Document:-

A/CN.4/SR.2194

Summary record of the 2194th meeting

Topic:

Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

Extract from the Yearbook of the International Law Commission:-

1990, **vol. I**

word "election", appearing three times in the paragraph, should be used only once at the beginning.

It was so agreed.

Paragraph 50, as amended, was adopted.

Paragraphs 51 and 52

Paragraphs 51 and 52 were adopted.

Paragraph 53

20. Mr. McCAFFREY first queried the expression "it was agreed", in the first sentence: was there really a consensus in the Commission on that point? Secondly, the expression "concurrent jurisdiction" would extend to too many hypothetical cases. All in all, too much had been packed into the sentence, which should be simplified. In the second sentence, the phrase "This conclusion was reflected in paragraph 1 of article 7" was unfortunate, since paragraph 1 of article 7 of the draft code was still between square brackets and had been adopted only on a very provisional basis.

21. Mr. GRAEFRATH said that paragraph 53 was itself hypothetical. It merely described the situation that would arise if the international criminal court were established and had concurrent jurisdiction with national courts. It did not in any way prejudge actual establishment of the court.

22. Mr. BENNOUNA, Mr. BARSEGOV and Mr. KOROMA said that they did not see how it could be "agreed" that a national court could not re-examine a case dealt with by an international court, since the point was self-evident.

23. Mr. BEESLEY proposed that the words "it was agreed", in the first sentence, should be replaced by "it was envisaged", and the words "This conclusion was reflected in paragraph 1 . . .", in the second sentence, by "This conclusion was consistent with paragraph 1 . . .".

24. Mr. THIAM (Chairman-Rapporteur of the Working Group) supported the proposed amendments.

Mr. Beesley's amendments were adopted.

Paragraph 53, as amended, was adopted.

Paragraph 54

25. Mr. BENNOUNA said that he could not understand the structure of paragraph 54. Subparagraphs (i) and (ii) appeared to refer to two hypothetical situations; subparagraphs (*a*), (*b*) and (*c*) set out the grounds on which either the first or the second situation might arise, or both together, and there was no clear distinction between them.

26. Mr. PELLET said that he had the same impression. In his opinion, the situations described in subparagraphs (i) and (ii) should be regarded as alternatives, and the word "or" should therefore be inserted between them.

27. Mr. McCAFFREY said that he, too, was unable to understand the structure of the paragraph. In any case, from the point of view of form, each of the subparagraphs (*a*), (*b*) and (*c*) ought to begin with the word "if", and subparagraph (*b*), in which there was evidently something missing, should be redrafted.

28. Mr. EIRIKSSON (Rapporteur) also queried the logic of the link between the two parts of paragraph 54. The situation in subparagraph (i) was already covered by subparagraph (iii) of paragraph 38, and the ground stated in subparagraph (*c*) appeared in paragraph 62. The text could therefore be simplified. The reference in subparagraph (*b*) to paragraph 3 of article 7 of the draft code should also be explained.

29. Mr. GRAEFRATH said that he supported the changes suggested by Mr. McCaffrey and the Rapporteur.

30. Mr. CALERO RODRIGUES, supported by Mr. PELLET, said that he was concerned about certain discrepancies—and he cited examples—between the English and the French texts of paragraph 54.

31. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that the paragraph should be redrafted. Subparagraphs (i) and (ii) had no place in it and also seemed to be pleonastic. The substance of subparagraphs (*a*) and (*b*) had to be retained. Subparagraph (*b*) covered cases such as had actually occurred in the post-war period, when national courts had shown undue indulgence towards war criminals, who could not be retried because of the *non bis in idem* rule.

32. Mr. PELLET said it should be made clear that the condition "if a State concerned has grounds for believing" applied not only to the situation in subparagraph (*a*), but also to the situation in subparagraph (*b*). It should also be borne in mind that an erroneous characterization by a national court, referred to in subparagraph (*b*), could work both ways: the court might also err by characterizing as an international crime something which was only a crime under ordinary law.

33. The CHAIRMAN, supported by Mr. KOROMA, said that consultations would be required among the members concerned in order to complete the drafting of paragraph 54.

The meeting rose at 4.40 p.m. to enable the Enlarged Bureau to meet.

