Document:-
A/CN.4/SR.2357

Summary record of the 2357th 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:-
1994, vol. I

tance) and 53 (Transfer of an accused to the Court). Of special significance was the relationship between existing arrangements for extradition and the arrangements for transfer to the court, which had been carefully synchronized in article 20, paragraphs 2 and 3, and article 53, paragraphs 2, 3 and 4. In addition, a State which was requested to transfer a person to the court would have the power to set the relevant order for transfer aside provided it could show sufficient reason; it might also defer compliance, for instance, if it was itself trying the accused for a serious crime.

81. Articles 57 and 58 dealt with recognition of judgements and enforcement of sentences respectively. The former was of a rather formal character, but could well have a particular procedural significance in systems that recognized the idea of *res judicata*.

82. Article 59 (Pardon, parole and commutation of sentences), paragraph 4, allowed for the possibility of release on probation subject to the control of the court; that control might, in certain circumstances, be delegated to the State, subject to reporting requirements.

83. Although there had been points on which it had disagreed—and those points were reflected in the commentaries to the articles—the Working Group had in general accepted the basic approach to the matter, and the provisions of the statute as a whole. It would, of course, have to reconsider the statute in the light of the discussion in plenary to examine any difficulties that might emerge. It would also revise and adopt the commentaries. In his view, the revised statute represented an important step towards an international criminal court of general and permanent jurisdiction, and was a mere satisfactory solution to the problem than the creation of ad hoc courts by executive resolution.

84. On behalf of the Working Group, he commended the statute to the Commission.

85. The CHAIRMAN thanked Mr. Crawford for his statement and congratulated the Working Group on the remarkable progress achieved at the present session. The debate on the item would continue at the next meeting.

86. In response to a point raised by Mr. PAMBOU-TCHIVOUNDA, and following a brief discussion, the CHAIRMAN suggested that, at its next meeting, the Commission should take up parts one and two of the draft statute and, if it had time, part three as well, on the understanding that members would have an opportunity to make general statements at the end of the discussion on the draft statute.

It was so agreed.

The meeting rose at 1.05 p.m.

2357th MEETING

Monday, 27 June 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (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, ILC(XLVI)/ICC/WP.3 and Add.1-2)

[Agenda item 4]

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

1. The CHAIRMAN invited the members of the Commission to begin their consideration of the revised draft statute for an international criminal court (A/CN.4/L.491), beginning with parts one and two, and pointed out that the commentaries thereto, which the Working Group on a draft statute for an international criminal court still had to revise, had been distributed informally as documents ILC(XLVI)/ICC/WP.3 and Add.1 and 2.

2. The third preambular paragraph of the French version of document A/CN.4/L.491 should be brought into line with the English original version and should read: *Soulignant également que ladite cour est destinée à être complémentaire des systèmes nationaux de justice pénale dans les affaires que ces systèmes ne sont pas en mesure de régler.* In the English version of article 15, paragraph 4 should be renumbered as paragraph 3.

3. Mr. ROBINSON said that he wished to take the opportunity to state his views on the report of the Working Group; he was a member of the Working Group, but had regrettably been unable to attend the first part of its work. The report, which was the outcome of excellent work, was capable of helping the Commission to move ahead and discharge the mandate given to it by the General Assembly.

4. He feared that the words "in cases which those systems cannot resolve" in the third preambular paragraph

---

* Resumed from the 2350th meeting.

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

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

[3] Ibid.

did not accurately reflect the concept of complementarity between the court and national criminal justice systems. They might give the wrong impression that it was a question either of cases which national systems did not have the competence to resolve, cases which could not be completed for some reason or cases in which domestic remedies had been exhausted. He therefore proposed that the words in question should be replaced by the following formulation taken from paragraph 2 of the commentary to article 1: "in circumstances where other trial procedures may not be available or may be ineffective".

5. The draft statute ascribed importance to its preamble, a point made many times in the commentary; that was particularly true of article 35, which made the discretionary power of the court not to exercise its jurisdiction dependent on the court's assessment of the purposes of the statute set out in the preamble. That raised two questions. First, was it certain that the preamble identified in a sufficiently clear manner the purposes which the court must take into account when exercising its discretion not to hear a case pursuant to article 35? Secondly, in any event, should a matter as important as the purposes of the court be left to the preamble? Should it not be dealt with instead in an article of the statute itself drafted in clearer terms than the preamble? Of course, for the purposes of interpretation, the preamble formed part of the content of a treaty and was therefore not unimportant. Traditionally, however, the preamble was used to set the tone and historical context of a treaty. He would not insist on the point, but thought that the function of article 35 warranted a separate provision identifying the purposes of the court.

6. With regard to article 2 (Relationship of the Court to the United Nations), he agreed that the registrar must obtain the approval of the States parties for the purposes of an agreement establishing a relationship between the court and the United Nations, but it was not entirely clear that such approval would be obtained. That being the case and aware that the problems associated with financing and the United Nations budget would certainly have an impact on the court, he was reluctant to support the idea of establishing a relationship between the two institutions. He therefore proposed the deletion of the words "and providing, *inter alia*, for the exercise by the United Nations of the powers and functions referred to in this Statute" on the grounds that they were unnecessary and, more fundamentally, it was for the States parties to agree with the United Nations on the content of the agreement in question, and their approval should not be anticipated.

