Document:-
A/CN.4/SR.2361

Summary record of the 2361st meeting

Topic:
<multiple topics>

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

Downloaded from the web site of the International Law Commission
(http://www.un.org/law/ilc/index.htm)

Copyright © United Nations

of extreme importance, should be reflected in the report of the Commission, as was the usual practice.

The meeting rose at 4.25 p.m.

2361st MEETING

Tuesday, 5 July 1994, at 10.20 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, 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. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Yamada, Mr. Yankov.

Cooperation with other bodies (*concluded*)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE FOR LEGAL COOPERATION

1. The CHAIRMAN welcomed Mr. Hans Nilsson, observer for the European Committee for Legal Cooperation, and invited him to address the Commission.

2. Mr. NILSSON (Observer for the European Committee for Legal Cooperation) thanked the Commission for inviting him to attend one of its meetings and to present a report on the most recent work of the Council of Europe in fields of interest to the Commission. He welcomed what seemed to be becoming a regular practice, particularly now that the Council of Europe was kept regularly informed of the work of the Commission, *inter alia*, through the excellent report presented by Mr. Eiriksson to the European Committee for Legal Cooperation.

3. He represented the secretariat of the European Committee for Legal Cooperation, but he was also involved with the Committee of Legal Advisers on Public International Law, on which Mr. Eiriksson represented his country. That Committee comprised 32 members, together with a number of observers from European and non-European countries that were not yet full members of the Council of Europe. Foremost among the problems considered recently by the Committee was the problem of State succession, which had become particularly important in the Council of Europe in the last few years, for, in May 1989, the Council had had only 23 member States, while that number had risen to 32 following the admission of nine countries of central and eastern Europe. The Council of Europe had also received nine other applications for admission from countries such as the Russian Federation, Ukraine and Albania.

4. The Committee of Legal Advisers on Public International Law had also considered the question of the creation of an international tribunal to prosecute crimes committed in the former Yugoslavia. Other Council of Europe bodies had also studied that question, among them the European Committee on Crime Problems, which had held an exchange of views of experts in October 1993 on the repercussions on international legal cooperation and domestic law of the creation of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.[1] One of the issues examined had been the question of the links between human rights protection and the creation of the International Tribunal. According to one view, States were under an obligation to relinquish their jurisdiction in favour of the International Tribunal, and were therefore no longer in a position to comply with the Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights. Article 103 of the Charter of the United Nations would corroborate that view. According to another view, defended by the majority of experts, while States were under an obligation to cooperate with the International Tribunal, such cooperation was subject to respect for other obligations under international law, namely, obligations at the same level or at a higher level with regard to the principles, including the humanitarian principles, in the name of which Security Council resolution 827 (1993) had been adopted. International human rights law thus had precedence over the law created by States, including law deriving from procedures set up by States through international treaties such as the Charter. Therefore, States could derogate from their obligations under international human rights instruments, including the International Covenant on Civil and Political Rights and the European Convention on Human Rights, only to the extent strictly necessary for complying with the humanitarian exigencies of the situation on the basis of which Council resolution 827 (1993) had been adopted. He would transmit an informal note concerning that exchange of views to the secretariat of the Commission.

5. Other issues considered by the Committee of Legal Advisers on Public International Law and in the broader framework of the Council of Europe included the creation of a permanent court. The Parliamentary Assembly of the Council of Europe had recently adopted a recommendation in which it had deemed it desirable to set up a court and had proposed, with a view to expediting that process, that a European Chamber should first be established. That recommendation had been communicated to the Committee of Ministers of the Council of Europe, which had transmitted it to the Committee of Legal

---

* Resumed from the 2358th meeting.

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

Advisers on Public International Law and to the European Committee on Crime Problems. Each of those Committees had drafted an opinion on the basis of which the Committee of Ministers would formulate a reply to the Parliamentary Assembly. Without wishing to anticipate the reply to be given by the Committee of Ministers, he indicated that the opinions of the two Committees were not strongly in favour of the idea put forward by the Parliamentary Assembly of the Council of Europe. Both Committees considered that it was for the international community as such to take responsibility for creating a permanent court.

6. The Vienna Summit of Heads of State and Government of the Council of Europe member States, held on 8 and 9 October 1993, had been a historic event. On that occasion, the first of its kind, the 32 Heads of State and Government attending the Summit had affirmed the responsibility of the Council of Europe regarding "democratic security" in Europe and they had recognized the predominant role of the Council *vis-à-vis* the newly established democracies in central and eastern Europe.

7. One of the very concrete results of the Vienna Summit had been the creation, by means of an additional protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, of a single European court of human rights. The Protocol had been signed by 31 of the 32 member States and between 18 months and 2 years would now elapse before the effective establishment of the court, which, by handing down judgements that would be binding on Council of Europe member States, would guarantee the exercise of human rights.

8. Another important result of the Vienna Summit had been the decision taken by the Heads of States and Government to draft a convention on minorities.

9. In the same area, it had also been decided to establish a new additional protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the cultural rights of minorities. Preparation of that protocol was under way.

