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**Summary record of the 2358th meeting**

Topic:  
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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. Benouna, 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 vis-

its 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.<sup>1</sup> 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 Bustamante Code.<sup>2</sup> 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-

<sup>1</sup> See *The International Conferences of American States, 1889-1928*, New York, Carnegie Endowment for International Peace, 1931.

<sup>2</sup> Official name of the Code of Private International Law contained in the Convention on Private International Law.

\* Resumed from the 2350th meeting.

cedures available under community law as compared with those adopted in free-trade areas. They also covered bilateral and trilateral schemes operating within the context of the Latin American Integration Association (LAIA) or those intended for use in the event of accession to the North American Free Trade Treaty (NAFTA).

6. Another important task was to update the provisions of an environmental law for the Americas. Work already undertaken by IAJC had been reviewed in the light of instruments on the environment and sustainable development approved by the United Nations. Over the past two years, resolutions had been adopted on liability under environmental law and on the possibility of updating the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, of 1940. IAJC also complied with the requirements of the General Assembly as set forth in the Inter-American Action Programme for the Preservation of the Environment.

7. As for encouragement and mutual protection of foreign investment, IAJC had decided, in the light of reports from its members, that it would be appropriate to study the general bases or a set of basic principles for proper regulation of stock markets. It involved a scrutiny of the regulations required to create a climate of confidence for capital flows from abroad into the stock exchanges of developing economies. Such regulations might be reflected in a model law, the harmonization of domestic laws or simply by publicizing such basic principles as transparency, auditing, prevention of insider trading, and dispute settlement methods. The work on international trade law included papers on international insolvency and the bankruptcy of multinationals.

8. One event which had brought OAS, and IAJC in particular, much satisfaction was the success of the Organization of American States Fifth Inter-American Specialized Conference on Private International Law, held in Mexico in 1994. Two important conventions had been adopted at the Conference, one on international contract law and the other on the civil and criminal law aspects of international trafficking in young persons. Both instruments had been based on technical documents prepared by IAJC.

9. The IAJC work programme continued to include topics relating to information law, improvements in the administration of justice, democracy in the inter-American system and the legal aspects of foreign debt. IAJC had decided to drop from its work programme the topic of the establishment of an inter-American criminal court until such time as the member Governments of OAS had reacted more positively and had provided IAJC with guidance on the criteria to be adopted.

10. It was apparent that the work of IAJC in the regional context and of the Commission in the universal context were similar and that, in some respects, they converged. There might be differences of approach, but the points on which they agreed in their endeavour to codify and progressively develop international law were more important. Economic interdependence and the increasing trend towards globalization also had an obvious legal element. The problems in international law were common to all regions of the world, involving as

they did such topics as State responsibility, crimes against the peace and security of mankind, and international watercourses.

11. In keeping with the terms of article 26, paragraph 4, of its statute, the Commission had established and now maintained cooperation with committees and commissions in the inter-American, Asian/African, European and Arab regions. That cooperation would undoubtedly promote the objectives set by the United Nations in declaring the 1990s the United Nations Decade of International Law.<sup>3</sup>

12. Mr. CALERO RODRIGUES said that he had had the honour to represent the Commission at the recent meeting of IAJC and had been able to exchange views with the Committee's members and to see for himself how interested they were in the Commission's work. He had taken the opportunity to suggest that the Commission's reports should be forwarded to members of IAJC, something he understood had now been done. Mr. Siqueiros might perhaps also wish to arrange for members of the Commission to receive the reports of IAJC, for the more the Commission knew about the work of regional organizations the better. He was confident that the two bodies would continue to work and to cooperate in the future. He thanked Mr. Siqueiros for the welcome he had received in Brazil and also for the statement to the Commission.

13. The CHAIRMAN, also thanking Mr. Siqueiros for his statement, said he agreed with the suggestion that there should be an exchange of reports between the two bodies, which would greatly assist the Commission in its task. The Commission had always set much store by the special relationship it enjoyed with regional bodies such as IAJC, since that relationship was invaluable in helping to acquaint the Commission with the work of codification under way elsewhere. On behalf of his colleagues, he expressed the hope that the mutually advantageous cooperation between IAJC and the Commission would continue in the future.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>4</sup> (continued) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,<sup>5</sup> A/CN.4/460,<sup>6</sup> 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)**

14. The CHAIRMAN invited the Commission to continue its consideration of the draft statute for an international criminal court, beginning with part three which

<sup>3</sup> Proclaimed by the General Assembly in its resolution 44/23.

<sup>4</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

<sup>5</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>6</sup> *Ibid.*

was entitled "Jurisdiction of the Court" (A/CN.4/L.491).

15. Mr. ROBINSON said that the approach adopted to the jurisdiction of the court had helped to resolve many of the problems identified by certain members of the Commission and also in the Sixth Committee, and the Working Group on a draft statute for an international criminal court was to be congratulated in particular on moving away from the artificial distinction between treaties that defined crimes as international crimes and treaties that merely provided for the suppression of undesirable conduct that constituted crimes under national law. In establishing a body such as the international criminal court, care should be taken to create a jurisdictional basis that was as uncomplicated as possible, and to avoid unnecessary refinements. It was regrettable, therefore, that the Working Group had established yet another requirement that was equally unwarranted.