2194th MEETING

Friday, 13 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/429 and Add.1-4,[2] A/CN.4/430 and Add.1,[3] A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (*continued*)

CHAPTER III (The Commission's discussion of the question at the present session) (*continued*)

Paragraph 54 (continued) *and new paragraph 54* bis

1. The CHAIRMAN recalled that, at the previous meeting, the Commission had decided to hold informal consultations on paragraph 54. A new text had been drafted by Mr. Pellet and Mr. Eiriksson (Rapporteur).

2. Mr. PELLET explained that the new text was intended to distinguish clearly between the two possibilities outlined in paragraph 54. The new paragraph 54 dealt with the second of those possibilities, namely that the court would be only partly a review court, or court of appeal. The new paragraph 54 *bis* dealt with the other possibility, namely that the court's competence would be limited to reviewing decisions by national courts, as under paragraph 38 (iii). The new text was intended to be more comprehensible, and read:

> "54. As to the authority of judgments in cases where a national court has taken a decision, a re-examination by the international court could be contemplated, for instance: (*a*) if a State concerned has reason to believe that the decision was not based on a proper appraisal of the law or the facts; (*b*) if the national court erred by characterizing a crime covered by the code as an ordinary crime (paragraph 3 of article 7 of the draft code); (*c*) in the case of an appeal by the convicted person.
>
> "54 *bis*. Of course, if the court were established only to consider appeals against judgments handed down by national courts, its decisions would take precedence over the judgments of national courts."

3. Mr. McCAFFREY said that he welcomed the proposed new text of paragraph 54, which he found clearer than the original text. He was not sure, however, whether subparagraph (*b*) had the same meaning as in the original text.

4. Mr. CALERO RODRIGUES expressed the same concern.

5. Mr. EIRIKSSON (Rapporteur) said that the wording of subparagraph (*b*) should be identical to that used in paragraph 3 of article 7 of the draft code: " . . . if the act which was the subject of a trial and judgment as an ordinary crime corresponds to one of the crimes characterized in this Code".

6. Prince AJIBOLA pointed out that the words "appeal" and "review" had quite different meanings in English.

7. Mr. GRAEFRATH said that the Working Group had already discussed at length the difference between those two terms and had deliberately opted for the word "review", which was much broader in meaning. As for subparagraph (*b*), he supported the wording proposed earlier by Mr. McCaffrey: "(*b*) if the national court handed down a judgment characterizing the offence as an ordinary crime, whereas it should have been characterized as a crime under the code . . .".

8. Mr. RAZAFINDRALAMBO asked why the condition of prior attribution of review powers to the international court had not been retained in the new text of paragraph 54. The paragraph dealt with the case of concurrent jurisdiction, in which the court would have *ad hoc* jurisdiction to hear appeals but could also, as an appeal court, review judgments handed down by national courts.

9. Mr. BARSEGOV said that the content of subparagraph (*b*) should be closer to that of article 7 of the draft code, which had been the result of a lengthy drafting process. There should be no discrepancy between the two. He also had serious doubts about the proposed paragraph 54 *bis*, which did not appear to square with the remainder of the text.

10. Mr. CALERO RODRIGUES said that he was not happy with the text proposed for subparagraph (*b*). In both the English and the French texts, it should be clear that an appeal to the international court would be possible where an offence had been wrongly characterized.

11. Mr. PELLET, replying to Prince Ajibola's observation, said that, in French, the term *appel* had a more technical meaning than *réforme*, which corresponded to the term "review" in English. The problem could be avoided by using the word *saisine* (seisin), stating that a case could be brought before the court either by a State or by an individual. He suggested meeting Mr. Razafindralambo's objection by replacing the words "a re-examination by the international court could be contemplated" in the new paragraph 54 by "provision for a re-examination by the international court could be made in the court's statute".

12. Mr. AL-QAYSI said that he was anxious for the wording of subparagraph (*b*) to have exactly the same meaning as in the original text.

13. Mr. EIRIKSSON (Rapporteur) said that there was no need for the national court to have made an error. The international court could take up a case if the national court had treated as an ordinary crime an offence which corresponded to a crime covered by the code. The meaning of subparagraph (*b*) was intended to correspond with that of paragraph 3 of article 7 of the draft code.

