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Summary record of the 2359th meeting

Topic:
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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[1] (*continued*) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3, ILC(XLVI)/ICC/WP.3 and Add.1-2)

[Agenda item 4]

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

1. The CHAIRMAN invited the 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 Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia,[4] 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

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

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

[3] Ibid.

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

on whose territory a crime had been committed wanting the case to be tried by an international criminal court. One could call to mind in that respect the Libyan Arab Jamahiriya, in the Lockerbie case,[5] Mexico, in *United States* v. *Alvarez-Machain*,[6] or even Panama in connection with *United States* v. *Noriega*.[7] In all those cases, each of which, incidentally, was different, the draft statute did not provide for the court's basic function as a "safety valve". Why create an international criminal court if, at the same time, everything was being done to ensure that no cases were ever brought before it?

5. For the court to be really useful, it must have jurisdiction in two kinds of situation. The first was one in which it was the wish of the States concerned, either in order to overcome an international crisis, as mentioned earlier, or for reasons of an essentially internal character, for instance, if certain Latin American States wanted, quite legitimately, to have drug traffickers tried before an international body. The draft statute as it stood closed the door on that possibility, unless multilateral conventions provided otherwise. The second situation arose in the case of particularly serious crimes which shocked the international community as a whole and were not punished by the territorial State. Article 20, paragraph 1, did, of course, confer jurisdiction on the court for four categories of crimes, but, in effect, that jurisdiction was immediately taken away by the ensuing articles, under which a voluntary act on the part of States was required—an act, in fact, if not in law, of the very States that were guilty or involved with the guilty parties. Part three, however, contained two positive provisions: article 21, paragraph 1 (*a*), and article 23, under which the consent of the State behind which guilty parties could shelter was not required. Oddly enough, it was precisely those two provisions that were the subject of the severest criticism, backed up by arguments that were not very sound. In short, his general view was that the court should have jurisdiction, first, automatically and without the special consent of any State, over a small number of crimes that concerned and threatened the international community as a whole, it being understood that certain safeguards were necessary; secondly, over such other international crimes as the States directly concerned might wish, acting either unilaterally or by agreement, to be tried by the court; and, thirdly, pursuant to certain protocols additional to existing multilateral conventions, including those listed in the annex, always provided that the States parties to those conventions acceded to a special protocol concluded to that effect.

6. With regard to article 20, the list in paragraph 1 was satisfactory. In paragraph 1 (*c*), however, there was no reason to drop the usual expression "laws and customs of war" and to refer simply to the laws of war. The commentaries on that point were not very convincing; international law consisted, of course, of written instruments, but also of custom. A question also arose with regard to the inclusion in the list of apartheid. While he was not indifferent to Mr. Robinson's forceful argument in support of its inclusion (2358th meeting), it would be of advantage only if crimes of apartheid could be prosecuted regardless of the consent of the State and regardless of whether or not the relevant Convention had been ratified. It was also because there must be no link between the suppression of the crime of apartheid and the Convention that there had been no support for the argument put forward by Mr. Crawford (ibid.) to explain why apartheid had not been included in the list in article 20, paragraph 1. Moreover, while the most fundamental crimes should, of course, be listed, the right place for the definition of those crimes was not in the statute of the court, but in the Code of Crimes against the Peace and Security of Mankind. So far as article 20, paragraph 2, was concerned, it would be infinitely preferable to provide for the court to have jurisdiction over such other internationally defined crimes as States might refer to it, but, in the case of the second ground of jurisdiction, without the crimes in question necessarily being exceptionally serious. He was thinking of the drug-trafficking problem.