7. On article 3 (Seat of the court), he had the same comments concerning the approval of the States parties as he had made on article 2. He had some reservation as to the appropriateness of assigning responsibility to the Secretary-General of the United Nations for the conclusion of an agreement with the host State on behalf of the States parties, but that reservation depended on the stage at which the agreement was concluded. The host State agreement should deal with the various matters usual in such cases, but additionally with other matters, such as prison facilities in the host State.

8. In connection with article 6 (Qualification and election of judges), he had been among those who had argued that the court should consist of persons with both criminal trial and international law expertise: criminal trial expertise was needed, most importantly for assessing evidence; expertise in international law was needed for dealing with the many international law issues which arose during a trial, although the number of such issues would now be significantly reduced by the wise decision of the Working Group to have a specific enumeration of the crimes under international law over which the court would have jurisdiction. Thus, the court would not have the difficult task of determining whether a particular offence was a crime under international law. But it would have other international law issues to resolve: in particular, article 33 (Applicable law) provided that the court should apply, *inter alia*, the rules and principles of general international law. Paragraph (1) of the commentary to article 6 made it clear that, for the court to discharge its functions effectively, the correct balance must be struck between expertise in criminal law and criminal justice, on the one hand, and expertise in international law, on the other. But if that was so, how was that objective compatible with a system in which a judge could have much criminal trial experience, but none in international law, or vice versa? The work of a judge in court was a composite whole consisting of a variety of functions calling for a variety of skills. And that held good for the planned court. How would a judge with criminal trial experience, but no experience in international law, arrive at a correct decision if he was not able to make a judgement as to what constituted under general international law a crime against humanity in terms of article 20 (Jurisdiction of the Court in respect of specified crimes)? And, conversely, how would a judge with experience in international law, but no criminal trial experience, be able to assess and weigh evidence which was on the face of it contradictory and inconsistent? The system envisaged by the Working Group seemed to be based on the principle that a judge might very well be experienced in only one field and that the judges would have to rely on each other. The system might yield judges possessing both types of expertise. But it was also likely to yield judges possessing only one to the exclusion of the other. It had to be recognized that not many people had expertise in both areas. Article 6 could be improved so as to avoid what was tantamount to inviting States, with the system of list A and list B, to nominate persons having expertise in one area, but not in the other. He therefore proposed the deletion of subparagraphs (*a*) and (*b*) of paragraph 1 and the inclusion in paragraphs 2 and 4 of a provision to the effect that, in nominating and electing judges, the States parties should bear in mind that, in addition to the requirements of paragraph 1, judges should have criminal trial experience and recognized competence in international law. It would then be possible to reformulate the provision of the draft statute concerning the division between list A and list B by making it a kind of directive to guide the court, for example, when establishing a trial chamber, and to ensure that it had a satisfactory blend of judges with the two qualities and, so far as possible, a majority of judges with criminal trial experience. Alternatively, it might be made clear in the commentary that, when nominating and electing judges, the States parties should bear in mind that judges also

needed to have recognized competence in criminal trial and in international law. However, if subparagraphs (*a*) and (*b*) of paragraph 1 were retained, he wondered why the requirement was for "recognized competence in international law", but only "criminal trial experience". The level of expertise should be the same in both areas: the requirement should therefore be either for recognized competence in criminal trial and in international law or for experience in criminal trial and in international law. He also suggested that in the English version the end of paragraph 5 should read "... any case the hearing of which he has commenced to hear".

9. Turning to article 10 (Independence of the judges), he said that he assumed that it was not the intention in paragraph 2 to preclude a judge who was working only part-time in the court from continuing as an employee in his country's public service or civil service in the case of services based on the Westminster model: in that system, a civil servant worked with and for politicians who were members of the executive branch, but was not himself a politician; he was expected to continue to work in the civil service even after a change of government and must therefore carry out his duties impartially and objectively. Why could such a civil servant not be appointed as a judge of the court? In its present wording, paragraph 2 seemed to exclude that possibility, for the civil servant would be considered to be a member of the executive. And the commentary to article 10 did not offer any clarification. He proposed that the second sentence of paragraph (2) of the commentary to article 10 should be amended to read:

> "The reference to the executive branch is not intended to cover persons who do not perform ordinary executive functions of government but have an independent role or office or who are employees in the public service of their country and do not perform political functions."

10. With regard to article 12 (The Procuracy) he was not sure what was meant in paragraph 4 by the phrase "on a stand-by basis".