14. The CHAIRMAN, at the suggestion of Mr. BEESLEY, proposed that an informal working group

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

[3] *Ibid.*

consisting of Mr. Thiam (Chairman-Rapporteur of the Working Group), Mr. Pellet, Mr. Graefrath, Mr. Barsegov, Mr. Eiriksson (Rapporteur) and Mr. Beesley should complete the drafting of paragraph 54.

It was so agreed.

Paragraphs 55 and 56

15. Mr. KOROMA suggested that the order of the two sentences in paragraph 55 should be reversed, so that the paragraph would proceed from the general to the particular.

16. Mr. THIAM (Chairman-Rapporteur of the Working Group) endorsed that suggestion.

17. Mr. RAZAFINDRALAMBO suggested that paragraph 56, with its reference to the *nulla poena sine lege* rule, should be placed before paragraph 55, which referred to specific penalties.

18. Mr. KOROMA and Mr. THIAM (Chairman-Rapporteur of the Working Group) agreed with that suggestion.

The amendments by Mr. Koroma and Mr. Razafindralambo were adopted.

Paragraphs 55 and 56, as amended, were adopted.

Paragraph 57

19. Mr. McCAFFREY pointed out that the term "enforcement" was more appropriate for civil judgments than for the decisions in criminal matters referred to in paragraph 57. In the heading and in the first and last sentences, the term "enforcement" should therefore be replaced by "implementation".

20. Mr. NJENGA said that the last part of the last sentence, with its reference to the "possible role of the claimant State", was much too weak. It should be amended to read: "... the priority of the claimant State would need to be considered". Another solution might be to omit the word "possible", referring simply to the role of the claimant State.

21. Mr. THIAM (Chairman-Rapporteur of the Working Group) supported the suggestion to replace the word "enforcement" by "implementation" in the English text, but pointed out that the term *exécution* in the French text was correct. The term *jugements*, however, should be replaced by *décisions pénales*.

22. Mr. KOROMA said that the term "claimant" was more appropriate for civil than for criminal proceedings. He suggested that it be replaced by "complainant".

23. Mr. TOMUSCHAT said that "complainant" was unsuitable as a legal term. It would be necessary to use a few more words to indicate the State which had initiated the proceedings.

24. Mr. EIRIKSSON (Rapporteur) suggested that Mr. Njenga's proposal should be modified to read: "... the advantages and disadvantages of according priority to the complainant State would need to be considered".

25. Mr. NJENGA agreed with that sub-amendment.

26. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that, as far as the idea of a "complainant" State was concerned, it was possible in French to speak of *l'État qui a porté plainte* or *l'État auteur de la plainte*.

27. Mr. MAHIOU drew attention to the connection between paragraph 57 and paragraph 43, which dealt with the various options as to who could submit a case to the court. He urged that the language of paragraph 57 be brought into line with the terminology used in paragraph 43.

28. Mr. EIRIKSSON (Rapporteur) proposed that the last sentence should be reworded along the following lines: "The other would provide for implementation under national systems, in which case the advantages and disadvantages of according priority to the State which initiated the case would need to be considered."

29. Mr. PAWLAK suggested that the words "of judgments" should be inserted after the word "implementation" in that text.

30. Mr. HAYES pointed out that the words "of judgments" should be inserted at the end of the first sentence; there would then be no need for them in the last sentence.

31. The CHAIRMAN said that, if the heading preceding the paragraph was to be "Implementation of judgments", there was no need to insert the words "of judgments" either in the first or in the last sentence.

32. If there were no objections, he would take it that the Commission agreed to replace the word "enforcement" by "implementation" in the heading and in the first and last sentences of paragraph 57, and to amend the last sentence along the lines proposed by the Rapporteur (para. 28 above).

It was so agreed.

Paragraph 57, as amended, was adopted.

Paragraph 58

33. Mr. JACOVIDES said that the reference in the second sentence to "most of the Members of the United Nations" was not clear. It would be better to speak of the "majority" of the Members of the United Nations.

34. Mr. BENNOUNA criticized the words "would ratify the court's statute" from the standpoint of legal terminology. The reference should be to States becoming parties to the statute of the court.