7. With regard to article 21, some members recommended the deletion of paragraph 1 (*a*), whereas the spirit of that provision should, on the contrary, be extended to all the crimes listed in article 20, paragraph 1. It should be possible to prosecute all those crimes, perhaps with the addition of apartheid, irrespective of any consent by the State, failing which there would be no prosecutions at all. Safeguards were, of course, necessary and they already existed. Under articles 26 (Investigation of alleged crimes) and 27 (Commencement of prosecution), the prosecutor and the presidency had the power not to commence prosecutions or to abandon them. That protection could be augmented by other mechanisms. If the court was created by treaty, complaints could be examined by the authorities of the States parties, which would immediately dismiss any complaints that were obviously unfounded. If, as he hoped, the court was created by a resolution of the General Assembly, its General Committee could act as a "filter". The other part of article 21 should deal with referral of a case to the court unilaterally and by agreement. If that system were accepted, or at any rate proposed as an alternative, there would be no need for article 22.

8. There were two fundamental reasons why, whatever some members of the Commission said to the contrary, article 23 had a place in the draft statute: first, because, in that article, the jurisdiction of the court was not subordinated to the goodwill of the State internationally responsible; and secondly, because it was realistic and met a real need. If such a provision had existed, the Security Council would have been able to discharge its principal responsibility with regard to the maintenance of international peace and security without having had to set up the International Tribunal, for example. If that article was deleted while all those provisions of the draft that commanded full consensus were maintained, the result would be a paradoxical situation in which a totally unusable court would have been established, while at the same time the Security Council would be obliged to

[5] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3.

[6] For a summary, see *International Legal Materials* (Washington, D.C.), vol. XXXI, No. 4 (July 1992), pp. 900 *et seq.*

[7] *Federal Supplement*, vol. 683, United States District Court for the Southern District of Florida (1988), pp. 1373 *et seq.*

increase the number of ad hoc organs with parallel jurisdiction and also, probably, with genuine efficacy.

9. Certainly, the shortcomings of the Security Council affected article 23: the five permanent members' power of veto sprang to mind. But, under Articles 24 and 25 of the Charter of the United Nations, Member States had conferred a number of responsibilities on the Council, had recognized that, in that context, the Council acted on their behalf and had agreed to accept and carry out its decisions. Such was the current state of affairs and legal position. Certainly, too, as Mr. Calero Rodrigues had pointed out (2358th meeting), there was no legal reason to limit the jurisdiction of the court for the crime of aggression to cases in which the Council had determined the existence of an act of aggression. As ICJ had frequently pointed out, political jurisdiction and judicial jurisdiction were distinct and separate, a fact which, in "pure law", would be an argument for not including that provision, but, unfortunately, that would hardly be realistic. Nevertheless, the Working Group erred on the side of zealousness. There might be some hesitation about paragraph 2 of article 23, but paragraph 3 was undeniably excessive and should be deleted.

10. He was not altogether convinced that that whole exercise was of any real use, but he had endeavoured to make comments and proposals that were both critical and constructive. If the comments made by him and by others, particularly Mr. Calero Rodrigues and Mr. Robinson (ibid.), were not taken up in the draft, he very much hoped that they would be faithfully and fully reflected in the commentaries. In fact, he would like the Commission to go further and, with regard to parts one and three of the draft statute, to propose an alternative model. That model would certainly be ambitious and would at first encounter opposition from States, but, unless it was demonstrated to States that some other option was possible, there was a danger of establishing a court that would simply serve as a sop to the conscience.

11. Mr. Sreenivasa RAO said that, although in his capacity as a member of the Working Group he had accepted most of the articles in part three of the draft statute, he wished to make some comments on it, not only because it contained important provisions that defined the basis for the jurisdiction of the court, but also because it had provoked some interesting and incisive comments.

12. If articles 20, 21 and 23 were perceived in the context of an ideal world in which States conducted themselves like well-behaved children in a society endowed with a paternalistic jurisdictional system, with a widely accepted code of conduct and with a smoothly functioning mechanism for implementation, then the suggestions made by Mr. Pellet were defensible. However, realism was called for in a world in which the very idea of an international court in any form—and not just of an international criminal court—was greeted with some circumspection and in which States were prepared to have recourse to such a court only as a last resort. The fact remained that the idea of establishing an international criminal court had recently taken on cogency and urgency and that the Commission, prompted by the General Assembly, had begun to take an interest in it, although no one had ascertained whether a sufficiently powerful political will existed to bring it to fruition. Against that background, the Working Group had tried to create a small window in the hope of overcoming reservations and winning the widest possible support.