10. Another very tangible result of the Vienna Summit had been the creation of a commission against racism, xenophobia and intolerance, which had already begun its work and had set up a legal working group to study the drafting of international instruments in that field.

11. Among the work currently under way in the European Committee for Legal Cooperation, he cited a draft European convention on nationality. The Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality had existed since 1963, but the draft convention was aimed at incorporating new trends in that sphere. It would deal, *inter alia*, with the consequences of multiple nationality, the rights and duties of citizens, acquisition, loss and recovery of nationality and would include provisions concerning nationality after a State had ceased to exist or following the transfer of sovereignty over a territory. Initially, the discussions were taking place in a working group, but when further progress had been made on the draft, the European Committee for Legal Cooperation would welcome the opportunity for co-operation with the Commission or with some of its members.

12. In its capacity as a steering committee, the European Committee for Legal Cooperation had also approved a draft recommendation on the independence, efficiency and role of judges, which was to go before the Committee of Ministers for final approval and adoption. That recommendation was particularly important for the countries of central and eastern Europe, which were currently recasting their legislation, including their constitutions, and were thus very mindful of the guiding principles set forth in the Council of Europe's recommendations, which they regarded as European standards which they were obliged to respect.

13. The European Committee on Crime Problems had recently concerned itself with the implementation of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. A first step had been the adoption of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, which was a classical instrument of legal cooperation, but one which also contained some interesting provisions concerning damages. For instance, when legal action on liability for damages had been initiated by a person, the parties concerned were to consider consulting each other, where appropriate, to determine how to apportion any sum of damages due. The Convention also provided for an obligation to inform when a party to the Convention had become the subject of a litigation for damages.

14. With regard to the Convention, it was interesting to note that, on 9 September 1991, the Committee of Ministers had adopted Recommendation No. R (91) 12 concerning the setting up and functioning of arbitral tribunals under that Convention.

15. The European Committee on Crime Problems had also recently approved a draft agreement on illicit traffic by sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The draft agreement dealt with areas closely related to State sovereignty, the international law of the sea, and problems of extradition. It had been adopted by the European Committee on Crime Problems at the end of June 1994 and was to be submitted to the Committee of Ministers. The general principle of the agreement was that, when a State referred to as the "intervening State" had information giving reason to believe that a vessel on the high seas was engaged in trafficking in narcotic drugs, it could intervene, provided that it first requested authorization from the flag State, which must, as far as was possible, communicate its decision within four hours of receipt of the request. Having received the authorization of the flag State, the intervening State would probably compel the vessel to enter one of its ports, where a search would be carried out. In the event of narcotic drugs being discovered, the intervening State would be able to prosecute the perpetrators of the offence, unless the flag State decided to exercise its "preferential jurisdiction", meaning its right to exercise its jurisdiction on a primary basis to the exclusion of the concurrent jurisdiction conferred on the intervening State by the draft agreement.

16. The draft agreement was extremely detailed, comprising about 40 articles, and was accompanied by a very full explanatory report.

17. On the question of damages, the draft agreement constituted a substantial advance with regard to the protection of individual rights in the field of legal cooperation in criminal matters, in that it provided that, if a natural or legal person suffered loss, damage or injury as a result of negligence or some other fault attributable to the intervening State, that State was liable to pay compensation.

18. It also provided that, where the action was taken in a manner which was not justified by the terms of the agreement, the intervening State was liable to pay compensation for any resulting loss, damage or injury.

19. Lastly, it was interesting to note that the draft agreement included an article on settlement of disputes and that it had an annex dealing specifically with the arrangements for recourse to arbitration.

20. With regard to the work of the Parliamentary Assembly of the Council of Europe, he referred in particular to its work on reservations made by member States to Council of Europe conventions.

21. In 1993, the Assembly had drawn up Recommendation No. 1223 (1993) on that question, in which it had recognized that, on acceding to an international convention, States were entitled, according to the rules of international law, to make certain reservations and that that possibility simplified the accession of States to certain Council of Europe conventions. It had nevertheless emphasized that the use of reservations also had major drawbacks. First, the unity and coherence of the convention might be impaired. The legal machinery that it instituted might be weakened and fall short of the goal of harmonizing and unifying the relevant law. As States were no longer bound by the same international undertakings, reservations interfered with the equality which should prevail between contracting parties and seriously complicated their relations. In addition, it was often difficult to determine the obligations of each State. The Parliamentary Assembly had thus considered it advisable and even necessary that the number of reservations made in respect of Council of Europe conventions should be considerably reduced. It had accordingly recommended that, with regard to reservations already made and conventions already concluded, the Committee of Ministers should invite member States to make a careful review of their reservations, withdraw them as far as possible and make a reasoned report to the Secretary-General of the Council of Europe if certain reservations were maintained.

22. The Committee of Ministers had already replied to that recommendation in a communication adopted on 17 February 1994 in which it had indicated that it had invited member States to withdraw their reservations, but without great success. The Committee of Ministers had also recalled that, according to the rules of general public international law and the relevant treaty provisions, States had the right to limit their respective international obligations by formulating reservations to certain treaty provisions. It therefore did not believe that it was appropriate to request Council of Europe member States to make reasoned reports to the Secretary-General when certain reservations were maintained.