35. Mr. PELLET said that he was not satisfied with the opening words of the second sentence: "There was a general preference for the latter option...". The Commission should keep to its usual practice of not expressing preferences and use more neutral language.

36. Mr. THIAM (Chairman-Rapporteur of the Working Group) explained that the phrase referred to by Mr. Jacovides was intended to indicate that the second option, i.e. financing by the United Nations, presupposed that most Members of the United Nations would become parties to the statute of the court.

37. Mr. McCAFFREY proposed that the word "either", in the first sentence, should be replaced by "i.e." or a similar expression, such as "namely".

38. The point raised by Mr. Pellet could be met by rewording the second sentence along the following lines: "In the case of the latter option, the assumption would be that the majority of States Members of the United Nations . . .". Clearly, if only two or three States became parties to the court's statute, financing by the United Nations could not be seriously envisaged.

39. Mr. BENNOUNA said that the question of financing by the United Nations had been discussed thoroughly both in the Commission itself and in the Working Group. Such financing would guarantee the continuity of the court. He drew attention to the great difficulties which had arisen in the case of bodies financed by the parties concerned and not by the United Nations. The second sentence of paragraph 58 should therefore be reworded along the following lines: "The latter option, which has the advantage of guaranteeing greater continuity in the financing of the court, presupposes that the majority of the Members of the United Nations would become parties to the statute of the court."

40. Mr. JACOVIDES said that the question had indeed been discussed at length in the Commission and in the Working Group and a clear trend—accurately reflected in the second sentence—had emerged. He could none the less accept Mr. Bennouna's rewording, on the understanding that it acknowledged the existence of such a trend.

41. Mr. TOMUSCHAT said that he endorsed Mr. Bennouna's reformulation. The experience of the Human Rights Committee, which was financed by the United Nations, provided a good illustration. The process of ratification was necessarily a long one and the financing of the body concerned had to be assured on a continuing basis.

42. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he agreed with the wording proposed by Mr. Bennouna, which correctly reflected the position in the Working Group.

43. Mr. PAWLAK said that he, too, agreed with Mr. Bennouna's proposal, but the reference to "greater continuity" placed undue emphasis on the financial aspects of the matter. He would prefer a reference to the "effectiveness" or "independence" of the court.

44. Mr. KOROMA agreed with Mr. Pawlak. It was undesirable to place too much emphasis on the financial aspects.

45. Mr. BENNOUNA said that he could accept a reference to "effectiveness", provided that the reference to greater continuity was maintained. The relevant passage could read: ". . . guaranteeing greater efficiency and greater continuity in the financing of the court . . .".

46. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the word "either", in the first sentence, by "i.e." or a similar expression, and to amend the second sentence along the lines proposed by Mr. Bennouna (paras. 39 and 45 above).

It was so agreed.

Paragraph 58, as amended, was adopted.

Paragraph 59

47. Mr. BARSEGOV said that paragraph 59 could be misunderstood as suggesting that the Commission was opposed to the idea of separate courts for different categories of crimes. Actually, there were international agreements in force which made provision for such separate international criminal courts. One example was the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Clearly, the Commission could not but fully endorse the content of existing treaties. He therefore suggested that paragraph 59 be reworded along the following lines: "The understanding was reached that, instead of separate courts for different categories of crimes, as is provided for in existing conventions, it would be preferable to have a single organ for international criminal justice."

48. Mr. KOROMA and Mr. BEESLEY supported that proposal.

49. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he accepted the proposal by Mr. Barsegov.

50. Mr. CALERO RODRIGUES, referring to Mr. Barsegov's proposed rewording, with its reference to "existing conventions", said that he did not recall any precise reference to a special criminal court in the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention did mention the concept of international criminal justice, but as far as he knew it did not provide for setting up a separate court.

51. Mr. BENNOUNA said that the reference to "existing conventions" should be retained. As far as the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* was concerned, work was actually being done in the United Nations on the problem of setting up a court and considerable progress had already been made.

52. Mr. CALERO RODRIGUES withdrew his objection.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend paragraph 59 along the lines proposed by Mr. Barsegov.

It was so agreed.