16. Subject to the proposal he wished to make with respect to article 21 (Preconditions to the exercise of jurisdiction), he fully endorsed the Working Group's decision to refer expressly, in article 20 (Crimes within the jurisdiction of the Court), to the crimes under international law over which the court had jurisdiction; he also agreed with the four crimes listed, namely, genocide, aggression, grave breaches of the laws of war, and crimes against humanity. He strongly believed, however, that apartheid as defined in the International Convention on the Suppression and Punishment of the Crime of Apartheid should also be included in the list, even if the list was not intended to be exhaustive. Admittedly, apartheid appeared in the annex to the statute as a crime to which article 20, paragraph 2, applied and over which the court therefore had jurisdiction. But he considered on both juridical and policy grounds that, if there was to be a list of crimes under general international law over which the court had jurisdiction—and he had doubts about the utility of such a list—then apartheid should be in it.

17. To explain first the juridical grounds for his view, he would point out that all the arguments adduced in paragraph (5) of the commentary to article 21 (ILC(XLVI)/ICC/WP.3), with regard to the Convention on the Prevention and Punishment of the Crime of Genocide applied with equal, and in some cases with greater, force to the International Convention on the Suppression and Punishment of the Crime of Apartheid. The commentary stated, for instance, that unlike the treaties listed in the annex, the Convention on the Prevention and Punishment of the Crime of Genocide is not based on the principle *aut dedere aut judicare*, but on the principle of territoriality. Article VI provides that persons charged with genocide or any of the other acts enumerated in the Convention shall be tried by a competent court of the State in which the act was committed. But the International Convention on the Suppression and Punishment of the Crime of Apartheid was not based on the *aut dedere aut judicare* principle either, nor was it based on the principle of territoriality alone. In point of fact, article V of that Convention actually provided for a wider basis of jurisdiction than did the Convention on the Prevention and Punishment of the Crime of Genocide, since it extended jurisdiction not only to the territorial State,

namely, the State in which the act was committed, but to any State that had acquired jurisdiction over the person, which was an indication of the seriousness with which the framers of the International Convention on the Suppression and Punishment of the Crime of Apartheid viewed the crime of apartheid.

18. Paragraph (5) of the commentary to article 21 then stated:

"However, as a counterpart to the non-inclusion of the principle of universality in the [Genocide] Convention, article VI also provides for the trial of persons by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

Article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid contained the self-same clause, since it provided, alternatively, for trial by an international penal tribunal having jurisdiction with respect to those States that had accepted its jurisdiction. The next sentence of paragraph (5) of the commentary to article 21 read:

"This can be read as an authority by States parties to the Convention who are also parties to the Statute to allow the Court to exercise jurisdiction over an accused who has been transferred to the Court by any State."

That would apply equally to the International Convention on the Suppression and Punishment of the Crime of Apartheid, subject to the qualification that the transferring State must have accepted the jurisdiction of the international penal tribunal. Apartheid, furthermore, was generally regarded as a crime against humanity and indeed was declared so to be in article I of the Convention. It could therefore be argued, notwithstanding the explanations given in the commentary and despite the inclusion of the Convention in the list contained in the annex to the draft statute, that the court could have jurisdiction over apartheid as a crime against humanity under article 20, paragraph 1 (*d*). It was also worth noting that the numerical support for the two Conventions was roughly the same, there being 95 States parties to the International Convention on the Suppression and Punishment of the Crime of Apartheid and 108 States parties to the Convention on the Prevention and Punishment of the Crime of Genocide.

19. As to the more important issue of the policy grounds for his objection to the omission of apartheid from article 20, paragraph 1, both apartheid and genocide were quite simply heinous crimes. That being so, although the list was said not to be exhaustive, any list of crimes drawn up by the Commission—a body required by the United Nations to engage in the codification and progressive development of international law—specifically for the purposes of the jurisdiction of an international criminal court was bound to be taken seriously and to have a prejudicial effect on the status of any crimes omitted from it. The omission of apartheid from article 20, paragraph 1, and the overemphasis on genocide, as reflected in a so-called inherent jurisdiction of the court, would leave the Commission open to a charge of adopting a short-sighted response to current events. The fact that the apartheid regime in South Africa had

been dismantled and that there was at present ethnic violence in a part of Europe and of Africa was no reason to highlight genocide to the exclusion of apartheid, both of which were equally repugnant by civilized standards. Apartheid might well rear its ugly head again in parts of the world other than South Africa. That was why the International Convention on the Suppression and Punishment of the Crime of Apartheid, in its definition of apartheid, did not confine the crime to events in South Africa but spoke of policies and practices of segregation similar to those in southern Africa.

20. The international community's appreciation, made some 45 years ago, of acts of genocide as constituting crimes under general international law that warranted the severest treatment and punishment was still relevant. He submitted that 50 years later, the characterization of apartheid as a crime under general international law for the purposes of the jurisdiction of an international criminal court, and the Commission's attitude to that crime at the present time, would still be relevant. Indeed, the characterization of a crime by the Commission and the United Nations in terms of the jurisdiction of an international criminal court carried more weight than the general characterization of a crime under international law. It was precisely because of the importance of the work of the Commission, and because of its prestige and influence, that he had the greatest difficulty in accepting an approach from the Commission and its Working Group that would reflect anything less than an appreciation that apartheid ranked among the most abhorrent crimes for the purposes of the jurisdiction of an international criminal court.