23. In its Recommendation 1223 (1993), the Parliamentary Assembly had also invited the Committee of Ministers to authorize the steering committees of the Council of Europe to examine the question of reservations made in respect of each convention in their sphere of competence. The Committee of Ministers had found it much easier to endorse that proposal, which was, moreover, already applied by most of the steering committees, including the European Committee on Legal Cooperation.

24. With regard to Council of Europe conventions which might be concluded in future, the Parliamentary Assembly had suggested that the validity of reservations should be limited to a maximum period of 10 years. That proposal had not been endorsed by the Committee of Ministers, which had considered that such provisions did not facilitate the application of conventions, since they were not respected in practice.

25. In conclusion, he cited the example of a Council of Europe convention which contained a clause under which reservations could be formulated, but which also provided that, if, at the end of a 10-year period, a State which had formulated a reservation failed to inform the Secretary-General of its desire to maintain it, that reservation would automatically be annulled. In one case, because of an administrative error, a State had failed to renew its reservations by the 10-year deadline, which had expired in May 1991. When the ambassador of that country had, in a letter dated May 1994, declared that his Government wished to maintain its reservations, while at the same time limiting their scope, the Secretary-General had had to contact all the Contracting Parties—which he had done on 10 June 1994—and ask them whether they would accept a late renewal of the reservations. In his letter to the Contracting Parties, the Secretary-General had stated that, if no objection had been received within 90 days of the date of notification, the reservations would be considered to be tacitly accepted and would take effect retroactively as of May 1991, the date on which they should have been renewed.

26. Mr. EIRIKSSON said that he had officially represented the Commission at the meeting of the European Committee on Legal Cooperation and had also participated, in other capacities, in the meetings of the Committee of Legal Advisers on Public International Law. The Commission's work figured prominently on the Committee's agenda for its last meeting of 1993 and its members continued to promote the Commission's efforts when asked to advise their Governments on positions to take in the Sixth Committee with regard to the report of the Commission. At the meeting of the European Committee on Legal Cooperation, he had presented a report on the work of the Commission at its preceding session and had noted with satisfaction that the Committee members were following the Commission's work with interest and wished to be kept informed of its progress, in particular, in respect of the draft statute for an international criminal court. He himself had had the opportunity to learn first-hand about the legal activities of the Coun-

cil of Europe. He had been encouraged by the Council's emphasis on legal cooperation between member States. The Council's work on nationality would certainly be of interest to the Commission when it discussed the topic of State succession and its effect on the nationality of natural and legal persons. He thanked Mr. Nilsson and hoped that cooperation with the legal bodies of the Council of Europe would continue.

27. The CHAIRMAN, speaking on behalf of the members of the various regional groups and the Commission as a whole, paid tribute to the excellent work the European Committee on Legal Cooperation had done on various international law issues. He was thinking in particular of the Committee's work on the issues of nationality and reservations to treaties, which were also on the Commission's agenda. The Committee's desire to coordinate its work with that of the Commission was very much appreciated and thought should be given to how such cooperation could be realized in practical terms. He requested Mr. Nilsson to convey to the European Committee on Legal Cooperation his best wishes for its success and his conviction that the long-standing ties of cooperation and friendship between the two bodies would develop even further in future.

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

28. Mr. YAMADA said that, on the whole, he endorsed the basic orientation and principal elements of part three, on which he had not yet commented. He noted with satisfaction that in articles 20 (Jurisdiction of the Court in respect of specified crimes) and 21 (Preconditions to the exercise of jurisdiction) the jurisdiction of the court derived essentially from the consent of the States concerned; that was consistent with the idea of jurisdiction "yielded" to the court of which he was in favour. He nevertheless wondered, why the new concept of the court's jurisdiction applied only to the crime of genocide. Genocide did, of course, have a special place in general international law, but all the crimes listed in article 20, paragraph 1, overlapped to some extent and had more or less the same degree of gravity. He hoped that that would not prevent States from acceding to the statute. He also hoped that "grave breaches of the laws of war" and "crimes against humanity" (art. 20, paras. 1 (*c*) and 1 (*d*)) would be defined in more detail in the draft Code of Crimes against the Peace and Security of Mankind. Article 20, paragraph 2, limited the court's jurisdiction and excluded crimes which were not considered to constitute exceptionally serious crimes of international concern. That safeguard was necessary as there was no longer any distinction between jurisdiction in respect of crimes of international concern and jurisdiction in respect of crimes established under treaties. The Commission must give further thought to that provision limiting the court's jurisdiction so that a clearer threshold could be formulated.

29. The system for accepting the jurisdiction of the court ("opting in"), as provided for in article 22 (Acceptance of the jurisdiction of the Court for the purposes of article 21), was sound. In respect of article 23 (Action by the Security Council), he endorsed the provision under which a determination of aggression by the Security Council was a precondition for bringing a complaint of an act of aggression, but he failed to see the logic of paragraph 3, which might in fact link legal proceedings to political measures adopted by the Council.