Paragraph 59, as amended, was adopted.

Paragraph 60

54. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that the words "against individuals", in the first sentence, were confusing and should be deleted.

55. Mr. NJENGA said that the words "against individuals" had to be retained. They were necessary to indicate that it was proposed to entrust the International Court of Justice with jurisdiction over individuals, as against its normal role of dealing with inter-State disputes. Out of respect for the ICJ, the following additional sentence could be added: "It

would be necessary to obtain the views of the ICJ on this option."

56. Mr. PELLET said that he had some doubts about the reference in the second sentence to the effect that jurisdiction over individuals would require a restructuring of the ICJ. In fact, the term "restructuring" did not fully convey the changes that would be necessary. The sentence should be shortened by omitting the words "a restructuring of the Court, including", thereby simply stating that "... such jurisdiction would require amendments" to the Statute of the Court.

57. Mr. GRAEFRATH said that the words "against individuals", in the first sentence, were essential in order to make it clear that the reference was to a new form of jurisdiction over individuals; the ICJ so far dealt only with disputes between States. He supported the changes proposed by Mr. Njenga and Mr. Pellet.

58. Mr. BENNOUNA said that the first sentence made it clear that jurisdiction over individuals was involved. It should not be forgotten that the possibility of criminal proceedings against a State was envisaged in article 19 of part 1 of the draft articles on State responsibility.[4]

59. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to retain the words "against individuals" in the first sentence, to amend the second sentence as proposed by Mr. Pellet and to add the new third sentence proposed by Mr. Njenga.

It was so agreed.

Paragraph 60, as amended, was adopted.

Paragraph 61

60. Mr. THIAM (Chairman-Rapporteur of the Working Group) proposed that the words *affaires de crimes internationaux*, in the first sentence of the French text, should be replaced by *affaires criminelles*.

It was so agreed.

61. Mr. BENNOUNA proposed that the last part of the paragraph should be amended to read: "... overcome certain difficulties in the exercise of universal jurisdiction".

62. Mr. CALERO RODRIGUES proposed that that amendment be modified to read: "... overcome certain difficulties in the application of the system of universal national jurisdiction", which would be clearer.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Bennouna's amendment, as modified by Mr. Calero Rodrigues.

It was so agreed.

Paragraph 61, as amended, was adopted.

Paragraph 62

64. Mr. McCAFFREY said that the first sentence of the introductory paragraph contained a statement which was not an accurate reflection of the discussion in the Commission. The Commission was in broad agreement not that there should be some kind of monolithic institution, but rather that more work should be done to determine whether a court of some kind should be established. One way of dealing with the point might be to mention the other international criminal trial mechanism to which General Assembly resolution 44/39 referred. He therefore proposed that, after the words "international criminal court", in the first sentence, the following words should be added: "or other international criminal trial mechanism". Alternatively, the words "of the establishment of" should be replaced by "of exploring further the possibility of establishing". If that too was not acceptable, the words "of the establishment of a permanent international criminal court" could perhaps be replaced by "of establishing some kind of permanent international criminal court or other international criminal trial mechanism": that would make it clear that there was not necessarily broad agreement on one particular kind of permanent international criminal court.

65. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that, while he was prepared to accept a statement to the effect that the Commission had reached agreement on the desirability of establishing a court or some other international criminal trial mechanism, he could not agree that there was any need for a further study to consider the desirability of establishing such a court. The General Assembly had already asked the Commission to carry out a study, and the Commission had done so; some thought could, however, perhaps be given at a later stage to the technical aspects of the organization of the court. Moreover, throughout the discussion of part III of his eighth report (A/CN.4/430 and Add.1), he had not heard one single member of the Commission question the desirability of the actual establishment of the court, though views had differed as to the modalities of so doing. In his view, therefore, the desirability of establishing a court was not open to question.

66. Following a brief exchange of views in which Mr. EIRIKSSON (Rapporteur), Mr. FRANCIS, Mr. GRAEFRATH, Mr. KOROMA and Mr. McCAFFREY took part, Mr. TOMUSCHAT proposed that, in order to meet the point raised by Mr. McCaffrey, the words "in principle" should be added after "broad agreement", in the first sentence of paragraph 62, and that the following phrase should be added at the end of the sentence: "although views differ as to the structure and scope of jurisdiction of such a court".