11. As to article 15 (Loss of office), the relationship between paragraphs 1 and 2 was not clear. The phrase "who is found guilty of misconduct or a serious breach of this Statute", in paragraph 1, almost suggested a procedure akin to a trial. However, it appeared from paragraph 2 that the decision to remove the Prosecutor from office would be taken by a majority vote of States parties—hardly a trial process—and that, in the case of a judge, it would be taken by a two-thirds majority of the judges. Paragraph (2) of the commentary indicated that the rules would provide for due process protection for the judge or officer. But the question was whether paragraph 1 of article 15 called for a separate procedure from that provided for in paragraph 2 or whether, as he believed, loss of office was determined by the States parties to the statute and the judges on the basis of paragraph 2. He would therefore propose that the introductory phrase of paragraph 2 should be reworded to read: "A determination as to loss of office on any of the grounds or for any of the reasons set out in paragraph 1 shall be decided by secret ballot." He further proposed that, in paragraph 1, the words "found guilty of misconduct or a serious breach" should be replaced by the words "found to have committed misconduct or a serious breach", since the voting procedure by States parties could hardly lead to a finding of guilt. He also had some doubts about the need for paragraph 3, which was, in his view, certainly applicable to judges, who should not participate in the decisions concerning other judges of the court. He wondered, however, whether the same was true in the case of other officers of the court, who should be fully entitled to participate in the proceedings, since the rules would in any event provide for due process.

12. So far as article 16 (Privileges and immunities) was concerned, he wondered whether there were any compelling reasons for conferring diplomatic privileges and immunities on the staff of the Procuracy, which included persons who were only clerks, while the staff of the Registry would have only functional privileges and immunities. It was worth noting in that connection that article 30, paragraph 3, of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991[4] placed the staff of the Prosecutor and of the Registry on the same footing.

13. Article 19 (Rules of the Court) raised the difficult question whether the rules of the court made by the judges should include the rules of evidence to be applied in a case by the court. Article 44 (Evidence) prescribed two rules of evidence, one relating to judicial notice of facts of common knowledge and the other to the reception of evidence obtained by illegal conduct. There were no other rules of evidence. Article 19 provided that the rules of evidence would be drawn up by the judges. He had no definite view on the matter, but that was not because he believed that those rules should be drawn up by the States parties and reflected in the statute. Rather, he doubted whether they could or should be drawn up by the court because they differed significantly from the rules of procedure the judges would have to lay down, and rightly so, and because they came very close to substantive law. Under article 33, the court would apply the rules and principles of general international law, which must encompass rules of evidence, and it would have to extract from those rules and principles applicable rules of evidence in the same way that it would extract other substantive rules relating to international criminal law, which admittedly, was not very well developed. While he had a flexible attitude to the matter, he could not help wondering whether it was prudent to include the article.

14. Mr. CALERO RODRIGUES said that he had just a few comments to make on parts one and two and on the draft statute as a whole. He was sorry, however, that the Commission absolutely had to submit a draft statute to the General Assembly at its forthcoming session, since the Working Group had not had time to improve the draft.

15. Referring to the preamble, he agreed with Mr. Robinson regarding the phrase "in cases which those systems cannot resolve", which did not convey the

[4] Hereinafter referred to as the "International Tribunal". For the statute, see document S/25704, annex.

desired intent. While he could accept Mr. Robinson's proposed version, he considered that it would suffice simply to delete that phrase. As to article 2 (Relationship of the Court to the United Nations), which had been debated at length in the Working Group, in his view, it represented a compromise between the position of those who wanted to establish a full United Nations body, with the inclusion of a provision to that effect in the Charter of the United Nations, and the position of those who considered that it was in any event necessary to establish a relationship between the United Nations and the court to ensure that the court was an instrument of the international community and not of a few States. He would have preferred the Commission as a whole to make it clear that, for the court to be effective, it would have to be attached to the United Nations through an amendment to the Charter. He regretted that the commentary to article 2 was so short. He also regretted that the informal paper prepared by the secretariat of the Working Group (ILC(XLVI)/ICC/WP.2, annex), which set out, very objectively, several possibilities in that connection and would provide a useful element of information for those at State level who would have to decide the matter, had not been appended to the commentary. In his view, the formula used, whereby the Registrar would be empowered with the approval of the States parties, to enter into an agreement or agreements establishing an appropriate relationship between the court and the United Nations, was vague and did not allow the court itself an opportunity to give its opinion because the Registrar would act only on the instruction of States parties or with their approval. Like Mr. Robinson, he doubted that the headquarters agreement could be concluded by the Secretary-General of the United Nations and the host State for, once again, that would deprive the court of the possibility of making its views known. He trusted that the court would be given a more active role in the matter.

16. He had three comments to make on part two concerning the composition and administration of the court.

17. First, he found it strange that article 5 (Composition of the Court) made no mention of the judges. The question of the election of judges was dealt with only in article 6, paragraph 3, although they would undeniably form an integral part of the court from the outset, as they would have the task, under article 19, of preparing the rules of the court. It therefore should have been stated expressly in article 5 that the court was composed of 18 judges.

18. Secondly, with regard to the choice of judges, he agreed with Mr. Robinson about the drawbacks of the system of lists A and B. No doubt, the Working Group had wanted to ensure, by means of that complicated system, which was also reflected in the composition of the chambers, that the judges had the highest qualifications in both criminal and international law. But the solution adopted might in the end run counter to the desired objective: even if the decisions of the chambers were collective, could a judge with wide experience in one field, but none in the other, really work efficiently?