13. He considered that the extension of the jurisdiction of the court to the crime of genocide was a welcome measure in the progressive development of international law. Welcome too was the power that would be accorded to the Security Council to seize the court, pursuant to article 23, paragraph 1, and he accepted that power, subject to an explicit amendment to the Charter of the United Nations and not merely a liberal interpretation of Chapter VII, which would be highly dangerous, not only because the Council could not be both judge and party, but also because a victor could not establish a court—for a victor's justice was a most detestable thing. The Commission must have no scruple in making a recommendation that the Charter should be amended to that effect.

14. The proposal that apartheid should be included in the category of crimes under general international law listed in article 20, paragraph 1, was valid and well-founded. He was not sure that the fusion of subparagraphs (*a*) and (*b*) of that paragraph made matters any clearer. In any case, he was satisfied with the basis for the jurisdiction that could be invoked under article 20, paragraph 1 or paragraph 2.

15. With regard to preconditions to the exercise of jurisdiction (art. 21), he had already stated his position on the desirability of the regime of consent that was envisaged. The risk was worth taking, with some minimum conditions imposed so as not to alarm States. After all, it was possible that, once the court had been set up and experience had proved positive, the exercise of its jurisdiction would automatically become broader.

16. The ensuing debate had justified the prudent approach adopted by the Working Group. Subject to the reservations he had expressed concerning article 23, he accepted the proposals of the Working Group and was grateful to its Chairman for taking account of his comments in the commentaries.

17. Mr. TOMUSCHAT said that, having had occasion to express his views as a member of the Working Group, he would confine his remarks to the issues of apartheid—a crime which was not listed in article 20—and genocide.

18. Apartheid was incontestably an abhorrent violation of international law, but the pertinent question was whether apartheid was a crime under international law whose perpetrator incurred criminal responsibility. The members of the Commission must answer that question in their capacity as jurists. The fact was that, in the present case, unlike that of the draft Code of Crimes against the Peace and Security of Mankind, the Commission was not being asked to formulate new rules of criminal law: its task was simply to enumerate the crimes under general international law that were well established. Yet, in point of fact, the International Convention on the Suppression and Punishment of the Crime of Apartheid had not been ratified by any of the States belonging to the Group of Western European and Other States, not

because those States tolerated apartheid, but because the provisions of the Convention were drafted in excessively general terms which would make it possible, for example, to condemn as assistance to the crime of apartheid the establishment of trade relations of any kind with South Africa and because those States considered—and history had vindicated that view—that it was better to promote the equality of all South Africans by other peaceful means.

19. In practice, no person had been found guilty of the crime of apartheid under the Convention, a state of affairs that clearly illustrated the reluctance to apply the Convention, precisely because the view had been taken that the best way of combatting apartheid was to use political means.

20. The debate on the issue of apartheid should not be reopened at the current time and in the current context. The problems of South Africa had been dealt with, even if that did not mean the end of apartheid, which might re-emerge anywhere in the world. In that case, however, the debate should take place in the context of the draft Code of Crimes against the Peace and Security of Mankind.

21. Genocide was undeniably the most horrible and atrocious of crimes under general international law and he found it incomprehensible that anyone could be reproached for placing too much emphasis on it, at the expense of apartheid. The two phenomena could not be compared, for apartheid was not synonymous with death, whereas genocide was the extermination of entire ethnic communities, the supreme negation of civilization and solidarity, and any appropriate measure to combat it was therefore good. For that reason, he unreservedly accepted article 21, paragraph 1 (*a*), which was rightly based on consensus, and under which the crime of genocide could not be prosecuted without reference to the will of States, which must ratify the statute, thereby accepting the jurisdiction of the court. That was one of the two "openings" in the direction of the international community.