21. Concerning article 21, he supported the general approach to preconditions for the exercise of the court's jurisdiction, with one exception. The general rule for such exercise was that a complaint was brought pursuant to article 25 (Complaint), paragraph 2, and that the jurisdiction of the court in respect of the crime was accepted by the State which had custody of the suspect and by the State on whose territory the crime had been committed. That precondition for the exercise of the court's jurisdiction was acceptable, but it should be applied in respect of all of the crimes under article 20, paragraphs 1 and 2. In effect, he could find no warrant for the distinction between genocide and all the other crimes. The only distinction called for was that made between crimes under general international law listed in article 20, paragraph 1, and the crimes under "suppression" conventions under article 20, paragraph 2. In that regard, he accepted the distinction between the two sets of crimes drawn in article 20, paragraph 2, where the conduct alleged under the "suppression" conventions must constitute exceptionally serious crimes of international concern. That should be the only distinction made between the two sets of crimes for jurisdictional purposes. He could find no justification for the singling out of genocide and the conferral of a so-called inherent jurisdiction on the court in respect of that crime. He understood inherent jurisdiction to mean that a State party to the statute was able to lodge a complaint of genocide, notwithstanding the fact that it had not accepted the court's jurisdiction over that crime in the circumstances set out in article 21. If the jurisdiction of the court in respect of genocide did not need to be accepted in order for a State party to lodge a complaint,

why was that facility not extended to the other crimes listed in article 20, paragraph 1, which, like genocide, were also acknowledged to be crimes under general international law? In his submission, to thus distinguish between genocide and other crimes under general international law listed in article 20, paragraph 1, on the one hand, and between genocide and the crimes under "suppression" conventions on the other, was an unnecessary refinement.

22. He would reiterate that apartheid should not be treated differently from genocide. In his opinion, international criminal law had not reached a level of development at which it was permissible to speak of an inherent jurisdiction in the particular sense that an international criminal court would have jurisdiction in respect of a complaint of genocide lodged by a State party to the statute that had not accepted the jurisdiction of the court in respect of the crime of genocide. It was a concept of inherent jurisdiction that smacked of a progressive development of the law which was not warranted at the present time. In any event, it went beyond what was envisaged in article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, a provision which was generally similar to article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid, and which allowed for the trial of persons "by such international criminal penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". The latter part of that phrase should be emphasized, because it plainly referred to States accepting the jurisdiction of the tribunal in respect of the crime of genocide or apartheid. It would of course be permissible to provide for exercise of jurisdiction over genocide on the basis of a complaint by a State that had not accepted the court's jurisdiction over that crime, either if such a course was supported by the generality of State practice and *opinio juris*, though he did not believe that to be the case; or if it was felt that that was an area ripe for progressive development of the law. Again, he did not believe that to be the case, particularly in view of the fact that crimes against humanity—aggression and grave breaches of the laws of war, which admittedly were crimes under general international law—were not similarly treated. He therefore proposed the deletion of article 21, paragraph 1 (a), and article 25, paragraph 1, and consequentially of article 51 (Cooperation and judicial assistance), paragraph 3 (a) and article 53 (Transfer of an accused to the Court), paragraph 2 (a) (i).

23. Reverting to the question whether there was any validity in the separation of the crimes under general international law listed in article 20, paragraph 1, and those listed under article 20, paragraph 2, he wondered whether it was really necessary to have two lists, bearing in mind that there were only two points of distinction between the two paragraphs. The first was that article 20, paragraph 1 (a), ascribed a so-called inherent jurisdiction to the court in respect of genocide, though it should be noted that that special feature did not apply to the other crimes listed in either of the two paragraphs. The second point of distinction was that article 20, paragraph 2, required that conduct alleged under the "suppression" conventions should constitute exceptionally serious crimes of international concern. Those distinctions apart,

there was no difference between the crimes as far as the jurisdiction of the court was concerned. Paragraph (3) of the commentary to article 20 stated, in particular, that it was not the function of the statute authoritatively to codify crimes under general international law. What, then, was the purpose of maintaining a separate list and paragraph for crimes under general international law? Indeed, the commentary also stated that the conditions for the existence and exercise of jurisdiction under paragraphs 1 and 2 were essentially the same, with the exception of genocide. The truth was that, despite the disclaimer in the commentary, the Working Group did in fact appear to be making a statement about crimes under general international law, and to be giving pre-eminence to some crimes over others—a sort of pedagogical exercise. It should be remembered that the Working Group had accepted the criticism of the Sixth Committee that a mere reference to crimes under general international law was too vague, and it had in any event decided to enumerate specifically crimes under general international law. So again the question arose, what was the purpose of the separate listing of crimes under general international law under article 20, paragraph 1? In his view, no purpose was served in terms of identifying different jurisdictional requirements. On the other hand, the non-inclusion of a crime generally acknowledged to be a crime under general international law would, because of the influence and prestige of the Commission, and notwithstanding assertions to the contrary in the commentary, have a prejudicial effect on the perception of that crime by the international community. The likely prejudicial effect of listing those four crimes as crimes under general international law for purposes of the court's jurisdiction far outweighed any value the listing might have. The impression would be given that the Commission had a hierarchical conception of crimes under general international law, and that doubt was cast on the status of crimes omitted from the list in article 20, paragraph 1.