19. One minor point concerned the system of alternate judges, which, as contemplated in article 9 (Chambers), paragraph 7, would not, in his view be effective. A close calculation showed that, of the 18 judges elected, only 17 would be available, since one would have to assume the duties of President. Six others would sit on the appeals chamber. If two trial chambers sat simultaneously, that would leave only one of the 11 remaining judges to carry out the duties of alternate judge. In the circumstances, there seemed little point to paragraph 7 and it could be deleted without difficulty.

20. Mr. YAMADA said that, thanks to the written comments of Governments and to the discussions in the Working Group, the draft statute now before the plenary meeting reflected the significant progress made as compared with the version considered at the previous session. He would therefore once again stress the need to complete work on the draft statute by the end of the current session so that the final report could be submitted to the General Assembly at its forty-ninth session.

21. He had four comments to make on the preamble and on parts one and two of the revised draft statute.

22. First, he welcomed the insertion of the third paragraph of the preamble, which stated clearly that the court was intended to be complementary to existing national criminal justice systems. That was a balanced approach, in his view, and should help the court to become an organ which was accepted as universally as possible by sovereign States.

23. Secondly, he was in favour of the establishment of the court by a treaty rather than by a resolution of the United Nations, on the understanding that an appropriate relationship would be established with the United Nations by a separate agreement. Some members would obviously have preferred the court to be made a judicial organ of the United Nations, the Charter of the United Nations being amended accordingly. However, the treaty solution had the advantage of implying a firm commitment to the court by each State party, and that was necessary for the proper functioning and stability of the court. It would not prevent the international criminal court from enjoying a status and authority comparable to those of ICJ.

24. Thirdly, although he would have preferred the court to be given a permanent character in order to ensure its stability and independence, he recognized the need for a reasonable balance between the cost and the benefit. In that sense, the current formula whereby the court would meet when necessary to consider a case referred to it afforded a flexible and well-balanced solution which had his support.

25. Fourthly, with regard to the composition and administration of the court, the most important point was to ensure the independence and impartiality of the judges and the Procuracy. From that standpoint, he could approve the revised draft articles as a whole and, in particular, article 15, paragraph 2 (*a*), which provided that loss of office, in the case of the Prosecutor, would be decided by a majority of States parties and not by the court, as had been the case in the previous version. Also, in order to maintain the truly international character of the Procuracy, he would favour the inclusion in article 12 of a provision stipulating that the Prosecutor and

Deputy Prosecutors could not be nationals of the same State.

26. Mr. THIAM, speaking as a member of the Working Group, said that he, of course, accepted the draft statute. He regretted, however, that the drafting proposals made by the French-speaking members concerning the French version of the statute had not been taken into account. To give but one example, he had asked that the phrase in the second preambular paragraph, reading *cette cour est destinée à n'avoir compétence que* should be amended, as it was particularly infelicitous and also far too weak in that it gave the impression that the Commission was defending itself in advance against any criticisms from States which might fear that their jurisdiction was being ousted. He had also noted certain other instances of awkward drafting in the French version of the proposed articles.

27. His only remark on substance related to the appointment of judges. The system of lists A and B was highly questionable, for two reasons. In the first place, it was pointless for the judges to be too specialized at the outset, since they would have ample time to acquire on-the-job training; secondly, the inevitable consequence of such a system would be to make access to the court very difficult for judges from the third world who would not have had the opportunity to acquire the necessary knowledge in their own country to become specialists in criminal law or international law. Such "discrimination" would be wholly out of keeping with the very concept of an international court.

28. As to the relationship with the United Nations, he regretted that the opinion which he had represented—a minority opinion, admittedly, but none the less one that was very strongly held—and which favoured an amendment to the Charter of the United Nations had not been reflected at least in the commentary. Assuming that it was not conceivable at present for the court to be made an organ of the United Nations, that should be the ultimate aim even if it meant an amendment to the Charter. In any event, there would probably be an opportunity to amend the Charter for many other reasons, and the present instance was no less honourable than the others. In his view, along with ICJ, which was an organ of the United Nations, it would be advisable to have an international criminal court which would likewise be an organ of the United Nations, and he did not see why there would be any inequality of treatment as between the two international courts.

29. The CHAIRMAN said that he would ask the secretariat to make the necessary corrections in the French version of the draft statute, in consultation with Mr. Thiam.

30. Mr. PAMBOU-TCHIVOUNDA joined with the previous speakers in praising the spirit of openness that had guided the Working Group at the current session. But, while it was true that the current revised draft statute represented a definite improvement on the text submitted the previous year, it was also true that it might be improved still further in both form and substance.