30. With regard to part five of the statute, he was in favour of the inclusion of a reference to national law in articles 33 (Applicable law) and 47 (Applicable penalties). National law should fill in any gaps left by international criminal law, but the wording of article 33, subparagraph (*c*), was too vague and might violate the principle of *nullum crimen sine lege* embodied in article 39. The wording should correspond to that of article 47, paragraph 2. One possible improvement would be to make applicable law the basis for jurisdiction granted to the court by States and to specify in article 33, subparagraph (*c*), that national law was in that case the national law of those States referred to in article 21, paragraph 1 (*b*).

31. In part seven, the concept of a serious crime, as contained in article 53 (Transfer of an accused to the Court), paragraph 5, should be better defined—perhaps in the commentary—in order to clarify any connections with the exceptionally serious crimes of international concern referred to in article 20, paragraph 2. In respect of the annex, the list of treaties it contained was exhaustive, and that was good, but mention should also be made of how future treaties would be dealt with. One solution would be to amend the annex as necessary, but it would be more practical if future treaties contained a provision under which States could accept the jurisdiction of the court. The commentary could provide guidelines in that regard.

32. Mr. ROBINSON said that the wording of article 25 (Complaint) should be brought into line with that of article 2, which stipulated that the States parties to the statute would be referred to throughout the text as "States parties", as distinct from the States parties to the statute which accepted the court's jurisdiction in respect of a specific crime. As provided for in article 26 (Investigation of alleged crimes), paragraph 4, if, upon investigation, the prosecutor concluded that the grounds were insufficient, he could decide not to prosecute. Under article 27 (Commencement of prosecution), paragraph 1, if, upon investigation, the prosecutor concluded that there was a *prima facie* case, he would file an indictment. While, in both cases, the prosecutor was authorized to make the decision following the investigation, the criterion on which he would decide to prosecute was more

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

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

[4] Ibid.

restrictive than that on which he would decide not to do so. Otherwise, it should be made clear that the expressions "sufficient basis" and "*prima facie* case" had exactly the same meaning. Along the same lines, article 26, paragraph 5, could be improved by adding the words "in accordance with paragraph 1 of the present article" after the words "not to initiate an investigation" and the words "in accordance with paragraph 1 of article 27" after the words "or file an indictment".

33. As to article 27 itself, if the definition of a "*prima facie* case" was to be applicable, it should be included in the article and not in the commentary. In any event, he would prefer a *prima facie* case to be defined as evidence which would be a sufficient basis to convict the accused on a particular charge. According to article 27, paragraph 2, the president, after examining the indictment, would decide whether a *prima facie* case existed in respect of the crime, and that was, in his view, not sufficient. The president should in fact be making his determination on the basis of all the available information, including a concise statement of the allegations of fact and of the crime or crimes with which the suspect was charged, as referred to in paragraph 1 of the article. In addition to the question whether the president should base his decision on the indictment or on the indictment and on the concise statement established by the prosecutor, it might be asked whether the concise statement might not be influenced by the individual bias of the prosecutor in terms of the weight to be given to the various elements of evidence and to other factors. The concise statement was practical because it resulted in a speedy procedure, saving time and organization. At the same time, might it not be better for the president to have available all the information gathered by the prosecutor? Lastly, paragraph 2 should make clear what would happen in the event that the president did not confirm the indictment.

34. With regard to article 28 (Arrest), the concept of "probable cause" referred to in paragraph 1 (*a*) was not common to all legal systems and should therefore be explained. The concept of "special circumstances" referred to in paragraph 3 (*b*) was explained in paragraph 3 of the commentary (ILC(XLVI)/ICC/WP.3/Add.1) by two examples, but it seemed to give the president too much discretionary power. Perhaps, in addition to the two examples provided in the commentary, other circumstances could be included in the text which would provide the necessary certainty in that regard.

35. Article 29 (Pre-trial detention or release) gave rise to two problems. First, what would happen to the person arrested if the local judicial officer determined that the warrant had not been duly served and that the rights of the accused had not been respected? Was the person then simply released? Secondly, why did the judicial officer have to act in accordance with the "procedures applicable in that State" and not with the procedures and laws, and why, in any case, did the judicial officer not have to act in accordance with the procedures relating to the rights of the accused as included in the statute of the court? The reference to the procedures applicable in the State where the arrest occurred was explained in the commentary by reference to article 9, paragraph 3, of the International Covenant on Civil and Political Rights, according to which anyone arrested should be brought promptly before a judicial officer. However, that instrument had been drafted with a national court in mind, not an international court, and the meaning of the word "promptly" could not be the same in the two situations. It might thus be asked whether, in the "international" context of the court, a delay of two to three days might not be acceptable so that a judge of the court could be sent to the territory where the arrest had taken place and exercise on that territory the functions of a local judicial officer. Similarly, while article 29, paragraph 3, was based on article 9, paragraph 5, of the Covenant, which provided for compensation in the case of unlawful arrest or detention, it was difficult to imagine who would provide the compensation or what provisions had been made under the statute to ensure the enforcement of a decision to award compensation.