67. Mr. BENNOUNA and Mr. GRAEFRATH supported that proposal.

68. Mr. KOROMA said that he, too, supported the proposal, but would suggest that the words "different views were expressed" be used instead of "views differ".

69. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Tomuschat's amendment, as modified by Mr. Koroma.

It was so agreed.

[4] *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

70. Mr. FRANCIS, supported by Mr. McCAFFREY, suggested that, since General Assembly resolution 44/39, in which the Commission had been requested to consider the question of the establishment of a court, also referred to another international criminal trial mechanism, some reference to the Commission's brief consideration of such a mechanism should be incorporated in the report at an appropriate point.

71. The CHAIRMAN suggested that interested members should draft an appropriate form of wording to cover that point, for the Commission's consideration.

It was so agreed.

72. Mr. CALERO RODRIGUES, noting that the word "extradition" appeared in subparagraphs (*a*), (*b*) and (*c*), said that the concept of extradition, as established in international law, was concerned specifically with the relationship between two national systems and should not be used in the context of an international system of criminal jurisdiction. In that connection, he read out article 5 of the draft convention for the creation of an international criminal court prepared by the London International Assembly in 1943,[5] according to which the handing over of an accused person to the prosecuting authority of the international criminal court was not an extradition. Accordingly, he proposed that the word "extradition", in all three subparagraphs, should be replaced by "handing over". In addition, the words "alleged perpetrator", in subparagraph (*a*), should be replaced by the word "accused".

It was so agreed.

73. Mr. KOROMA proposed that the word "concede", at the beginning of subparagraph (*a*), and the word "waive", at the beginning of subparagraphs (*b*) and (*c*), should be replaced by "cede".

It was so agreed.

74. Mr. McCAFFREY proposed that, further to the amendment made in paragraph 57 (see para. 32 above), the words "enforcing" and "enforcement", in subparagraphs (*a*) and (*b*), should be replaced by "implementing" and "implementation", respectively.

It was so agreed.

75. Mr. THIAM (Chairman-Rapporteur of the Working Group), referring to the French text, proposed that the word *abandonnent*, at the beginning of subparagraph (*a*), and the word *abandonner*, at the beginning of subparagraphs (*b*) and (*c*), should be replaced by *renoncent à* and *renoncer à*, respectively.

It was so agreed.

76. Mr. EIRIKSSON (Rapporteur) proposed that, in order to bring out more clearly the point it sought to make, the third item in subparagraph (*c*), beginning with the words "There are different choices . . .", should be amended to read:

> "In addition to those who could bring a case before the court under the other two models, namely other States concerned (territorial State, State whose national has been tried, States against which the crime was directed) or all States parties to the court's statute, this model could allow for the possibility of the convicted individual bringing a case."

It was so agreed.

77. Mr. PELLET proposed that, further to the amendment made in paragraph 41 (see 2193rd meeting, para. 9), the word "final", in the second item in subparagraph (*c*), should be deleted. In the fifth item, the word "not" should be added before "require", and the words "neither a public prosecutor nor" should be deleted.

It was so agreed.

78. Mr. CALERO RODRIGUES said that, in his view, the first sentence of the fifth item in subparagraph (*c*) was unnecessary. Obviously, if a court was going to hear an appeal, the accused would presumably have to be present. He therefore proposed that the sentence be deleted.

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraph 63

79. Mr. GRAEFRATH said that the mention of illicit drug trafficking could be deleted. It was not an extension of, but was included in, the competence of the court. However, he would not object to retaining the reference.

80. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he would not object to deleting the reference to illicit drug trafficking; in view of its importance, however, it might be useful to cite it as an example.

81. Mr. EIRIKSSON (Rapporteur) proposed the following wording for the first sentence: "It is possible to choose from among the various elements discussed in sections 2 to 5 above for incorporation in each of the envisaged models." The second sentence could then be deleted, thus dispelling the reservations voiced by Mr. Graefrath.

It was so agreed.

Paragraph 63, as amended, was adopted.