24. He therefore proposed that paragraphs 1 and 2 of article 20 should be conflated into one paragraph, to read:

“The Court has jurisdiction in accordance with this Statute in respect of the following crimes:

“(a) the crime of genocide;

“(b) the crime of aggression;

“(c) grave breaches of the laws of war;

“(d) crimes against humanity;

“(e) crimes established under or pursuant to the treaties specified below, which, having regard to the conduct alleged, constitute exceptionally serious crimes.”

A list would then follow of the eight crimes under the “suppression” conventions referred to in the annex. Even if he had not, as earlier, proposed the deletion of the provisions relating to the inherent jurisdiction of the court over genocide, he would still suggest the restructuring of article 20 along the lines proposed.

25. As to article 21, paragraph 2, the correct reference should be to paragraph 1 (b) (i), since that was the para-

graph that applied to the custodial State. Secondly, he noted that, rightly in his view, the paragraph required acceptance of the court's jurisdiction by a State which had already established a right to the surrender of the accused from the custodial State. Article 22 (Acceptance of the jurisdiction of the Court for the purposes of article 21), paragraph 4, provided for ad hoc acceptance by that State of the court's jurisdiction. But a question might arise: what if the request for extradition came after the request for arrest and transfer under the statute and before that latter request had been carried out? It would seem that in such a case the acceptance of the court's jurisdiction by that State would also be required. In other words, as long as the request by another State was properly made of the custodial State for the surrender of the accused, the acceptance of the jurisdiction of the court by that State was required, whether the request was made before or after a warrant for the arrest and transfer of the accused had been transmitted to the custodial State pursuant to article 53. It might well be that the words “has agreed to a request from another State” should read “has received a request from another State”, in article 21, paragraph 2, for the right of that other State in an *aut dedere aut judicare* treaty to the surrender of an accused would not ordinarily depend on the agreement with the custodial State. Most usually, it would have an entitlement to such surrender if it had established its jurisdiction over the crime in any one of the three or four circumstances set out in the *aut dedere aut judicare* treaty. Generally speaking, he supported the approach taken in that paragraph. It would inevitably restrict the jurisdiction of the court, but that was unavoidable if the Commission was to respect treaty obligations.

26. His only comment concerning article 21, paragraph 3, was that he thought it was misplaced in that article, which dealt with preconditions for the exercise of the court's jurisdiction. It established an *aut dedere aut judicare* obligation, and would thus perhaps be more appropriately located in article 53, on arrest and transfer.

27. Paragraph 1 of article 23 (Action by the Security Council) seemed to be cleverly drafted so as to mask the issue as to whether the Security Council was afforded a right to refer a case to the court. In the context of Article 39 of the Charter of the United Nations, the words “so determines” would suggest a determination by the Council that there was a threat to the peace, a breach of the peace or an act of aggression. The other possible interpretation was that the court would have jurisdiction in cases where the Council so determined. In either case, he disagreed with that provision. The court's jurisdiction should in all cases be triggered by a complaint from a State under article 21. It was not the business of the Council to bring a case before the court, either directly or indirectly. If there was a threat to the peace, a breach of the peace or an act of aggression, and a crime under the statute appeared to have been committed, a State would lodge a complaint in the circumstances set out in article 21, and the court would be subject to the constraints and limitations outlined in paragraphs 2 and 3 of article 23.

28. Much thought was currently being given to restructuring the United Nations. A crucial element in that restructuring was the relationship between the Security Council and the General Assembly. There was an urgent

need to ensure a better balance between those two core organs. The restructuring exercise would not be assisted by provisions that directly or indirectly purported to give new powers to the Council. In that connection he noted the observation by one member of the Commission that a power to refer a case to the court could not be ascribed to the Council in that way. He therefore proposed that article 23 should be entitled "Threat to or breach of the peace or act of aggression", and that paragraph 1 should be deleted.

29. Paragraph (9) of the commentary to article 23 stated that any power the Security Council might have pursuant to Article 103 of the Charter could be exercised in any event. Without wishing to provoke a polemical debate, he felt obliged to point out that Article 103 had a qualification that was often overlooked: it did not establish the prevalence of Charter obligations over all other obligations; it established such a prevalence only over treaty obligations. Obligations under general international law remained untouched by Article 103.

30. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) thanked Mr. Robinson for his detailed and helpful comments. He regretted the fact that Mr. Robinson had not been present in the Working Group, since his presence there would have enabled proper account to be taken of those comments at the appropriate time. Mr. Robinson had raised almost all the pertinent issues concerning part three of the draft statute. However, except with regard to the location of article 21, paragraph 3, and possibly the question of the title of article 23, he had to say that he disagreed with Mr. Robinson on every issue.

31. On the question of crimes under general international law, he did not think that Mr. Robinson's redrafting of article 20 solved the problem, since in any event the Commission would be listing certain crimes as crimes under general international law, whatever names those crimes were given in the text. He therefore did not agree that the consequences Mr. Robinson feared would ensue, since there were certainly crimes under general international law not contained in paragraph 1, as was made clear in the commentary. He could not stress too strongly that such an exercise had never previously been undertaken, and that great caution was therefore required. The Working Group had selected the four crimes on which consensus had been reached regarding inclusion in a list of crimes under general international law. No consensus had been obtained for the inclusion of other crimes, including the crime of apartheid. Apartheid had been excluded for that reason, not because it was not a crime under general international law. The distinction was also important in terms of the operation of the *nullum crimen sine lege* principle. That principle operated in relation to crimes under general international law, by reference to general international law. It operated in relation to crimes under the treaties listed in the annex by reference to quite separate considerations, and properly so. Under the *nullum crimen sine lege* principle, that distinction would have to be drawn and the statute would therefore contain a distinction between crimes under general international law and crimes pursuant to the unified list of treaties, whatever course was adopted. It was

therefore not a good idea to conflate the two paragraphs of article 20.

