunal had had no difficulty in extending the concept of State obligations to cover individual criminal responsibility by affirming that crimes against the law of nations were committed by men, not by abstract entities.

20. If the Nürnberg Tribunal had been able to deduce the principle of individual criminal responsibility from a very general treaty prohibition on war as an instrument of national policy, why should it not be possible to do the same within the framework of the Charter, whose provisions were at least as specific as those of the Pact? The substantial body of United Nations practice would, moreover, facilitate the task of the court, which, unlike the Nürnberg Tribunal, would also have at its disposal documents prepared by the General Assembly, such as

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

[2] Ibid.

[3] Ibid.

[4] *Yearbook . . . 1993*, vol. II (Part Two), pp. 100 *et seq.*

[5] Ibid., p. 20.

[6] London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 288).

[7] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Hereinafter referred to as the "Nürnberg Principles") (*Yearbook . . . 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), para. 45).

the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[8] and the Definition of Aggression.[9] Even if those documents were not treaty definitions of aggression, they would afford more guidance to the new court than had been available to the Nürnberg Tribunal.

21. A second stumbling block was that the lack of a definition of self-defence reinforced doubts arising out of the lack of a definition of aggression, since the two concepts were complementary.

22. Such excessive timidity was the essential problem the Commission had to overcome in drafting the statute of the new court. The task of the court would be not so much to decide whether a particular State had committed aggression as to determine whether individuals indicted had been sufficiently privy to the planning or waging of the war as to be guilty of the crime of aggression. That was primarily a problem of proof rather than one involving a legal definition of aggression.

23. He conceded, however, that a problem still existed even if article 26, paragraph 2 (*a*), was confined to the crime of aggression. Wild charges of aggression were often made against States and States would not want to expose their political leaders to a criminal indictment before the court without adequate safeguards. A scheme with the following elements might therefore be envisaged: an article 26, paragraph 2 (*a*), limited to the crime of aggression; making a finding of aggression by the Security Council a preliminary condition for any indictment; and a provision in relation to individuals indicted to the effect that, in addition to other defences available to them, they were entitled to prove that, notwithstanding the Security Council determination that the State whose policy they had directed had committed aggression, the actions which they had controlled or directed had in fact been legitimate self-defence. In other words, a finding of aggression by the Security Council, being essentially political in nature, should not preclude the accused individual from arguing self-defence.

24. A related problem was that of the role of the Security Council *vis-à-vis* the court. Article 25 (Cases referred to the Court by the Security Council) envisaged that the Security Council could refer cases to the court. But a reading of the written comments of Governments indicated some apprehension about the precise role of the Security Council. In his view, the Commission should accept that the Council's role would not be to refer specific complaints against specific, named individuals, but to bring to the attention of the court situations which warranted the opening of an investigation. The investigation would be conducted by the Procuracy, which would decide whether an indictment should be brought against a named individual. The Security Council was not empowered to conduct a criminal investigation and it would be for the Procuracy, in accordance with normal procedure, to identify individuals who should be charged with responsibility.

25. Mr. TOMUSCHAT said that he entirely agreed with Mr. Bowett on the need to retain article 26, paragraph 2 (*a*), which, to his mind, occupied much too modest a place in the draft statute. In any event, the Working Group on a draft statute for an international criminal court had very wisely refrained from including a list of well-defined crimes in paragraph 2 (*a*), which was a general and open clause that would be applicable whenever a crime under general international law occurred. It was really very closely linked to article 22, in the sense that its general wording allowed customary international law to move into the interstices corresponding to situations where international treaties could not be invoked for reasons of non-ratification. To replace the concept of a crime under international law by that of aggression would therefore be both to restrict the jurisdiction of the court and to expand it unduly: to restrict it because international crimes other than aggression would be excluded where international treaties could not be invoked—a situation that would be unacceptable, in particular, in the case of the crime of genocide—and to expand it because, in the present state of international law, at least since the jurisprudence of the Nürnberg Tribunal, individual criminal responsibility could arise from the planning or waging of a war of aggression, but not from the mere act of aggression. The Definition of Aggression[10] was, to be sure, reproduced in the draft Code of Crimes against the Peace and Security of Mankind,[11] but the Code was merely an instrument designed to become an international treaty and there were no grounds for regarding all its ingredients as part of customary international law.

26. Mr. ARANGIO-RUIZ said that the problem of crimes against humanity was a category that Mr. Bowett seemed to have excluded, although it had been envisaged in the London Agreement,[12] which had served as the basis for the Nürnberg Tribunal. Assuming that the court had jurisdiction for crimes of aggression, its jurisdiction would cover *ipso facto* the acts committed in the course of such aggression, but what happened when the Security Council did not establish that an act of aggression had taken place, when no State or entity was designated as the aggressor and when terrible crimes had been perpetrated none the less? There were also, of course, war crimes in the strict sense, for which there existed, in addition to general international law, a corpus of treaty law, but the main problem remained that of crimes against humanity.

