**UNITED NATIONS** **A**

# General Assembly

Distr.
GENERAL

A/CN.4/458/Add.3*
22 December 1997
ENGLISH
ORIGINAL: ENGLISH/SPANISH

INTERNATIONAL LAW COMMISSION
Forty-sixth session
2 May-22 July 1994

## COMMENTS OF GOVERNMENTS ON THE REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Addendum

CONTENTS



* Reissued for technical reasons.

# CHILE

[Original: Spanish]

[22 March 1994]

The creation of an international criminal court has been, and continues to be, firmly supported by Chile as a means of ensuring that the perpetrators of serious international crimes, and other persons involved, do not remain unpunished. Our country has put forward a number of basic approaches for the consideration of the draft statute now being studied.

In the opinion of the Government of Chile, these basic approaches would be as follows:

1. The creation of an international criminal Tribunal should be approached as an issue independent of the Code of Crimes against the Peace and Security of Mankind; this is the only means of ensuring the timely approval of both legal issues, notwithstanding their close interconnection.

In this respect, the draft is consistent with the position of the Government of Chile, the basis of which is that separate treatment of the Statute of the Tribunal and of the Code of Crimes is desirable both for methodological and for political reasons, the purpose being to further international criminal law and to facilitate the participation of more States both in the proposed Code and in a possible international criminal jurisdiction. The above is without prejudice to the extension of the competence of the Tribunal, once the Code has been approved and has entered into force, to cover the international crimes identified in that instrument.

With that in mind, it is necessary to deal with the issue of the relationship between the Code and various multilateral conventions, given the possibility of the overlapping or duplication of definitions of criminal offences, the omission of aspects of a previously defined category of crimes or a reduction in their scope.

2. The creation of the international criminal Tribunal must not imply that States are relieved of their obligation to try persons accused of crimes against international peace and security or to grant their extradition.

Chile is a party to several international instruments which envisage a universal system of jurisdiction based on the obligation of States to try persons accused of international crimes or to grant their extradition. From this standpoint, the establishment of an international Tribunal cannot mean that the State would find itself obliged to renounce its exercise of jurisdiction by virtue of the principle stated above, since it is not intended that the Statute should embody a principle of preferential jurisdiction that would prevail over that of national courts.

3. The competence of the Tribunal with which we are concerned should be subsidiary to that exercised by national courts. International criminal

jurisdiction should, therefore, as a general rule, come into play only in the absence of national jurisdiction.

Our country, like the draft statute, conceives the Tribunal as a means at the disposal of the States party to the instrument, other States and the Security Council, to guarantee greater justice and to ensure that serious crimes do not go unpunished. Thus, the regime established by the statute should be understood as being complementary to the regime based on the option of bringing to trial or granting extradition; the option of referring the case to the international Tribunal would be seen as a third alternative for States, which must be entitled to exercise their jurisdiction with respect to a particular crime under either a multilateral treaty, customary law or their national law. This does not preclude, and it should be so provided in the statute, the exclusive and sole competence of the international Tribunal with respect to crimes of particular gravity such as genocide where there is no State in a position to try the criminals.

Moreover, as our country has stated on previous occasions, the international Tribunal would in no circumstances be able to exercise jurisdiction as a court of appeal or court of second instance in relation to decisions of national courts; in addition to causing constitutional problems for many States, that would imply an interference in their internal affairs.

For the foregoing reasons, the Government of Chile enters its reservation with respect to the provision in article 45, paragraph 2 (b), which, in certain circumstances, would allow a review of the judgements of national courts. Indeed, it is necessary to deal more thoroughly with the question of when national courts are to be regarded as having failed to perform their function of hearing and trying international crimes, thereby entitling the international criminal Tribunal to intervene.

4. The jurisdictional body should be created by a treaty within the framework of the United Nations. This is another of the approaches previously put forward by our country.

Chile shares the view, which has also been expressed by other States, that it would be desirable for there to be at least some relationship between the Tribunal and the United Nations not only on account of the authority and permanency that would confer on the Tribunal but also because the competence of the Court might depend in part on decisions of the Security Council. For this reason the Government of Chile tends to favour a solution involving the conclusion of a treaty of cooperation similar to those concluded between the United Nations and its specialized agencies, which would set out the obligations and functions of the organs of the United Nations in relation to the satisfactory and normal development of the functions of a Tribunal.

5. The Tribunal should also be or establish a standing mechanism enabling the judges participating in it to meet without delay when they are convened.

With respect to the structure of the Tribunal, Chile agrees with the draft to the extent that it seeks a solution characterized by flexibility and economy by creating not a standing full-time body, but a mechanism which would enable

the judges to meet without delay for the cases for which they are convened. Thus, the draft statute envisages a pre-existing mechanism which comes into operation only when needed and whose composition, in each specific situation, would be determined by objective criteria ensuring the impartiality of the members of the Tribunal.