36. Article 31 (Designation of persons to assist in a prosecution) was useful in that it provided for the designation of persons to assist the prosecutor, but paragraph 3, which made the terms and conditions of employment of such persons subject to the approval of the presidency, might prompt the question whether the prosecutor's independence would not suffer by reason of the requirement for such approval. Why should such persons not be treated in the same way as those appointed under article 12 (The Procuracy), paragraph 2?

37. He was not sure of the meaning of paragraph 2 of article 32 (Place of trial), which provided that the court might exercise its jurisdiction on the territory of any State. Did that mean merely that the court could hold a trial in places other than its seat or did the term "exercise its jurisdiction" have a broader meaning?

38. Subparagraph (*c*) of article 33 seemed pointless. In all the cases in which the court was required to apply a rule of national law, it would be because the statute so provided, as in article 59 (Pardon, parole and commutation of sentences), or pursuant to applicable treaties or the rules and principles of general international law; those possibilities were already covered in subparagraphs (*a*) and (*b*) of article 33, respectively.

39. Article 35 (Discretion of the Court not to exercise jurisdiction) had apparently been drafted in response to comments made in the Sixth Committee of the General Assembly at its forty-eighth session in 1993, but he was not sure that the provision solved the problems raised at that time. Subparagraphs (*a*), (*b*) and (*c*) might in fact create some confusion. Subparagraph (*b*), for example, stated that the court could decline to exercise its jurisdiction if the crime in question was under investigation by a State having jurisdiction over the crime. In most of the cases brought before the court, the crime would already have been investigated. It might often happen in practice that a State, especially a small State, might have investigated a crime and concluded for one reason or another that it could not cope with the situation and that it would like to bring the case before the international criminal court. As article 35 was worded at present, a State could not do so.

40. Subparagraph (*c*) also allowed the court to decline to exercise its jurisdiction if it thought that the crime was not of sufficient gravity. The criterion of gravity was al-

ready a defining element for many crimes, in particular the ones referred to in article 20, paragraph 2. That element constituted a necessary condition and its absence might well be invoked under article 34 (Challenges to jurisdiction).

41. The concerns stated in the Sixth Committee could be met by restricting article 35 to its present introductory paragraph, which would end with the word "preamble", after the deletion of the words "if it is satisfied".

42. Mr. BENNOUNA said that he had some reservation about paragraphs 1 and 3 of article 23, an essential provision of the draft articles with respect to the independence of the court. Despite what was said in the commentary (ILC(XLVI)/ICC/WP.3), paragraph 1 did prompt doubts. The Security Council had indeed recently established an ad hoc criminal court, but for a specific case and for a limited period. The aim in paragraph 1 seemed to be to make exceptions the rule. That was worrying, given the present membership of the Council and its mode of operation.

43. Paragraph 3 was even more problematical in that it prohibited the court from commencing prosecutions without the approval of the Security Council when the Council had determined the existence of a threat to the peace. The notion of threat was a very broad one, especially in the Council's recent practice, and such a provision might paralyse the future court. Article 23 ought in fact to contain only paragraph 2, with a very clear definition of the competence of the Council with respect to an act of aggression. In addition, the procedural relations between the court and the United Nations might be spelled out more clearly in an agreement between the Organization and the States parties to the statute.

44. He endorsed the comments made by Mr. Robinson on article 31, paragraph 3, and article 32, paragraph 2. On the latter point, he also thought that the place of trial should always be the seat of the court: the independence of the court was at issue because, otherwise, it might be hostage to public opinion. He also agreed with Mr. Robinson concerning article 33: the court applied national law to the extent that either the statute or treaties or the rules and principles of general international law so required.

45. In article 22, the Commission had adopted the principle of a declaration, but there might be cases in which the court's jurisdiction would be recognized by virtue of a bilateral or multilateral treaty. It might be useful to provide expressly for that possibility.

46. Article 35 was ambiguous, since it was not clear that it was concerned with jurisdiction, admissibility or the appropriateness of prosecutions. In any event, the article should be reconsidered.

47. Mr. ROSENSTOCK, referring to article 27, paragraph 3, said that he had doubts about authorizing the presidency to amend the indictment of its own motion. The independence of the prosecutor was of vital importance and the provision should therefore be revised.

48. The arguments advanced against article 35, in particular by Mr. Robinson, were hardly convincing. The article had been drafted in response to the serious concerns which had been expressed, and the provision was a very pragmatic one without which fewer States might accede to the statute. In subparagraph (*b*) in particular, the conjunction "and" made all the difference: the mere fact that a crime was being investigated did not bind the court in any way at all.

49. Article 42 (*Non bis in idem*) was perhaps not sufficiently clear with regard to the point raised in paragraph 3 of the commentary, meaning that the case must have been the subject of a determination on the merits.