32. As to paragraph 1, he noted that Mr. Robinson agreed with its content, except in the matter of the crime of apartheid. The first point to be made was that some acts of apartheid were crimes against humanity. In his opinion, some acts of apartheid also involved the crime of genocide: acts committed pursuant to a policy of apartheid could constitute genocide as defined, for example, if they were aimed at the extermination of a racial group. Those acts were included, as could, and perhaps should, be made clear in the commentary. The question was whether to include apartheid in paragraph 1 as a crime under general international law *eo nomine*. The Working Group had decided against doing so, for three reasons. First, the International Convention on the Suppression and Punishment of the Crime of Apartheid had been included in the annex to article 20 and was therefore not excluded from the statute. Secondly, although it had been widely ratified, the Convention had not been ratified by any member of the Western Group of States. In his view, for a crime to be considered as a crime under general international law, there had to be a general international consensus in that respect and that was not the case at present. He was not suggesting that the agreement of that particular group was of special significance, merely that in that case it showed that there was no general international acceptance of the crime. Thirdly, and most importantly, apartheid, as defined in the relevant Convention, had just ceased to exist in fact. It was up to the new Government of South Africa to decide on any action to be taken with respect to those who had committed the crime of apartheid. If the international community were to create a jurisdiction over apartheid as a crime under general international law, as distinct from a crime under the Convention, it would in effect be taking a position on what should happen to those who had practised apartheid. He would only be prepared to do so with the strong support of the present Government of South Africa. For all those reasons, it would be unwise to include apartheid in paragraph 1 of article 20.

33. Mr. Robinson had complained that the statute contained a certain amount of progressive development of the law. That was understating the case: the entire statute could be classified as progressive development. In fact, the Commission's task was to draft a statute which would then be the basis for discussion by States. It had, therefore, to envisage defensible categories of jurisdiction. In his opinion, there ought to be a category of inherent jurisdiction, as a matter for subsequent discussion. If the Commission took the position that there should be no inherent jurisdiction, or no inherent jurisdiction without the backing of the Security Council, then it would in effect be precluding such a possibility, and providing a powerful argument for those opposing real progress in that area.

34. The case for an inherent jurisdiction, if it could be made at all, was particularly strong with respect to genocide. Among what were described as the "crimes of crimes", genocide was the worst of all. Moreover, it was a crime that was still being committed. Under the Convention on the Prevention and Punishment of the Crime of Genocide, jurisdiction was based on territoriality, yet



genocide was usually practised by or with the complicity of the Government of the very State on whose territory it was committed. If the Commission failed to take advantage of the authority granted in article VI of the Convention, it would create impunity for those committing genocide while they were in power.

35. The entire statute was a compromise between two approaches which might be termed minimalist and maximalist. The statute did, at least in the case of the crime of genocide, acknowledge the idea of a universal jurisdiction. It was up to States to take that idea further, if they chose to do so.

36. With reference to article 21, he would point out that, prior to the acceptance of an extradition request, it was primarily for the custodial State to decide whether to take action. It was reasonable to give the decision-making power to the custodial State, as opposed to the requesting State. Otherwise, a requesting State which had no viable prospect of actually obtaining custody of a suspect could impose its veto after the fact by the simple device of making an extradition request. For those reasons, the Working Group had rejected the broader formulation that had been proposed for paragraph 2.

37. Mr. THIAM, speaking as a member of the Working Group, said that he had been in favour of including apartheid in the list contained in paragraph 1 of article 20. However, the opposing view had prevailed, namely that it was sufficient to mention the International Convention on the Suppression and Punishment of the Crime of Apartheid in the annex. In that connection, it might be asked whether that Convention, which the Western Group of States had failed to ratify, even belonged in the annex. The Western Group had objected to the form, not the substance, of the Convention, in particular to its express reference to apartheid as practised in southern Africa. There was universal agreement that apartheid belonged to the category of crimes that were unacceptable to the conscience of mankind. Apartheid was as odious a crime as genocide and, in fact, the two were closely related.

38. He would continue to maintain that apartheid should be added to the list of crimes in paragraph 1 of article 20. Moreover, apartheid would most certainly have a place in the Code of Crimes against the Peace and Security of Mankind. The Commission could not include apartheid in one list and exclude it from another.

39. Mr. HE said he wished to pay tribute to the Working Group for the remarkable results it had achieved in a short period of time, thereby demonstrating that the Commission could indeed be efficient when it worked in a well-organized and dynamic manner. By and large, he concurred with the compromise solutions arrived at by the Working Group on the draft statute.

40. With regard to part two of the draft statute, there was a contradiction between article 12 (The Procuracy), paragraph 6, and article 15 (Loss of office), paragraph 2. Under article 15, decisions with regard to loss of office would, in the case of the Prosecutor, be decided by a majority of States parties. Yet, under article 12, the presidency was authorized to decide with regard to the disqualification of the Prosecutor. To remove any ambiguity, the words "and shall decide in case of doubt as to

the disqualification of the Prosecutor or Deputy Prosecutor" should be deleted from paragraph 6 of article 12.