22. The second opening, provided by article 22 (Acceptance of the jurisdiction of the Court for the purposes of article 21) was also necessary. In addition, he shared the view expressed by Mr. Pellet, who wished to extend the list of crimes for which the court would have jurisdiction without the need for States to make a specific declaration of acceptance in that regard. The Commission must nevertheless be realistic and find a middle course. The draft statute had to be approved by the General Assembly and must thus command the political support of Member States. The type of jurisdiction that the Working Group had established with regard to the crime of genocide was really the strict minimum. If article 21, paragraph 1 (*a*) was deleted, there was a danger that the proposed court might cease to have any meaningful purpose. Furthermore, unless it created those two openings, the Commission might be short-circuited, particularly in view of the fact that discussions had begun at the Headquarters of the United Nations on the establishment of a jurisdictional mechanism to prosecute the persons responsible for genocide in Rwanda.

23. He was not entirely convinced of the need for paragraph 3 of article 23, which was too cautious. He agreed with Mr. Calero Rodrigues (2358th meeting) and Mr. Pellet that the best solution would simply be to eliminate it. In contrast, paragraph 1 of article 23 was entirely justified. The Security Council could take all the necessary measures to maintain and re-establish international peace and security and, contrary to what Mr. Sreenivasa Rao had just said, indicating in that paragraph that the Council was empowered to seize the court did not make it a judge: it simply meant that the Council had the power to institute proceedings, it being understood that the procuracy would establish the indictment and that independent judges would hear the case. That was not the same as endorsing victor's justice.

24. He would have preferred a more powerful institution, such as the one advocated by Mr. Pellet. However, had that choice been made, the Commission might be criticized for being overly zealous and the international community might reject the statute. Moreover, in view of its deadlines, the Working Group had not been able to prepare two totally parallel drafts, one based on the hypothesis of establishment by treaty and the other on the hypothesis of establishment by a resolution of the General Assembly or the Security Council. The draft under consideration was a good compromise, even if it contained traces of conservatism and orthodoxy, which arose from the weakness of legislative structures in the international community. In the absence of a better solution, a treaty was, under the present circumstances, the most viable legal instrument to be used in establishing the future international criminal court.

25. Mr. ROSENSTOCK said that taking a cautious view of the powers to be invested in the court would not weaken its capacity to meet the needs of the international community, but would in fact strengthen the likelihood that it would be established and available. An example in that regard was Article 36, paragraph 2, of the Statute of ICJ, which, at the time of its adoption, might have appeared overly cautious to those advocating compulsory jurisdiction, but which had not prevented the Court from making an important contribution, while its jurisdiction was accepted by an ever increasing number of States.

26. In respect of the international criminal court, cases were likely to be brought before it in one of two ways: agreement by all the parties concerned or a determination by the Security Council that the matter should be dealt with by the court.

27. With regard to the issue of apartheid, he agreed entirely with the views of Mr. Crawford (ibid.) and Mr. Tomuschat. He had some concerns about paragraph 1 of article 20 because it failed to provide enough guidance as to crimes under customary international law. The earlier draft had been preferable in certain respects. While the commentary helped clarify the situation to some extent, it might have placed more emphasis on Security Council resolution 827 (1993) of 25 May 1993 concerning the establishment of the International Tribunal, in which the Council had endorsed the report of the Secretary-General,[8] which had some important things to

[8] Document S/25704 and Add.1.

say about the state of customary international law. He also agreed with the criticism of paragraph 1 (*c*): the expression "grave breaches of the laws of war" was a poor choice and should be replaced by "laws and customs of war".

28. He shared in large measure Mr. Robinson's view (2358th meeting) that the distinction between genocide and other crimes under general international law might not be necessary. Mr. Crawford's suggestion (ibid.) that an example of *ipso jure* jurisdiction should be provided was appealing, but some mention in the commentary would suffice and was probably less likely to make States apprehensive because even genocide could give rise to abusive litigation on the part of minorities.