Paragraphs 64 and 65

82. Mr. NJENGA, supported by Mr. JACOVIDES, suggested the following wording for paragraph 64: "Establishing an international criminal court would be a progressive step to develop international law, particularly if accepted by a broad majority of States."

83. Mr. KOROMA said that he agreed with Mr. Njenga's proposal, but wondered why the usual wording had not been used, namely "a progressive development of international law", instead of "a progressive step to develop international law".

84. Mr. EIRIKSSON (Rapporteur) said that paragraph 64 and the two alternatives for paragraph 65 went together and the Commission should attempt to produce one paragraph that incorporated all their elements. Perhaps attention should be centred on the first alternative for paragraph 65.

[5] See United Nations, *Historical Survey of the Question of International Criminal Jurisdiction* (memorandum by the Secretary-General) (Sales No. 1949.V.8), pp. 18-19 and appendix 9.B.

85. Mr. GRAEFRATH said that the Commission should restrict itself to paragraph 64 for the moment and he supported Mr. Njenga's proposal for that paragraph.

86. Mr. CALERO RODRIGUES said that he agreed with the Rapporteur. The first alternative for paragraph 65 repeated paragraph 64, but paragraph 64 was preferable and should be adopted without change.

87. Mr. EIRIKSSON (Rapporteur) said that Mr. Njenga's proposal gave the impression that a court established by a few States would be a contribution to international law. Adding the word "particularly" placed emphasis on that. He would prefer a different wording, for the point was that, unless the court was accepted by a broad majority of States, it would not be a contribution to international law.

88. Mr. RAZAFINDRALAMBO suggested combining paragraph 64 and the first alternative for paragraph 65 so as to read: "Establishing an international criminal court would in the end be a progressive step to develop international law and be successful only if it were widely supported by the international community."

89. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he fully supported Mr. Razafindralambo's proposal.

90. Mr. KOROMA suggested that the first part of paragraph 64 should be amended to read: "Establishing an international criminal court would in the end enhance respect for the rule of law . . .". The point was not to develop international law, but to combat crime.

91. Mr. PAWLAK said that he saw no contradiction in combining references both to the development of international law and to respect for the rule of law.

92. Mr. ARANGIO-RUIZ said that, by stressing the difficulty of creating an international court and the need for broad support from States, the text was implying that the establishment of a court was more difficult than the drafting of a code, which was not the case.

93. Mr. TOMUSCHAT said that the word "would" in paragraph 64 should be replaced by "will" and that the last part of the paragraph should be amended to read: ". . . and for that purpose it needs the wide support of the international community". The form of language must be more positive.

94. Mr. PELLET said that he strongly disagreed with Mr. Tomuschat's proposal, which was premature.

95. Mr. FRANCIS said that he would not oppose Mr. Razafindralambo's proposal, but the rule of law was implied in the wide acceptance of an international court. He therefore preferred Mr. Njenga's proposal, which could be improved by deleting the word "particularly".

96. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the following combined text for paragraph 64 and the first alternative for paragraph 65: "Establishing an international criminal court would in the end be a progressive step in developing international law and strengthening the rule of law, and be successful, only if widely supported by the international community."

It was so agreed.

Paragraph 64 and the first alternative for paragraph 65, as amended, were adopted.

97. Mr. EIRIKSSON (Rapporteur), referring to the second alternative for paragraph 65, said that it must be linked to paragraph 64. The Commission should ask for advice on subject-matter jurisdiction and should use the formulation from General Assembly resolution 44/39 in doing so.

98. Mr. BENNOUNA, speaking on a point of order, said that the Commission should first decide whether it wished to retain the content of the second alternative for paragraph 65 at all. The Commission was a body of legal experts that must choose its own model; it should not ask the General Assembly to select one for it.

99. Mr. THIAM (Chairman-Rapporteur of the Working Group) and Mr. NJENGA said that they agreed with Mr. Bennouna.

100. Mr. KOROMA also agreed, but pointed out that the Commission had made it a practice to ask for such indications from the Sixth Committee of the General Assembly. Perhaps the Chairman could raise the point in introducing the Commission's report to the Sixth Committee.

101. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the second alternative for paragraph 65.

It was so agreed.