41. As to part three of the draft statute, and more particularly article 21, paragraph 1 (a), he had reservations about the need to provide a separate arrangement for the crime of genocide, as opposed to all other cases. The commentary pointed out that the court should have inherent jurisdiction over the crime of genocide. However, treating genocide as a separate case under article 21 might give rise to difficulties. For instance, not every State party to the Convention on the Prevention and Punishment of the Crime of Genocide would necessarily be a party to the statute. Furthermore, three types of States might be involved in a particular case: the State lodging the complaint; the State in which the genocide had been committed; and the State in which the accused was present. Even if States in each category were parties to the statute, they might not necessarily accept the court's jurisdiction in a particular case.

42. Article VI of the Convention stipulated that persons charged with genocide should be tried by the competent court of the State in which the act had been committed; it also provided for the trial of persons by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". He did not see the need to make a distinction between genocide and all other cases and therefore endorsed Mr. Robinson's proposal to delete paragraph 1 (a).

43. Article 23 was a crucial provision of the draft statute. Unfortunately, the words "so determines", in paragraph 1, were unclear. One might well ask what exactly was to be determined by the Security Council. According to the commentary, article 23 was not intended in any way to increase the powers of the Council as defined in the Charter of the United Nations, but to make available to the Council the jurisdictional mechanism created by the statute. Thus it was to be understood that referring cases to the Council would allow the court to exercise jurisdiction over situations to which Chapter VII of the Charter applied, so that the Prosecutor could go on to investigate and indict the individuals concerned.

44. Another question that might arise was whether the court, in exercising its jurisdiction, should take into account the preconditions set forth in article 21. As a result of action by the Security Council under article 23, the jurisdiction of the court would become compulsory in some sense, and the preconditions could be disregarded. Such an arrangement might encourage States not to cooperate and might prevent the court from playing its proper role, as demonstrated in the case 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,<sup>7</sup> where very little progress had been made thus far. In view of the real situation in the international community, it would be more appropriate for the court to operate on the basis of voluntary acceptance of its jurisdiction; such an approach was in conformity with the objectives set out in the preamble of

<sup>7</sup> See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.



the draft statute, namely that the court was intended to complement national criminal jurisdictions. He therefore proposed that the word "Notwithstanding" in paragraph 1 of article 23 should be replaced by "Subject to".

45. Mr. MAHIU said that he wished to pay tribute to the excellent work of the Working Group, which had managed to find compromise solutions to a number of delicate and difficult questions.

46. Unfortunately, article 2 left the matter of the relationship of the court to the United Nations somewhat unresolved. He was among those who favoured a very close relationship, one which would involve technical procedures and would undoubtedly have a political side to it. He was not, therefore, entirely satisfied with the idea, set out in article 2, of the Registrar being designated to enter into agreements establishing an appropriate relationship between the court and the United Nations. That task might more appropriately fall to the President of the court.

47. As far as part two of the draft statute was concerned, he had some reservations about paragraph 1 of article 11 (Excusing and disqualification of judges), for he was not sure whether it was appropriate that the presidency should be able to excuse any judge from the exercise of a function under the statute. Again, he was not convinced of the need to distinguish, as did paragraph 2 of article 15, between the Prosecutor and the other officers of the court in regard to loss of office. According to the commentary, the distinction was necessary because the Prosecutor was elected by States parties. However, other officers of the court, in particular the judges, were also elected by States parties.

48. With regard to part three, and more particularly article 20, he agreed that the court's jurisdiction should be limited to a certain number of crimes, yet it was regrettable that apartheid had not been included in the list contained in paragraph 1. The concrete situation that had given rise to the International Convention on the Suppression and Punishment of the Crime of Apartheid had, of course, been resolved and he could only welcome with the utmost satisfaction the new South Africa that had recently emerged. Nevertheless, in so far as it had a preventive function, the statute should include a reference to apartheid so that such a system could never be established again.

49. There seemed to be a contradiction between article 20, paragraph 2, and the annex. Paragraph 2 spoke of crimes established under or pursuant to the treaties specified in the annex which constituted exceptionally serious crimes of international concern. Yet, in the annex itself, reference was made to "grave breaches" rather than to exceptionally serious crimes. He wondered whether the inconsistency was a matter of substance or of form.

50. Article 21 was a key article and the Working Group had made an excellent effort to solve the problems in the earlier version. While he appreciated the need for a pragmatic approach, he none the less thought that the article might become a stumbling block to the application of the whole system established in the draft statute. The statute might in fact be neutralized by the

attempt to leave some degree of competence to national courts. Regrettably, he had no solution to propose.

51. The draft commentary placed a restrictive interpretation on article 22, paragraph 4, concerning the possibility of intervention by the court at the request of a State which was not a party to the statute. Such intervention would appear to be permitted only in a specific case and not with regard to a given crime. For example, if a State not a party to the statute requested intervention with respect to a crime against humanity, the court would be intervening not in connection with crimes against humanity as such but with a specific instance of a crime of that kind. The court's jurisdiction should be more open with respect to States which, for one reason or another, had not acceded to the statute.