29. He also believed that a decision by the Security Council should be an additional precondition with regard to the crimes referred to in article 20, paragraph 1. That was justified by the fact that those crimes involved, by definition, international peace and security and it was therefore important to avoid any abusive litigation so that the international community could give its full support to what was likely to be a complex and difficult process. It had been suggested in that regard that the process might be blocked by virtue of the rule of unanimity in the Council. Whether such concerns were justified or not, it was better to try to overcome the possible risk of blockage rather than to throw out the idea of a screening device altogether.

30. In respect of article 21, it was particularly important to guard against a *succès d'estime*, that is to say to try to establish a logical whole to which States might then refuse to accede. As indicated in the preamble and elsewhere in the text, the goal was not to replace existing systems, but to provide an additional regime.

31. The wording of paragraph 2, while a step in the right direction, was still in need of improvement because it was likely to give rise to hasty decisions and it did not place enough emphasis on the existing system, which it should add to, not replace. It should cover both those situations in which a decision to extradite had been taken and those where a valid request existed.

32. Paragraph 3 of article 23 had been slightly improved and there was no reason to fear that it might give rise to any abuse of process since the provision applied only where the Security Council was acting under Chapter VII of the Charter of the United Nations. He agreed with Mr. Tomuschat that article 23 did not in any way increase the powers of the Council; it merely recognized those powers, which should be enough to avoid creating new ad hoc tribunals.

33. Mr. de SARAM said that he would confine his comments to two essential points: paragraph 1 of article 20, which related to crimes under general international law, and article 23.

34. Generally speaking, although he endorsed the purposes of the two articles, he was not convinced that it was appropriate to include such provisions in the draft statute. As the Chairman of the Working Group had described it, the draft statute was intended to serve an adjectival or procedural purpose. Yet, article 20, paragraph 1, and article 23 seemed to be going beyond what was necessary in that regard.

35. In respect of article 20, paragraph 1, he recalled that the purpose of article 20 was to define for those States that chose to become parties to the statute the crimes over which the court would have jurisdiction, subject to certain substantive preconditions contained in article 21 and the procedural preconditions contained in article 22. Where a crime was defined in a treaty, as was the case of genocide and breaches of the laws of war, as well as other offences listed in the annex to the statute, the purpose of article 20 was already achieved. What, then, was the point of stipulating, as article 20 did, that the crimes of genocide and breaches of the laws of war were also crimes under general international law? It would seem that States, whether they were party to a treaty or not, would, on becoming parties to the statute, accept the court's jurisdiction in respect of crimes referred to in the treaties listed in the statute, subject to the substantive and procedural preconditions laid down in articles 21 and 22. There was therefore no reason to indicate in article 20, paragraph 1, that those treaty crimes should also be considered as crimes under general international law.

36. Such an indication was all the more questionable in that it raised other sensitive issues, in particular that of determining at what point treaty rules became an integral part of customary international law. It was difficult to answer such a question in the realistic but modest framework of a draft statute for an international criminal court.

37. Listing aggression among the crimes under general international law inevitably gave rise to the question whether the Definition of Aggression, adopted by the General Assembly in 1974[9] and regarded by some as only a relatively flexible recommendation to the Security Council, could be used as a definition to establish individual criminal responsibility in a court of law, having regard to the precision required by criminal law. He did not think so.

38. In respect of the fourth category of crimes mentioned in article 20, paragraph 1, namely, crimes against humanity, it could also be asked, at the present stage in the development of international law, at what level of magnitude violence against humanity should, in the absence of a treaty regime, be tried at the international level as an international crime. In his view, the category of crimes against humanity was too broad and too vague to qualify those acts as crimes under general international law and it was thus premature, incorrect and unnecessary to refer to it in article 20, paragraph 1.