27. Mr. YANKOV said that the traditional tendency to apply to domestic situations concepts elaborated in the framework of inter-State relations resulted in confusion between aggression and domestic conflict and in situations in which there was no agreement about the identity of the aggressor. The point in the current case was not to redefine the concept of aggression or to arrive at a precise definition of the concept of self-defence, but, as part of its consideration of the items of the draft Code of Crimes against the Peace and Security of Mankind and that of State responsibility, the Commission had to re-

[8] General Assembly resolution 2625 (XXV), annex.

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

[10] Ibid.

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

[12] See footnote 6 above.

flect on the kind of crimes the new situations of genocide entailed and on whether there had to be mechanisms or rules to deal with the new type of situation, which in the medium term might well prove to be more dangerous than confrontations between States or alliances. For example, 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 (hereinafter referred to as the International Tribunal)[13] must not ultimately turn out to serve little purpose from the point of view of case-law because that would be a serious and lasting setback for everyone.

28. Mr. IDRIS said that it was particularly important to clarify the procedural and substantive differences between the Security Council's bringing a complaint before the court in the strict sense of the term and drawing the court's attention to a given situation. Would that involve a political statement by the Council or something else that might be interpreted as a complaint formulated by the Council and brought before the court?

29. Mr. THIAM questioned whether there was any difference between an act of aggression and a war of aggression.

30. Mr. TOMUSCHAT said that a war of aggression usually presupposed a planned action systematically carried out by troops acting in a coordinated manner, whereas the concept of aggression was much broader and could be applied to an isolated act which might not last more than one day. There was thus a far-reaching difference in nature stemming in both cases from the scale of the action. By making "wars of aggression" punishable, the Charter of the Nürnberg Tribunal had introduced an innovation into international law that had derogated from the fundamental principles *nullum crimen sine lege* and *nulla poena sine lege*. Article 15 of the International Covenant on Civil and Political Rights contained another derogation of the same kind. The Commission must prevent derogations from such a fundamental principle of criminal law from proliferating too easily.

31. Mr. CRAWFORD, referring to the question asked by Mr. Idris, said that, under article 25, the Security Council could, in fact, delegate jurisdiction to the court, inasmuch as a Security Council resolution could replace the consent of States set out in articles 23 and 26. The Prosecutor was, however, not bound to institute proceedings: the point of article 25 was to enable the Security Council to bring cases before the court instead of creating a large number of special courts.

32. Mr. YANKOV said that he understood the de facto differences between acts of aggression and wars of aggression, but the *de jure* differences were not clear. In his view, it would be more sensible to consider that acts and wars of aggression both constituted crimes under general international law.

33. Mr. ROSENSTOCK said that he agreed with Mr. Crawford's analysis of the effects of a decision by the Security Council to bring a case before the court, whether it concerned aggression or, more generally, situations that were a threat to peace and security. Such a decision would have the same function as the acceptance by a State of the jurisdiction of the court under article 23 of the draft statute. However, if such acceptance was a precondition for the institution of proceedings by the Procuracy, it was not sufficient: a complaint still had to be filed. Yet it would be very difficult to get the Security Council to say that a person should be indicted by the court for genocide and, where the Council had instituted proceedings, it might be necessary to give the Procuracy more latitude than desired.

34. Accordingly, the Commission would have to agree that a decision by the Security Council entailed the application of article 23 of the draft statute, but that it was not the mechanism for instituting proceedings. The Commission therefore had to think about ways of solving the problem, but without giving the Procuracy such discretionary powers that it would deter States from becoming parties to the statute of the future international criminal court. The Working Group should explore that area more thoroughly.

35. Mr. MAHIOU said that he basically agreed with the line of reasoning set out by Mr. Yankov concerning the difference between acts of aggression and wars of aggression. The problem raised by Mr. Tomuschat was, of course, real, but, at the current stage, he had some difficulty understanding how it would be possible to distinguish between the two situations: after all, a war of aggression was nothing more than a succession of acts of aggression over time. Was an act of aggression instantaneous and of short duration, whereas a war of aggression was planned, expected and continued for a certain period? He doubted that those details would have a legal impact, particularly as what counted were their consequences for individuals whose responsibility had been established and who must be prosecuted in accordance with the seriousness of the act committed. An act of aggression could have devastating effects and, conversely, a war of aggression, depending on the types of weapons used, the circumstances, and so forth, might ultimately have limited consequences from the point of view of damage caused and the individual responsibility of the guilty persons. Those were, however, all cases of aggression, even if the consequences and responsibility might be different.

36. Given the limited time available for the consideration of the Working Group's report, it would be preferable for the members of the Commission to focus on important questions that were essential to ensuring that work progressed.

37. Mr. ARANGIO-RUIZ said that the difference between aggression and wars of aggression was a matter of threshold. Clearly, aggression was the commission of an aggressive act. However, for example, the shooting down of a civilian or military aircraft might or might not constitute an act of aggression, depending on the circumstances surrounding that act, the intention behind it, and so forth. Beyond a certain threshold, it was an act of aggression, a crime of aggression that was more or less serious. It would be for the court and the Prosecutor to draw a distinction and to decide on the degree of crimi-

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

nal responsibility of each of the persons accused of the crime of aggression.