Paragraph 26 (concluded)*

102. Mr. PELLET proposed the following wording for the first sentence of paragraph 26: "A major concern with respect to the establishment of a court is that it might restrict [national sovereignty] [the sovereign jurisdiction of States], although it must be taken into account that existing régimes of universal jurisdiction also have an impact on the exercise of State jurisdiction." The words "As a matter of fact", in the second sentence, should be deleted. He preferred the alternative "the sovereign jurisdiction of States", but would not object to the expression "national sovereignty". The last sentence should be amended to read: "Acceptance of the jurisdiction of an international criminal court constitutes, on the contrary, the exercise by States of their sovereign jurisdiction."

103. The CHAIRMAN, noting that Mr. Pellet did not object to the use of the expression "national sovereignty", said that, if there were no objections, he would take it that the Commission agreed to retain that formula and to amend paragraph 26 along the lines proposed by Mr. Pellet.

It was so agreed.

Paragraph 26, as amended, was adopted.

Paragraph 54 and new paragraph 54 bis (concluded)

* Resumed from the 2189th meeting, para. 36.

104. Mr. EIRIKSSON (Rapporteur) said that the informal working group (see para. 14 above) proposed the following new text for subparagraph (*b*) of paragraph 54: "(*b*) if the acts were tried as ordinary crimes although they corresponded to one of the crimes characterized in the code (paragraph 3 of article 7 of the draft code)".

105. Mr. Sreenivasa RAO suggested replacing the words "ordinary crimes" in that text by "common crimes".

106. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that a distinction was being made between crimes under ordinary law and political crimes. He supported the new text proposed for subparagraph (*b*).

107. Mr. BENNOUNA proposed the following wording: "(*b*) if the national court committed an error in characterizing an international crime as an ordinary crime (see paragraph 3 of article 7 of the draft code)".

108. Mr. KOROMA said that he supported the text proposed by the informal working group, but suggested replacing the words "characterized in" by the word "under".

109. Mr. EIRIKSSON (Rapporteur) pointed out that the words "characterized in" were used in paragraph 3 of article 7 of the draft code.

110. Mr. Sreenivasa RAO withdrew his suggestion.

111. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the new text of paragraph 54 and the new paragraph 54 *bis* presented at the beginning of the meeting (para. 2 above), but with paragraph 54 (*b*) being replaced by the text just proposed by the informal working group (para. 104 above).

It was so agreed.

Paragraph 54, as amended, and new paragraph 54 bis *were adopted.*[6]

112. Mr. FRANCIS said that the Commission should say something in its report on its attitude towards other international criminal trial mechanisms. Perhaps the Special Rapporteur could prepare an appropriate text.

113. The CHAIRMAN asked Mr. Thiam (Chairman-Rapporteur of the Working Group), Mr. Eiriksson (Rapporteur) and Mr. Pawlak to draft a text.

The meeting rose at 1.40 p.m.

[6] See also 2196th meeting, paras. 23-42.

2195th MEETING

Monday, 16 July 1990, at 10 a.m.
Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-second session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter III.

CHAPTER III. ***Jurisdictional immunities of States and their property*** (A/CN.4/L.448)

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

2. Mr. EIRIKSSON (Rapporteur) proposed that, for the sake of accuracy, the words "for second reading", in the second sentence, should be deleted. It was the plenary Commission, rather than the Drafting Committee, which considered draft articles on second reading. Similar amendments should be made in paragraphs 8 and 9.

It was so agreed.

Paragraph 6, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the words "for second reading", in the last sentence.

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraph 9

4. Mr. OGISO (Special Rapporteur) said that a footnote should be added after the words "article 2 (Use of terms)", in the second sentence, reading: "The Drafting Committee deferred the adoption of paragraph 1 (*b*) (iii *bis*) of article 2 pending the adoption of article 11."

5. Mr. McCAFFREY proposed that, in view of the amendment to paragraphs 6 and 8, the words "undertake the second reading of", in the first sentence, should be replaced by the word "consider".

It was so agreed.

6. Mr. MAHIOU proposed, also in view of the above amendments, that the words "had not been concluded", in the third sentence, should be replaced by "could not be concluded".

It was so agreed.

Paragraph 9, as amended, was adopted.