39. While he was thus in favour of the deletion of article 20, paragraph 1, he did not wish to imply that certain acts of aggression and certain acts in the category of crimes against humanity did not form part of international law. In his view, such questions must be resolved within the framework of the draft Code of Crimes against the Peace and Security of Mankind. The Commission should therefore continue to make every effort to draft a code that would be as widely acceptable as

[9] General Assembly resolution 3314 (XXIX).

possible. At that time, it would have to be decided whether it was justified to exclude apartheid from the list of crimes under international law.

40. It would be preferable to delete article 23 and to recall very clearly in a preambular paragraph the paramountcy of the Charter of the United Nations and the obligations set forth therein and the need to preserve the respective roles of the Security Council and the General Assembly. In that connection, the Commission might be guided by the proviso contained in the Definition of Aggression, which read:

Bearing in mind that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations.[10]

41. The assigning of a specific role to the Security Council was a matter which needed to be carefully considered and it should be borne in mind that the provisions of the Charter and the continuous evolution of practice under the Charter was an extraordinarily complex and difficult field. In view of its obvious political dimensions, the matter ought to be seriously considered by the General Assembly in consultation with the Council so that acceptable provisions could be included in the statute.

42. He endorsed the comments made by Mr. Rosenstock on paragraph 2 of article 21 and he firmly supported Mr. Robinson's proposal (2358th meeting) that it should be made clear that when, in the framework of extradition treaties in force, a valid request was received, it should be acted upon.

43. Mr. VILLAGRÁN KRAMER said that he did not wish to reopen a philosophical debate by asking again whether the Commission was in the realm of *lex lata* or of *lex ferenda*. The Commission's mandate was to prepare texts which might sometimes be a simple codification of existing rules and sometimes, when the Commission thought it appropriate, constitute progressive development of international law. But the Commission's efforts must always be aimed at drafting viable proposals which took the realities into account. And quite obviously in the case of the statute of an international criminal court, the Drafting Committee's efforts should be aimed at ensuring that Governments would find the Commission's proposals workable, would accept its premises and, when necessary, would go even further along the indicated road.

44. The text under consideration did, of course, have its faults, but it had the advantage of existing and he invited its detractors, instead of making criticisms, to submit in writing alternative proposals or even a complete counter-draft which could be compared with the present one. The draft statute submitted by the Working Group had solid foundations. Account had been taken, for example, of the work of the International Criminal Law Commission and of the results of the World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights which had taken place from 2 to 5 December 1992 at the invitation of the International Institute of Higher Studies in Criminal Sciences at Syracuse, Italy and the International Meeting of Experts on the Establishment of an International Criminal Court, which had been held in Vancouver from 22 to 26 March 1993, at the invitation of the International Centre for Criminal Law Reform and Criminal Justice Policy. Account had also been taken of the comments which Member States had submitted to the Security Council through the Secretary-General of the United Nations in connection with the establishment of the International Tribunal, in particular the report of the Committee of French Jurists,[11] in the drafting of which Mr. Pellet had participated and which contained the basic elements of the statute of the International Tribunal. The document before the Commission could thus be regarded as a distillation of the discussions in other forums. That was a great advantage, since the positions stated by Governments had thus been taken into consideration, together with all the comments submitted to the Commission.

45. Having thus defended in a plenary meeting of the Commission the draft articles prepared by the Working Group, which had done excellent work, particularly on the essential issue of jurisdiction, he had a number of specific comments to make.

46. First of all, it would be preferable for the planned international criminal court to be established by treaty and not by a resolution of the General Assembly or the Security Council. For what in practice was the effect of such resolutions? Unfortunately, experience had revealed their limitations. It must be acknowledged that the international community was powerless to resolve, for example, the situations in Rwanda or Haiti, if only owing to the principle of non-interference.