52. He experienced serious difficulties with the interpretation of article 23, on action by the Security Council. A reading of the draft commentary indicated that a compromise had been sought in the Working Group, but in his opinion a compromise position had not been reached. Two situations must be distinguished. Firstly, the court could not intervene unless an act of aggression had been determined by the Council, although it was open to discussion whether the Council was the sole organ competent to identify acts of aggression. Secondly, what could the court do once the act of aggression had been so determined? Paragraph 2 seemed to provide that a complaint of aggression might then be brought before the court, but paragraph 3 neutralized that possibility. Therefore, the court could do nothing unless the Council determined that an act of aggression had taken place and unless it authorized the court to act in the case.

53. With reference to part five of the draft statute, he had some doubts about the meaning of the words "to the extent applicable" in article 33 (Applicable law), subparagraph (c). Again, the commentary did not clarify matters. The phrase "having regard to the purposes of this Statute set out in the preamble" in the main paragraph of article 35 (Discretion of the Court not to exercise its jurisdiction) might also give rise to problems. It gave the impression that the preamble had become a sort of direct source of criminal law. That might be a welcome advance, but it was not in fact clear that the preamble could take precedence over articles of the statute itself. The wording of article 39 (Principle of legality (*nullum crimen sine lege*)), subparagraph (a), was vague and might even be unintelligible. Once more the draft commentary said nothing to clarify the situation. One solution might be to replace the term "in question" by "at the time of the facts". That would make it possible to identify the principle of non-retroactivity underlying the principle of legality introduced in the article.

54. In connection with part six, he noted that article 49 (Proceedings on appeal), paragraph 2, distinguished between appeals brought by the convicted person (subparagraph (a)) and appeals brought by the Prosecutor (subparagraph (b)). Subparagraph (b) appeared to be concerned with acquittal; if so, the fact should be stated clearly. The present wording created confusion as to whether in circumstances when the Prosecutor brought an appeal other than for acquittal a new trial would be ordered or paragraph 2 (a) would come into play and the appeals chamber could either reverse or amend the deci-

sion. Lastly, in article 51, the notion of cooperation and judicial assistance should be stated more strongly. In paragraph 1, "States parties shall use their best efforts to cooperate" should be replaced by "States parties shall cooperate".

55. Mr. FOMBA said that he had made his modest contribution to the work of the Working Group and broadly shared its conclusions. However, on the central issue of the jurisdiction of the court his preference was not for selective participation but rather for automatic participation based on a direct link between acceding to the statute and acceptance of the jurisdiction of the court. Such an approach would certainly be more internationalist, but the Working Group had chosen the possible over the desirable in producing a text which would be acceptable to States.

56. He strongly supported Mr. Robinson's proposal that the crime of apartheid should be included in the list of crimes in article 20. Although the apartheid regime had ended, there was no sure guarantee that apartheid would not resurface. In any event, the list could be revised at some future time and the crime of apartheid deleted if deletion was justified.

57. Mr. CALERO RODRIGUES said that part three was the essential component of the draft statute and the text represented an improvement with respect both to the crimes falling under the court's jurisdiction and to the States which must accept jurisdiction in order for the court to exercise it. However, he still believed that the court should always have jurisdiction *ex officio*.

58. He welcomed the listing of the crimes in article 20, even though the distinction made in former articles 22 and 26 between crimes under general international law and crimes under treaties had been maintained. It was indeed useful to state that only exceptional serious crimes of international concern were subject to the court's jurisdiction, and it must be remembered that article 35 provided for the discretion of the court not to exercise jurisdiction. Nevertheless, the phrase "crimes established under or pursuant to the treaties", in paragraph 2, was not satisfactory because it did not give a correct idea of the relationship between the jurisdiction of the court and the international instruments mentioned in the annex. Paragraph 1 was not intended to include a full list of crimes under general international law, but the problem remained that even a good list must necessarily be couched in vague terms. For example, although the concept of "crimes against humanity" was clear, no definition of the kind which would be required in criminal law yet existed. While the crime of aggression had been defined by the General Assembly, the definition applied only to States and not to acts of individuals, which was what the statute was intended to punish. Furthermore, the term "grave breaches of the laws of war" was at least ambiguous because it could be confused with the similar term used in the Geneva Conventions for the protection of war victims.

59. The Working Group had wisely decided not to enter into questions of substantive law. However, as he had always maintained, it was impossible to disassociate procedural from substantive law in the present case. The problem remained that there was no adequate substantive

law to be applied by the court and therefore it was impossible to draft a good statute. The solution lay of course in the draft Code of Crimes Against the Peace and Security of Mankind, and it was obvious that the Code and the court should go together. Any State unwilling to accept the Code of Crimes Against the Peace and Security of Mankind should not accept the court. The problem had arisen at the time of the establishment of ICJ and some 75 years later the Commission found itself faced with the same difficult situation. It was unfortunate that the Commission had decided to take a path which he could not follow. Perhaps in time other members of the Commission and even some States would become convinced of the simple truth which he was stating.

60. The text of article 22 also represented an improvement over the previous text, which had required the acceptance of too many States. He still believed that any State becoming a party to the statute should at the same time accept the court's jurisdiction. Even an "opting out" declaration would have been a compromise. Now, the provision for States to "opt in" undermined the seriousness of the statute because it allowed a State to become a party without necessarily incurring any legal obligation whatsoever.