31. With regard to substance, his remarks would focus on articles 8, 12 and 13 concerning the presidency, Procuracy and Registry of the court, all of which had a collegiate structure. He feared that there might be a "telescoping" of those three organs once they had begun to function. As an example he cited article 8, paragraph 4, which stated that "pre-trial and other procedural functions ... may be exercised by the Presidency in any case where a chamber of the court is not seized of the matter". The question arose, first, in what respect those pre-trial functions were specific and differed from the investigatory functions habitually exercised by the Procuracy; and, secondly, why mention was made of the chambers of the court, in view of the fact that no provision of article 9 stated that the chambers were investigatory bodies or organs. As to the functions of the Registry, the least that could be said was that they were not very clearly defined in article 13. It was necessary to refer to the commentary in order to find some indication of those functions.

32. With regard to form, he had some criticisms to make, particularly concerning articles 15 and 16. He took exception to the use of the words "the person" at the start of article 15, paragraph 3, to refer to a judge. That wording was hardly compatible with the dignity of the function in question and, in his view, it would have been preferable in that paragraph to repeat the words "a judge or other officer of the court" used at the beginning of paragraph 1. Lastly, in article 16, paragraph 3, was it really necessary to specify that "counsel, experts and witnesses before the court shall enjoy the privileges and immunities necessary to the independent exercise of their duties"? That seemed to go without saying and, unless there had been particular reasons for adding those words, he would prefer them to be deleted.

33. Mr. ROSENSTOCK said that he was basically in favour of the text submitted, although he believed that some of the drafting amendments proposed by Mr. Robinson deserved consideration. However, he totally disagreed with the view expressed by Mr. Calero Rodrigues concerning paragraph 7 of article 9, for that paragraph had a fundamental role to play. Specifically, it was important because of the structure of article 45 (Quorum and judgement), in which there was the possibility of a verdict being rendered without the presence of all of the fact-finders throughout the procedure. That was something which could happen and which should not necessarily invalidate a long, complex and expensive trial, but it should be avoided if at all possible. That, then, was the office of article 9, paragraph 7, which must therefore be retained and possibly even strengthened, although at the same time it must be recognized that there might be circumstances in which the court might be unable to apply it, *inter alia*, those referred to by Mr. Calero Rodrigues. That was no doubt the reason why that paragraph did not constitute a peremptory provision.

34. Article 6 was an extremely ingenious, albeit somewhat complex, provision designed to produce a court fully fitted to accomplish its task. Experience suggested that it was difficult even to lay down general criteria. If one went beyond general criteria, requiring of each judge experience and knowledge in both criminal law and international law, as would be ideal, that would be tantamount to preventing a large number of States from putting forward candidates. Article 6 was the solution

closest to the ideal balance between the two types of expertise, since, at the trial level, preeminence was given to criminal law experts, while, at the appellate level, it was experience in international law that was preeminent.

35. Mr. PELLET expressed his admiration for the considerable progress made by the members of the Working Group, its Chairman and the Special Rapporteur. Nevertheless, he continued to have very serious doubts and reservations about some provisions of the draft.

36. Concerning part one, he thought it regrettable that the Working Group had again closed the door to all the possibilities left open at the preceding session with regard to the establishment of the court, since it now envisaged the establishment of the court only by treaty or, not without reservations, by an amendment to the Charter of the United Nations.

37. With regard to the latter course, those reservations were probably realistic, given the political difficulties and technical legal problems that would be encountered if any attempt were made to revise the Charter. Nevertheless, as the fiftieth anniversary of the establishment of the United Nations approached, the revision of the Charter was on the agenda and, if the court could be established as the principal judicial organ of the United Nations in criminal matters, that would be an excellent solution. It was thus regrettable that the Working Group seemed to regard that solution only as a very remote eventuality.

38. The fact remained that, although the Commission was restricting its ambitions, two courses were possible. The first was the establishment of the court by a resolution of the General Assembly. That would be sufficient to legitimize it, but it might be possible to associate the Security Council with that resolution, with a view to increasing the effectiveness of the court and disarming some important political opposition. The second possible course was to establish the court by means of a treaty. That was the choice of the Working Group, a choice that it justified in an extremely summary—not to say cavalier—manner in paragraph (2) of the commentary to article 2. In particular, he did not understand why it would be "undesirable" to establish the court by a resolution of the General Assembly.

39. The Working Group's choice was very specifically reflected in several provisions of the draft and, in particular, in article 2, which provided solely for the conclusion of an agreement between the court and the United Nations. In the first place, that choice was, in his view, intrinsically debatable for positive reasons, since it denoted a curious philosophy. In the commentaries to part three, the Working Group rightly pointed out that the establishment of an international criminal court was intended to make it possible to try the most serious international crimes, those that affected the international community as a whole. Yet that objective would surely be much better ensured if the court was established by a resolution of the General Assembly, which was the most appropriate representative of that community, than if it was established by a treaty which might be ratified by about 60 States. There was no guarantee that those States would be representative of the international community as a whole and it was likely that they would not include those States that did the most to jeopardize the interests of the international community as a whole, those whose nationals most deserved to be brought to trial.

40. The Working Group's choice concerning the means of establishing the court was also debatable for negative reasons, namely, the resultant lack of internal coherence in the draft. As an example, he cited paragraph 2 of article 3, which in effect provided that the Secretary-General could conclude a treaty on behalf of a body other than the United Nations. Much more serious was the case of article 23 (Action by the Security Council), for it was hard to conceive of the Security Council, which was to all intents and purposes the representative of the universal community of States, handing matters over to a body established by a small group of "virtuous" States.