47. His other comments related more specifically to part three of the draft statute. First, with regard to the appropriateness of including apartheid among the crimes listed in article 20, paragraph 1, he recalled the distinction between crimes established under or pursuant to treaties and crimes under general international law. That distinction had already been made in the text of the draft statute annexed to the report of the Commission to the General Assembly on the work of its forty-fifth session.[12] The Assembly, far from finding the distinction baseless, had endorsed its underlying principle. The Commission had refined its approach even further in the present text. It had examined much more realistically the fundamental difference between crimes defined by treaties and crimes which, by their nature, fell under general international law. Where did apartheid stand? There was no doubt that it was a hateful international crime which was unfortunately not limited to South Africa and whose seeds could already be perceived in other regions of the world. It was enough to look at the progress made by fundamentalist movements in some societies. But the nature and gravity of a crime was one thing and the question whether it was a crime under general international law was another. Of course, ICJ had given some guidance in that regard. It had shown that the existence of

[10] Ibid.

[11] Document S/25266.

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

certain treaties was evidence of the existence of certain rules of general international law. But were a treaty itself and its degree of acceptance sufficient evidence of the existence of a rule of general international law? ICJ had stated further that some resolutions of the Assembly had the status of rules of general international law. Yet was it known how many States had accepted those rules? He preferred to support the cautious position taken by Mr. Tomuschat and not to be so bold as to assert that apartheid was a crime under general international law which should be included in the list in article 20, paragraph 1.

48. The fact that a crime fell in one category or the other clearly had implications for the jurisdiction of the court. In the Working Group's view, in the case of genocide, the court ought to have "inherent jurisdiction", the perhaps unhappy term used in the commentary. It might have been better to speak of jurisdiction *ipso jure*. It was essential for the principle of the jurisdiction *ipso jure* of the future international criminal court to be defined as clearly as possible and to rest on sound legal foundations. He had put forward the idea, which had not been adopted by the Working Group, that acceptance of the court's jurisdiction might be tacit and result from acts unmistakably demonstrating the willingness of a State which had not expressly accepted the jurisdiction of the court by depositing an instrument to that effect to accept that jurisdiction in a specific case. To allow that possibility might be a way of strengthening the exercise of the jurisdiction of the court. The Working Group ought to consider it.

49. His last comment concerned article 23. The phrase "if the Security Council... so determines" used in paragraph 1 and echoed by the phrase "unless the Security Council so determines" in paragraph 3 was not a very happy one. It was not desirable for the court to exercise its jurisdiction by virtue of a mandate of the Security Council. In order to provide a better guarantee of the necessary independence of the court, it would be preferable to replace those phrases by a more flexible formula such as "at the request of the Security Council". He did not, however, support the suggestion that paragraph 3 should be deleted. The provision was based substantially on the Charter of the United Nations provisions concerning the powers of the Council as the guardian of international peace and security. There was some point in referring to that in the present context.

Other business

[Agenda item 10]

50. Mr. Sreenivasa RAO informed the members of the Commission that, in the context of the United Nations Decade of International Law,[13] India was marking in 1994 the centenary of the birth of a distinguished Indian jurist, the late Pramothanath Bandyopadhyay, who had written in particular about the practices and principles of international law which had governed the States of ancient India as between themselves and between them and States outside the Indian subcontinent. He had made a remarkable contribution to international law, not only by demonstrating that international law did not owe its origins exclusively to Europe, but also by inspiring several generations of students of international law to promote the concept of the rule of law based on equality and justice for all.

51. A copy of Mr. Bandyopadhyay's work[14] would be lodged with the secretariat for the members of the Commission to consult if they wished.

52. The CHAIRMAN said that the work was indeed an important one, for it broadened the often very Eurocentric approach, to the history of international law.

The meeting rose at 1.05 p.m.

[13] Proclaimed by the General Assembly in its resolution 44/23.

[14] *International Law and Custom in Ancient India* (New Delhi, Ramanand Vidya Bhavan, 1982).

2360th MEETING

Wednesday, 29 June 1994, at 3.10 p.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. Mikulka, 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[1] (*continued*) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3, ILC(XLVI)/ICC/WP.3 and Add.1-2)

[Agenda item 4]

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

1. The CHAIRMAN invited the 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).

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

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

[3] Ibid.