50. Turning to article 44 (Evidence), paragraph 1, he said that the oath should not be the customary one taken in judicial proceedings in the State of which the witness was a national, but, rather, an oath peculiar to the court in which the witness was being heard. The question could certainly be dealt with in the court's rules of procedure, but also in the statute itself, for example, by means of the formula "to tell the truth, the whole truth and nothing but the truth". The reference to the customary procedure in the State of which the witness was a national might create problems, if only because some States did not provide for an oath. In the case of perjury, the solution of leaving it to the competent domestic courts to prosecute persons committing perjury before the international court was hardly satisfactory. The court should at least be able, like any criminal court, to punish perjurers for contempt of court. That provision must therefore also be revised.

51. The commentary should make it clear that article 45 (Quorum and judgement), paragraph 3 (*b*), concerned murder or other crimes which, although particularly heinous, were not covered by article 20 on the jurisdiction of the court. As it stood, the commentary seemed odd and irrelevant.

52. It might be asked whether article 52 (Provisional measures) created an obligation or merely an option. In the case of an obligation, the article should perhaps be made subject to the limits set out in article 51 (Cooperation and judicial assistance), paragraph 3. If it was an option, the commentary should say so more clearly.

53. Article 53, paragraph 4, seemed totally incompatible with the residual nature of the jurisdiction of the court and might impose on States obligations incompatible with their obligations towards States not parties to the statute. The paragraph should therefore be deleted or made much more flexible.

54. Mr. HE, referring to article 37 (Trial in the presence of the accused), which provided for the possibility of trying an accused in his absence, said that a well-established principle of international law prohibited trials in the absence of the accused, not only because such trials raised serious problems of impartiality and respect for the rights of the accused as set out in the International Covenant on Civil and Political Rights, but also because sentences handed down after such trials, since they could not be enforced, would undermine the authority and therefore the credibility of the international criminal court in the eyes of the international community. Moreover, the criminal law of many countries prohibited trying an accused in his absence, and it would be

difficult for such countries to accede to the statute if it authorized such trials. That possibility should therefore be excluded.

55. Article 42 allowed the court, subject to certain conditions, to retry a person already tried by another court. The provision ought to be limited to States which had acceded to the statute of the court and had also accepted its jurisdiction. The point must be stated clearly, either in the article itself or in the commentary, in order to prevent the provisions of the article affecting the rights of States which, without being parties to the statute of the court, had accepted its jurisdiction.

56. Mr. RAZAFINDRALAMBO said that, as a member of the Working Group on a draft statute for an international criminal court, he had generally supported the solutions adopted, except perhaps with regard to the permanent status of the court and the independence of judges. He would therefore confine his comments to a question of form which he thought was very important and which might have an impact on the substance.

57. The problem was with the title of the chamber vested with the powers to review the decisions of the trial chamber: in the French version of the text, it had been called *chambre des recours*, a title which appeared incorrect.

58. In the first place, the term *recours* did not cover the application of the principle of two-tier jurisdiction. The so-called appeals chamber would in fact rule as a traditional court of appeal, since, pursuant to article 49 (Proceedings on appeal), paragraph 1, it had "all the powers of the Trial Chamber", and that meant that it was both judge of the facts and judge of law. But it was then difficult to say that it could make orders *en cassation*, as in the French system, since the French court of appeal ruled only on law and not on the facts.

59. Accordingly, he did not understand why the appeals court could not be called *chambre d'appel*, the term which was, moreover, used in article 25 of the statute of the International Tribunal.[5]

60. Mr. THIAM, speaking as a member of the Working Group and replying to Mr. Razafindralambo, said that, since article 49, paragraph 2 (*b*) stated that, if the appeal was brought by the prosecutor [the appeals chamber] might order a new trial, it was clear that the appeals chamber had a function of referral. In the case covered by the subparagraph, it could not reverse or amend the decision of the trial chamber, but merely referred the case to another court, which was precisely what a court of appeal did. The appeals chamber thus had two functions: a function of *appel*, when the appeal was brought by the convicted person (when it could reverse or amend the decision); and a function of *cassation*, when the appeal was brought by the prosecutor. The title *chambre des recours* had been adopted in an effort to reconcile different legal systems.

61. Mr. Robinson had questioned the usefulness of subparagraph (*c*) of article 33, which referred to rules of national law. National law could not in fact be invoked independently of the statute, a treaty, or the rules of general international law. The provision contained in subparagraph (*c*) was indeed useful, since a further reference was made to national law in article 47, paragraph 2, concerning applicable penalties. It should also be noted that most of the draft statutes which had been elaborated provided expressly that the court could apply national law.

62. With regard to the wording of article 33, subparagraph (*c*), on the other hand, he agreed with Mr. Bennouna's criticisms of the word *faisable*. He had himself proposed in the Working Group that the first part of the phrase should be replaced by the words *le cas échéant*.

63. His last comment concerned article 35. In his view, the article was inappropriate, as no court could have "discretionary powers", except in respect of its own internal functioning. It was inconceivable for the court to have a discretionary power, as that would mean that no one would have a remedy against it, neither the accused nor even the State that brought a complaint against an individual and met with a judicial decision that the case could not be pleaded. The article was poorly worded and should be reformulated or deleted.