41. Concluding his comments on part one, he said that, if the Working Group were to retain such a restrictive draft, even after some "fine tuning", he would be unable to support it, particularly with regard to article 2, article 3, paragraph 2, and a number of other provisions of part three which he would discuss at the appropriate time.

42. With regard to part two on the composition and administration of the court, he drew attention to a few less important problems.

43. With reference to article 6, he considered that the draft was not as complicated as some claimed and that furthermore it made it possible to maintain a happy balance between the necessary competence of criminal trial experts and experts in international law.

44. Concerning article 12, he would have preferred the functions of investigation and prosecution to have been kept separate, thereby strengthening the guarantees accorded both to those accused and to the victims, but he did not wish to make that an issue of principle. Paragraph 2 was an improvement on the previous draft, in that it provided for some degree of collegiality between the Prosecutor and Deputy Prosecutors, and that was preferable to a sum of individuals where the prosecution of international crimes was concerned. The precedent of the Nürnberg Tribunal could be invoked in support of that collegiality. Paragraph 4 was incomprehensible in both French and English and the commentary thereto provided little in the way of clarification.

45. As for article 13, on the Registry, he was surprised at the provision in paragraph 2 for a five-year term of office or such shorter term as may be decided on.

46. Concerning article 16, he wondered why the Vienna Convention on Diplomatic Relations had been preferred to the Convention on the Privileges and Immunities of the United Nations.

47. With reference to article 17 (Allowances and expenses), he saw no justification for the provision of an annual allowance to the President. It would be preferable to apply the same system to the President as was provided for the judges, depending whether they exercised their functions on a part-time or a full-time basis.

48. Mr. THIAM, speaking as a member of the Working Group, said that he wished to revert to some points on which he had already expressed his disagreement in the Working Group.

49. With regard to article 6, care must be taken not to create a watertight division between different disciplines. Citing the example of ICJ which essentially applied international law, he pointed out that neither of the two judges who had successively been appointed by Senegal had been an expert in international law. Yet both had acquired that expertise.

50. It was only to be expected that there should be distinctions between different disciplines in academic life, but matters were different in the outside world.

51. On article 12, he recalled that, in the Working Group, he had insisted on the need to distinguish between the exercise of the functions of investigation and prosecution, with the essential role of the Prosecutor being to prosecute, whereas the investigation must be entrusted to another judge. Of course, he understood the financial concern that had resulted in no provision being made to establish a specific investigatory organ, but it was regrettable that concerns of that kind should operate to the detriment of the fundamental principles of law.

52. Mr. ARANGIO-RUIZ said that it would not be desirable to reopen the debate on the means of establishing the international criminal court at the current stage of the process. However, since the question had been raised, he wished to reaffirm his support for the Working Group's choice of a treaty as the proper way of establishing an international criminal court. The establishment of an international criminal court by a resolution, whether a resolution of the General Assembly or of the Security Council, or indeed of both bodies, would not be in accordance with international law. Only its establishment by a treaty would constitute a valid procedure. Admittedly, it would give rise to difficulties, the main one being that not all States Members of the United Nations would necessarily be parties to it, but, to begin with, that difficulty was not insurmountable and, furthermore, whatever the extent of the difficulty, the solution was not to be found in the establishment of the court by a resolution of a United Nations body. A treaty was needed.

53. Mr. Sreenivasa RAO said that the draft statute could certainly be improved with regard to its form and even to some points of substance. As a member of the Working Group, he had always endorsed the idea of a permanent court which, while certainly costly, would be a better way of providing the international community with an independent and objective system of criminal justice. The members of the Commission who were not part of the Working Group could draw attention to any matters that might have escaped the Group's notice, but on the whole, in view of the variety of possible options, the text on which the Working Group had finally agreed was the best that could have been achieved within the time-limits set by the Commission. Compared to the statute of the International Tribunal, the text was even innovative, for example, with regard to the composition of the court (arts. 5 and 6). If the Commission spent one more year on the draft statute, doubts or disagreements would still exist. The best course would therefore be to endorse what had been achieved and submit it to Member States so that they could comment on the fundamental problems to which the text gave rise, in particular the question of the relationship between the court and the United Nations. The Working Group had not considered itself competent to decide on that issue and it was thus up to the Member States to do so.

54. Mr. VILLAGRÁN KRAMER said that a distinction should be made between differing viewpoints and drafting problems. As far as the latter were concerned, the observations of the members of the Commission might receive closer attention if they were submitted in writing. As to substance, the distinction between criminal justice and international law actually reflected the problem of balance in the composition of the court. In that connection, account should be taken of the comments by Mr. Robinson and Mr. Thiam but there might well be persons with broad experience in both criminal law and international law and the court might be composed of judges with broad experience in the first field without necessarily being experts in the second, and vice versa.