38. With regard to a comment by Mr. Rosenstock, he did not believe that it should be left to the Security Council to bring charges of genocide against individuals or groups or accuse them of committing that crime. That was the Prosecutor's task, whereas the Council had to concern itself with threats to the peace, breaches of the peace and acts of aggression in order to ensure the maintenance of international peace and security. Needless to say, a problem of genocide might arise in connection with an act or a series of acts characterized as aggression by the Council, but that was another matter.

39. Mr. TOMUSCHAT said he did not think that it was the task of the Commission to define crimes under international law; that would have to be done by the future court. The Commission should simply point the way, setting forth a general clause which referred to crimes under general international law; then, in each instance, the court would have to say whether an individual had committed a breach of a very important rule of international law and whether he had therefore committed a crime under international law. It would be advisable for the Commission to reflect on the effects of the clause contained in article 26, paragraph 2 (*a*), of the draft statute, which should be given a more prominent place in the draft.

40. The Commission was not drafting new rules: it had to do that within the framework of the draft Code of Crimes against Peace and Security of Mankind, in which it could include the crime of aggression or the crime of war of aggression.

41. It was not a question whether aggression was unlawful in relations between States—any act of aggression was unlawful under Article 2, paragraph 4, of the Charter of the United Nations and under general international law—but of the possible existence of a rule that established individual criminal responsibility.

42. The Commission might wish in that connection to reflect on the sources of general international law, to which reference was made in article 26, paragraph 2 (*a*), of the draft statute. General international law comprised rules of customary law, which in turn derived from practice and *opinio juris*. The only practice that established individual criminal responsibility was the practice of the Nürnberg Tribunal[14] and the Tokyo Tribunal[15] and it was not very solid because not one individual had been charged with aggression since then. It was based on the planning and waging of a war of aggression and the same principle was set forth in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[16] An act of aggression and a war of aggression differed in size and magnitude, but also, significantly, in law. Half a century after the end of the Second World War, the international community was not prepared to institute proceedings for an isolated act of aggression. General international law had a second source, the dictates of the conscience of mankind (the Martens clause), as underlined by ICJ in its judgment in the *Corfu Channel* case[17] and the advisory opinion it had delivered in connection with reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[18] There, as well, there was no question of individual criminal responsibility.

43. There was a difference, which was more than factual, between a war of aggression, which shocked the conscience of mankind, and an isolated act of aggression, which was the outcome of a political miscalculation or the work of militant activists. It was therefore possible to invoke only two legal texts and the practice based on those texts; but the texts in question referred solely to wars of aggression, specifying that they were crimes under international law. There had thus far been no international instrument which stated that aggression as such, even an isolated act of aggression, was a crime under international law.

44. Mr. THIAM said that he had some misgivings about the distinction drawn by Mr. Tomuschat between aggression and a war of aggression, in other words, between an unprepared act and a planned act. Prior to the Second World War and at the time of the Nürnberg trial, the expression "war of aggression" had covered any war waged without a prior declaration, since, at the time, war had been regarded as a lawful act, whereas all wars were now unlawful. He therefore saw no difference between a war of aggression and aggression, since they had the same legal consequences. He would like further clarification on that point.

45. Mr. Sreenivasa RAO said he was gratified that the question under consideration had given rise to a very open dialogue and exchange of views among all members of the Commission in plenary. The Working Group was, of course, useful, but discussion in plenary could be very productive and he trusted that the practice would continue.

46. As to the distinction drawn between an act of aggression and a war of aggression, it had its use, no doubt, but he was not persuaded by Mr. Tomuschat's arguments. His own view was that such a distinction was not necessary to determine which were the crimes of aggression that could lead to prosecution before the court.

47. With regard to Mr. Bowett's point concerning the role of the Security Council in the event of a threat to peace and an act of aggression—a role which was well defined in Chapter VII of the Charter of the United Nations—it was clear that, when the Security Council determined the existence of a general situation of aggression, it could take a number of steps under its own powers, but it should not categorize a particular individual as an aggressor. It was for the Procuracy of the court to examine the complaints or allegations of aggression and to submit the evidence gathered to the court, which could then, without prejudice to the Council's initial decision, pronounce on the responsibility of an individual and de-

[14] See footnote 6 above.

[15] Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, Tokyo, 19 January 1946, *Documents on American Foreign Relations* (Princeton University Press, vol. VIII, 1948), pp. 354 *et seq.*

[16] See footnote 8 above.

[17] Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

[18] *I.C.J. Reports 1951*, p. 15.

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

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

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

The meeting rose at 12.45 p.m.

2330th MEETING

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

Chairman: Mr. Vladlen VERESHCHETIN

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

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

[Agenda item 4]

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

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

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

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

[2] Ibid.

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