64. Mr. ROBINSON said that he was not convinced by Mr. Thiam's arguments in favour of the retention of article 33, subparagraph (*c*). True, article 47 did provide that the court could have regard to the penalties provided for by the law of the States referred to in paragraphs 2, subparagraphs (*a*), (*b*) and (*c*), but it was the statute that required the court to take account of the provisions of that law.

65. Unless he could be shown instances in which the court would be obliged to apply national law independently of the statute or of any treaty or any rule of general international law, he would continue to have doubts about the need for the reference to national law in article 33.

66. The CHAIRMAN, speaking as a member of the Commission, said that, according to Mr. Robinson's logic, there would really be no need for any article on applicable law, since the statute would obviously apply as a matter of priority.

67. Mr. THIAM said that some States might conceivably agree to accede to the statute only on condition that their own national law would be applied in specific cases.

68. Mr. TOMUSCHAT said he too considered that the reference to national law in article 33, subparagraph (*c*) should be maintained. The draft statute, after all, did not contain a complete set of rules and, in practice, the court would often have to rely on national law to fill in gaps in the statute on a particular question. To take but one example, defences, the Statute made no provision in that connection so that the court would have no other choice than to refer to the general principles of the criminal law of the States parties. And those general principles were principles not of international law, but of national law.

69. The reference to national law in article 33 should therefore be regarded as a kind of security provision for

[5] Document S/25704, annex.

cases in which the statute itself did not lay down any rule.

70. Mr. PAMBOU-TCHIVOUNDA, addressing himself to the Chairman of the Working Group, said that paragraph 1 (*e*) of the preliminary note which preceded the draft commentary dealt with the amendment and review of the statute. He was surprised that the question was not dealt with in the body of the statute itself and would like to know whether the omission was deliberate or whether the Working Group intended to deal with the matter in some other way.

71. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court), replying to Mr. Pambou-Tchivounda, said that the Working Group had decided, and the Special Rapporteur had agreed, that the earlier article dealing with review should be deleted, for two reasons.

72. In the first place, it had decided that amendments and review, like finances, for example, were organizational matters that should be dealt with in the treaty to be concluded and that a reference to the matter in the commentary would therefore suffice.

73. Secondly, it had not wished to prejudge the future of the Code of Crimes against the Peace and Security of Mankind and to envisage only the case where the Code would be incorporated in the statute in the context of a formal review after a specified period.

74. With regard to amendments, Mr. Yamada's suggestion that the annex could be more readily modified than the statute itself, so as to add new crimes to it, seemed attractive.

75. In responding to the remarks made by members, he would endeavour to follow the sequence of the articles.

76. As far as article 2 (Relationship of the Court to the United Nations) was concerned, a distinction had to be made between the community of the Member States of the United Nations, on the one hand, and States parties to the statute, on the other, even though there would also be close links between the two groups. The question which arose therefore was to what extent the United Nations or other groups of States could impose a very substantial financial burden on the States parties to the statute by expanding the jurisdiction of the court. That was certainly the answer to the suggestion that the court should be able to exercise jurisdiction under bilateral treaties and limited multilateral treaties in relation to crimes not covered in article 20. It would be tantamount to requiring the States parties to the statute to make "their" court available to other States, with all the financial consequences that that implied, in relation to crimes not envisaged in the statute. Of course, if it were possible, as some members of the Working Group devoutly hoped, to link the court directly to the United Nations and to make it an organ of the United Nations by means of an amendment to the Charter of the United Nations, there would be no difficulty, since the United Nations itself would be responsible for the financial consequences of the inclusion in the statute, or its annex, of any new crimes defined in treaties concluded under United Nations auspices. But since, at the present stage, the question whether the court would be established by treaty or as an organ of the United Nations remained open, it would be better for those aspects of the matter to be dealt with in the commentary rather than in the body of the statute itself.

77. With regard to article 5 (Composition of the court), he would rely on those members of the Commission who were specialists in French law to find the best translation into French of the term "appeals chamber", it being understood that it was not possible to afford, in terms either of cost or of personnel, to have a two-tiered system of appeal after trial at first instance, as many national systems did. The appeals chamber would have to combine the functions which, in French law, were exercised by two different bodies, the court of appeal and the court of cassation, and which, in Australian law, for example, were exercised first by an intermediate appeal court, with respect to matters such as the proper conduct of the trial, and then by a final appeal court, on crucial questions of law.

78. As to article 23, it would be most undesirable if the Security Council were compelled, owing to the absence of a provision such as that which appeared in article 23, paragraph 1, to create further ad hoc courts, as it had been forced to do at great expense in the case of the former Yugoslavia, without even knowing in advance whether the court in question would ever have to hear a case. The advantage of the system provided for in article 23, paragraph 1, was that the Council could wait until there was in fact an accused, or a potential accused, before making a decision. Accordingly, whatever views might have been expressed with respect to its wording, article 23, paragraph 1, laid down a very useful principle that was absolutely indispensable for the statute. At the same time, he recognized that the criticisms made with regard to paragraph 3 were not unfounded and, unless it was possible to find a better version, it might be preferable to delete the provision. One possibility would be to limit paragraph 3 to cases in which the Council had not only determined that there was a situation involving a threat to or breach of the peace under Chapter VII of the Charter, but was actively taking steps to resolve the situation. In any event, in his view, the provision was necessary even if its wording fell within the realm of "issues still to be discussed".