61. It was a good thing that the acceptance of the State in which the crime had been committed could be waived in two instances: (a) when action was taken on the initiative of the Security Council, and (b) when a complaint of genocide was brought under article 25, paragraph 1, by a State party to the Convention on the Prevention and Punishment of the Crime of Genocide. Any State could bring a complaint of genocide, as a crime under general international law, but subject to the requirements of article 21. Parties to the Convention did not have to meet those requirements. It was a good arrangement, but should be more clearly expressed in the statute.

62. The requirement of acceptance by the custodial State as a precondition to the exercise of jurisdiction (art. 21) was reasonable, but acceptance by the State where the crime had been committed was more problematic. It might be possible to rely on the provisions relative to the Security Council and the Convention on the Prevention and Punishment of the Crime of Genocide, but it might happen that a veto by the State in question would mean the end of the possibility of bringing a criminal to trial before the court. Perhaps more attention should be given to the requirement. For his own part, he would be prepared to waive it entirely.

63. The provision contained in article 23, paragraph 2, was a reasonable one, as was the provision contained in paragraph 1 that the Security Council had the possibility of bringing a case before the court. However, he shared Mr. He's unease with the words "if the Security Council . . . so determines". The statute should not be saying that the Security Council had the power to determine that the court had jurisdiction. Some alternative form of language must be found. He had very serious doubts about paragraph 3, which had apparently been modelled on the Charter of the United Nations provision concerning the relationship between the General Assembly and the Security Council, according to which the Assembly could not discuss a matter that was before the Council. However, the present case was different: in a situation

falling within the exclusive competence of the Council there might be indications that a crime under the statute had been committed, and in those circumstances the court should have the right to act.

*The meeting rose at 1.05 p.m.*

## 2359th MEETING

*Wednesday, 29 June 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

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

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,<sup>2</sup> A/CN.4/460,<sup>3</sup> A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3, 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 Commission to resume its consideration of part three of the draft statute for an international criminal court, which was entitled "Jurisdiction of the Court" (A/CN.4/L.491).

2. Mr. KABATSI said that the revised draft statute was on the whole acceptable to him, but, like any product of a compromise, it was open to criticism. With regard to article 20 (Jurisdiction of the Court in respect of specified crimes), the wording of the first sentence of paragraph 1 could be interpreted to mean that the court could only be seized of the crimes listed in that paragraph. As ambiguity of that kind was to be avoided in the statute of an international criminal court, it would be advisable to make it clearer that the list of crimes was purely indicative. Furthermore, the crime of apartheid was admittedly covered by article 20, under paragraph 2 of the article; and the Working Group on a draft statute for an international criminal court, which had perhaps been too influenced by the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Viola-

tions of International Humanitarian Law Committed in the Territory of the Former Yugoslavia,<sup>4</sup> had apparently not given sufficient thought to the possibility of including it in the crimes listed in paragraph 1. The long-awaited disappearance of apartheid in South Africa had perhaps also contributed to that omission, but it should not be forgotten that the crime of apartheid was one of the most horrible, that it could always resurface and that similar practices did exist elsewhere. Since many members of the Commission shared that view, the crime of apartheid should be included, in a spirit of compromise, as article 20, paragraph 1, subparagraph (e).

3. As to article 21 (Preconditions to the exercise of jurisdiction), he would have preferred the court to have a broader inherent jurisdiction. Genocide was, of course, the most horrendous crime and deserved special treatment on that account, but the court's inherent jurisdiction should be extended to practically all the crimes listed in article 20, paragraph 1, and to crimes against humanity in particular. The restrictions imposed by article 21 were, in his view, inappropriate for a court for which the international community had been waiting for so long. With regard to article 23 (Action by the Security Council), he would have been happier if any intervention by the Security Council could have been avoided. A limited involvement was none the less acceptable, under Chapter VII of the Charter of the United Nations, but paragraph 3 of the article amplified the Council's powers unduly. Even if it decided that a situation of aggression did exist and determined that certain persons should face trial, the right of veto could still have a blocking effect when it came to the decision to refer a case to the court. He therefore strongly advised that paragraph 3 should be deleted.

4. Mr. PELLET said he was surprised to find that the most fervent advocates of the creation of the court were endeavouring to divest its statute of substance. Although he was one of those who had certain reservations, with regard to the draft as a whole, he was trying to salvage what he could. His basic proposition was that the establishment of the court by treaty was open to criticism because it would turn the court into a club of righteous States when it was mankind as a whole that was concerned with the crimes in question and the entire international community that was shocked by those who committed such crimes. Apart from two provisions, part three of the revised draft statute accentuated the consensual approach which was a feature of the statute and which, in the case of that particular subject, was a serious defect. Not only would the court in principle be open only to the States parties to its statute, but in addition, only States, as very narrowly defined in article 21, paragraph 1 (b), could bring cases before it—a condition that was further strengthened in paragraph 2 of the same article. Moreover, those States must have adopted the optional clause accepting the jurisdiction of the court (art. 22), the only exception being the one that derived from article 21, paragraph 2, and article 22, paragraph 4, combined. Yet there was one very simple possibility for which, curiously, the statute did not provide, namely, the possibility of a State which had custody of the suspect or

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

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

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

<sup>4</sup> Hereinafter referred to as the "International Tribunal". For the statute, see document S/25704, annex.