55. With regard to the relationship of the court to the United Nations, article 2 stipulated that the registrar could enter into agreements establishing that relationship and article 3 provided that the Secretary-General could conclude an agreement with the host State governing the relationship between that State and the court. The exact nature of the relationship was not at all clear from those two provisions. As to whether or not the Security Council could bring cases before the court, the point was that a body that had the power to do more could always do less. The Council could, of course, not exercise judicial functions, but, under Chapter VII of the Charter of the United Nations, it could determine whether there had been an act of aggression, whether an international crime had been committed and whether the perpetrators of that crime should be punished. It would therefore not be going beyond its powers if it brought cases before the court. The matter had been discussed at length by the Working Group and the provisions agreed on in that connection represented the common denominator of the views expressed.

56. Mr. de SARAM said that he generally agreed with the revised draft statute, which was clearly a very great improvement over the text considered at the preceding session. The members of the Working Group and, in particular, its Chairman, who had definitely done more than had been asked of him, were to be congratulated on their efforts. In any event, the draft statute would be reviewed and "fine tuned" by the Working Group in the light of the observations made in plenary and in the Working Group itself.

57. With regard to the substantive issue of whether the court should be established by resolution or by treaty, he was almost entirely in agreement with Mr. Arangio-Ruiz. In the ideal situation where general political will existed and the necessary funds were available, the best course would be to amend the Charter. At the present stage, however, neither of those two conditions had been met. Noteworthy in that connection was the fact that,

according to the Advisory Committee on Administrative and Budgetary Questions (ACABQ), operating costs for the International Tribunal would amount to US$ 32 million per biennium, and that gave some idea of the amounts involved. Moreover, as envisaged by the Working Group, the statute would be annexed to a treaty concluded between States parties establishing the court. Such a treaty would enter into force only after a large number of States, from all regions of the world, had acceded to it. The 60 ratifications or accessions which had been required for the United Nations Convention on the Law of the Sea were too low in number for the statute.

58. In respect of the other substantive questions raised during the debate, the preamble should in fact be an article dealing with the objectives of the court and the future treaty should have its own preamble. With regard to articles 2 and 3, it would be best to omit any reference to the registrar or the Secretary-General and simply to indicate that agreements would be concluded. In terms of the composition of the court, he agreed entirely with Mr. Calero Rodrigues that reference should be made to the judges at the start and that the articles of part two should be reorganized. The provisions of article 6 were somewhat complicated, but not without reason. The Working Group had given much thought to the question of a fair balance between the criterion of criminal trial experience and that of competence in international law and the wording it had chosen seemed the most appropriate.

59. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that nearly all the observations made during the debate could be readily taken into account by the Working Group. Several observations by Mr. Robinson, in particular, could be incorporated into the various articles. Like Mr. de Saram, he personally was of the view that the preamble should actually be an article of the statute. It would likewise be necessary to clarify the question of who would conclude the agreements referred to in articles 2 and 3. Some points could nevertheless be clarified immediately.

60. Mr. Pambou-Tchivounda had asked whether article 8, paragraph 4, gave the court prosecutorial functions. That was not the case because the provision in question referred to those articles of the statute that required that the court as a whole should achieve certain purposes. In any case involving prosecutorial functions, the Procuracy or the Prosecutor was always mentioned explicitly. Under articles 24, 33, 35 and 43, for instance, the court had certain functions and obligations which would be exercised by the presidency until a chamber had been established. The point had been to avoid repetition in the text and nothing sinister had been intended. The problem of alternate judges, raised by Mr. Rosenstock, in article 9, paragraph 7, could in fact become highly relevant in practice, since trials for serious crimes could continue for many months. There was nothing to prevent a judge sitting in one chamber from acting as an alternate judge in another as long as the hearings were coordinated. That provision was important and should be retained.

61. In respect of the Procuracy, he agreed fully with those who maintained that the Prosecutor and the Deputy Prosecutor must not be nationals of the same State. It would also be appropriate to replace the expression "on a stand-by basis" with more precise wording. The Working Group had given careful thought to the distinction between investigation and prosecution that existed under certain legal systems. All things considered, it had decided not to retain that distinction, for two reasons. First, all the matters brought before the court would have already been investigated and the complaint would be accompanied by all the elements that the complainant State could bring to bear. Secondly, as a first attempt was being made to establish a permanent criminal court, the Working Group had preferred to set up as flexible a mechanism as possible with as few functionaries as could be compatible with due process. Mr. Robinson's comments on article 15 and those by Mr. Pambou-Tchivounda on paragraph 3 of that same article were completely justified. The wording of article 16, paragraph 3, was based on that of the Charter of the United Nations. Lastly, the question of the annual allowance for the President should be re-examined.