79. Turning to part four of the draft statute, he agreed with Mr. Robinson that there was a problem with regard to the relationship between article 26, paragraph 4, and article 27, paragraph 1. The relationship between article 26, paragraph 1, and article 27, paragraph 1, did not, however, seem to him to raise any difficulty.

80. Article 26, paragraph 1, simply provided that the prosecutor could decide not to prosecute if he considered that the case referred to him did not come within the jurisdiction of the court, as, for instance, where someone tried to bring a case of "ordinary" murder before it.

81. Article 26, paragraph 4, dealt with a different case in which the prosecutor had to decide whether or not the court ought to exercise its jurisdiction and that decision was subject to appeal. There was no reason why, if it became clear at an early stage that there was no sufficient basis for the court to exercise its jurisdiction, the prosecutor could not take the necessary decision on the

understanding that his decision would be subject to appeal.

82. Article 27, paragraph 1, provided for the case where the prosecutor considered that there was sufficient basis to proceed. He agreed that the provision could be spelt out in more detail. The question whether there was a *prima facie* case, which was a pure question of evidence in relation to the crime of which the suspect was accused, and the question whether the court should hear the case, which went beyond the question whether there was a *prima facie* case and involved other considerations, were obviously two different matters and it was right, in his view, that they should be the subject of two separate provisions, although he agreed that those provisions required coordination.

83. In his view, the definition of a "*prima facie* case" should not be included in the statute, since that would tie the hands of the court in an area where it would ultimately have to develop its approach in the light of experience. In any event, "*prima facie* case" was defined in the commentary and that definition was sufficiently broad, as the prosecutor would not only have to satisfy himself on paper that there was *prima facie* evidence, but would also have to make quite sure that the whole case "held together".

84. He agreed that, as Mr. Robinson had suggested, it should be made clear in article 27, paragraph 2, that, in arriving at the decisions referred to in subparagraphs (*a*) and (*b*), the presidency could have regard to the dossier. That could, however, simply be explained in the commentary. The presidency could, of course, always ask for further material in addition to the indictment itself.

85. It should also be made clear, either in the statute or in the commentary, what happened if the indictment was not confirmed: in that event, the prosecution lapsed and the accused, if in custody, had to be released.

86. "Probable cause", as referred to in article 28, paragraph 1 (*a*), should not, in his view, be defined in the body of the statute, any more than "*prima facie* case" should be and for the same reasons. There again, having regard to the diversity of cases, the officials responsible for running the system should have some degree of discretion. As to paragraph 3 (*b*), he agreed with Mr. Robinson that the two "special circumstances" referred to in the commentary were the ones that immediately sprang to mind and that they did not cover the whole range of situations which might arise in the future. None the less, apart from the fact that it was hard to imagine such other situations, that provision should not go into so much detail that it would make the text unduly cumbersome.

87. Similarly, in article 29, paragraph 1, it would be difficult to spell out the role of the "judicial officer". The "compensation" referred to in paragraph 3 of the article would be paid by the States parties.

88. The Working Group had decided that a paragraph 3 should be added to article 31, but it might revert to the matter.

89. With regard to article 32, it was obviously preferable for the place of the trial to be the seat of the court. It had been felt, however, that such a provision might be too rigid and it had therefore been decided in the interests of, among other things, cost, to provide, in paragraph 2 of the article, that the court could exercise its jurisdiction on the territory of any State.

90. The question of applicable law, which was the subject of article 33, had been discussed in great detail during the past two years. While he agreed with Mr. Thiam that the wording of the French version of subparagraph (*c*) was awkward and should be redrafted, he would insist on the need to retain a reference to national law in the article. It would, of course, have been possible to spell out, in the provision, the choice of law rules to which the court should refer, but a deliberate decision not to do so had been taken in order to maintain a degree of flexibility.

91. Article 35, which one member had proposed should be deleted and which Mr. Robinson has suggested should be confined to a general clause, was essential, in his view, because the conclusion had been reached, after two years' work, that it was impossible to confine the court's jurisdiction merely by defining the crimes it would have to try. In point of fact, the crimes in question covered a wide range of situations, some of them rather minor; and that was why the court must be vested with the additional power not to exercise jurisdiction. That would also meet a concern which had been widely expressed in the Sixth Committee.

92. With regard to article 37, he was glad to hear that the concern for the trial to be held in the presence of the accused was not confined only to common law countries, but also existed in China. At the same time, article 37 provided for an acceptable compromise, on a vexed issue, between different systems and left it to the court to decide whether or not the trial should take place in the absence of the accused.

93. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to conclude its general discussion on the draft statute for an international criminal court, on the understanding that, when the Working Group had reviewed the relevant commentaries, they would be adopted in conjunction with the adoption of the Commission's report.

It was so agreed.

The meeting rose at 1.15 p.m.

2362nd MEETING

Friday, 8 July 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,