62. Two issues of principle had emerged from the debate. The first concerned the relationship between the court and the United Nations. The views expressed by Mr. Thiam on that matter represented the best possible solution for many members of the Commission and it was to be hoped that those views would be accurately reflected in the commentaries. Mention of them had already been made in the preliminary note to the draft commentaries and, in more detail, in paragraphs (1) to (5) of the draft commentary to article 2. With regard to the exercise by the organs of the United Nations of the powers referred to in the statute of the court, notwithstanding the problem of the drafting of article 3, the Working Group had used the precedent of the agreement between IAEA and the United Nations, wherein the latter exercised its powers on behalf of the former even though all the members of one were not necessarily members of the other. Like Mr. Calero Rodrigues, he would have preferred the useful and objective document prepared by the secretariat (ILC(XLVI)/ICC/WP.2) to be annexed to the report of the Working Group, but one of its members had objected strongly.

63. The Working Group had been of the view that the court should have the power to operate in conjunction with the United Nations, but it had not been in favour of establishing the court by means of a resolution. Many members had considered that it would be undesirable for the court to be established as a result of decisions taken by the executive branch of the countries voting for the resolution in question. The advantage of a treaty was that it could not enter into force until constitutional requirements had been met, whatever the constitutional system concerned. Moreover, either resolutions were recommendations to States, which would not be satisfactory in the case of the court, or they were binding, in which case the relationship between the State which was the addressee of the resolution and the United Nations would come under Chapter VII of the Charter, which would rarely be the case. The Working Group was entirely willing to give greater attention in the commentary to the views of those advocating the establishment

of the court exclusively through a resolution, but that did not change the fact that opposition to that solution had also been expressed in the Sixth Committee, where not one of the Member States expressing their views had been in favour. The guiding principle of the proposed statute was to set up a more solid constitutional foundation than an ad hoc tribunal. The other relevant point in that connection was that the subordination of the court to the Security Council or to the General Assembly would allow those two organs to dismantle at any time the court they had established, and that was highly undesirable for a criminal justice system.

64. The second question of principle concerned the qualification of judges. The provisions adopted in that respect in article 6 were perhaps complex, but certainly not excessively so. Their purpose was to reassure the many Member States which had expressed very strong reservations in the Sixth Committee about the idea of a criminal court functioning without a substantial contribution from judges having experience of the administration of criminal justice. In that respect, he agreed entirely with Mr. Pellet.

The meeting rose at 5.50 p.m.

2358th MEETING

Tuesday, 28 June 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Cooperation with other bodies (*continued*)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN welcomed Mr. Siqueiros, Observer for the Inter-American Juridical Committee, and invited him to address the Commission.

2. Mr. SIQUEIROS (Observer for the Inter-American Juridical Committee) said that the attendance of an observer from the Inter-American Juridical Committee (IAJC) at the Commission's session was in keeping with a pleasant tradition which, together with the regular visits made by a representative from the Commission to IAJC headquarters at Rio de Janeiro, Brazil, promoted ties of understanding between the two bodies. Thus it was that Mr. Calero Rodrigues' recent visit had provided IAJC with an opportunity to learn about the many drafts and new topics under consideration. He himself had also gained a deeper insight, thanks to the guidance and advice of his compatriot, Mr. Szekely, into the Commission's agenda and its methods for dealing with the various issues referred to it. He congratulated the Commission on its accomplishments and expressed the hope that its work would be crowned with success.

3. One of the duties of IAJC under its statute was to enter into cooperation with national and international bodies and organizations engaged in the development and codification of international law and in the study, teaching and dissemination of, and research into, legal matters of international interest. In August 1993, IAJC had sponsored a meeting with legal advisers from Ministries of Foreign Affairs throughout the region. The purpose of the meeting had been to stimulate an exchange of views on topical international legal issues of interest to the Foreign Ministries of the countries of the American continent. It had proved to be a fruitful initiative, for the meeting of diplomatic advisers and members of IAJC had provided a forum for the identification of issues of crucial concern at the regional and universal levels. The discussions on representative democracy in the context of the inter-American system, human rights violations by unofficial groups, drug trafficking and terrorism, all of which posed a threat to security throughout the continent, deserved special mention.

4. The history of IAJC dated back to the Third International Conference of American States, held in 1906, which had set up a special Commission of jurists.[1] During the first stage of its activities, from 1912 to 1939, the Committee had approved 12 drafts on public international law as well as what was to become the Bustamente Code.[2] The second phase had commenced in 1942 when it had assumed institutional form, taking the name by which it was now known, with headquarters in what at the time had been the capital of Brazil. Later on, with the adoption, within the framework of OAS, of the Protocol of Buenos Aires and with the reform of its constituent instrument, the Inter-American Council of Jurists had been dissolved and its main functions had passed to IAJC, which had thus been elevated to the status of a principal organ of OAS. Its basic duties were to act as an advisory body for legal matters, to promote the progressive development and codification of international law, to study the legal issues involved in the integration of developing countries in the continent and, where appropriate, to consider the possibility of standardizing their legislation.

5. As to the legal dimensions of integration, IAJC already had the benefit of comparative studies of the various subregional systems concerning methods for the settlement of disputes. The studies analysed the pro-

* Resumed from the 2350th meeting.

[1] See *The International Conferences of American States, 1889-1928*, New York, Carnegie Endowment for International Peace, 1931.

[2] Official name of the Code of Private International Law contained in the Convention on Private International Law.