From that point of view, the Government of Chile considers that the provision of article 15, paragraph 2, of the draft, which empowers the Court to remove the Prosecutor and Deputy Prosecutor from office, impairs the independence of the Tribunal: where they have been found guilty of proven misconduct or a serious breach of the statute, the power to do so should be vested in those who have authority to appoint them, namely the States parties to the Statute. Similarly, there is no apparent reason for the quorum required to deprive a judge of the Court of his office, as provided in article 15, paragraph 1, of the draft, and for not maintaining the criterion established in article 15 of the Statute of the International Court of Justice which does not accept the dismissal of a judge unless, in the unanimous opinion of the other members of the Court, he has ceased to fulfil the required conditions.

6. The Tribunal with which we are concerned should have mandatory jurisdiction with respect to the most serious and far-reaching crimes in which humanity as a whole may be regarded as being a victim as in the case of genocide. In other cases, jurisdiction should be optional.

In relation to jurisdiction, the Government of Chile favours a formula whereby States, merely by virtue of the fact of being party to the Tribunal's statute, acknowledge its authority to hear and try cases, subject to the exceptions established by each sovereign State ratione materiae and/or ratione temporis.

Without prejudice to the foregoing, in the case of the most serious and far-reaching crimes in which humanity as a whole may be regarded as being the victim, as in the case of genocide and crimes of war and aggression, the jurisdiction of the Tribunal should be mandatory, subject to the determination of the Security Council. From this point of view, Chile inclines towards Alternative B of article 23 of the draft statute, with the appropriate amendments in relation to mandatory jurisdiction.

In relation to the questions contained in the commentary to article 38 of the draft, the Government of Chile, concerning the right to challenge the Tribunal's jurisdiction, states that the solution must be found by distinguishing between situations relating to international crimes characterized in a treaty, and other cases. With respect to the former, any State party to the Statute would have the right to challenge jurisdiction. In other cases, only the State or States with a direct interest in the matter would have that right. Our country considers that the accused should also have the right to challenge the jurisdiction of the Tribunal, but that this right should be raised as a preliminary issue when cognizance is taken of the charge in question.

7. The international Tribunal should also have advisory jurisdiction in order to assist national courts in the interpretation of treaties relating to international crimes.

The draft does not consider the possibility that the international Tribunal might have advisory jurisdiction at the request of the States party to the statute. In that connection, the Government of Chile emphasizes the importance of the proposal whereby assistance would be given to national courts in the correct application and interpretation of those international instruments that define crimes that may be heard by such national courts. On this matter, our country considers that the experience of the advisory jurisdiction of the International Court of Justice and of the Inter-American Court of Human Rights has been very positive.

8. The offences that should be dealt with by the Tribunal would be those characterized by international treaties.

With regard to the law that would be applicable by the Tribunal, and in accordance with the principle of nullum crimen sine lege, the Government of Chile considers that the Tribunal should only be able to deal with offences defined in widely accepted international instruments such as those mentioned in article 22 of the draft, together with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

The above does not imply the exclusion from the law applicable to the offences contained in the future Code of Crimes against the Peace and Security of Mankind, when it enters into force, and it is also without prejudice to the conferral by States of jurisdiction with respect to other crimes not included in the said treaties.

A special situation arises with respect to the crime of aggression which has hitherto not been characterized in a universally accepted international instrument. In this connection, it is considered that this crime against peace should be included in the jurisdiction of the Tribunal under the provision which empowers the Security Council to submit a complaint to the Tribunal, provided that the involvement of the Security Council is only possible after that organ of the United Nations has determined the existence of aggression in accordance with Chapter VII of the Charter of the United Nations.

9. Offences within the jurisdiction of the Tribunal must be those committed by individuals, and the Tribunal would have no jurisdiction to try States. The draft is consistent with the Chilean position in referring only to offences committed by individuals; it does not extend the jurisdiction of the Tribunal to States, notwithstanding the fact that such individuals may be agents of the State.

As our Government has already indicated, to bring States to justice would raise the most serious difficulties and, in any case, there are other mechanisms in force in international law to penalize illegal conduct by States. In this respect, we reaffirm the opinion of Chile that, in order to counterbalance the lack of jurisdiction of the international Tribunal in respect of offences committed by States, the role of the Security Council, that of the International Court of Justice and, in particular, the mechanisms for the protection of human rights should be strengthened.

10. Lastly, in relation to the procedure of the Tribunal and to the problem of the enforcement of sentences, the Government of Chile makes the following observations:

(a) Article 51 of the draft does not envisage the possibility that judgements may include separate or dissenting opinions. Our country considers that, as the practice of other international courts indicates, the acceptance of separate or dissenting opinions makes a contribution to the development of international law and, in a particular case, might be of great importance to an accused person who decided to appeal against a conviction and would also be of interest to the Appeals Chamber in deciding whether to set aside a conviction;

(b) Article 67 of the draft provides for the power of the Tribunal to grant pardons, parole and commutation of sentences where the national legislation of the State in which the condemned person is serving his sentence so permits.

In this connection, the Government of Chile considers that, given the seriousness of the crimes covered by the jurisdiction of the Tribunal, a person should not, as a general rule, be released before the sentence imposed by the Court has been served and that in no case should the application for the above measures be subject to the vagaries of the national legislation of the States in which the sentences are being served; the measure indicated should be available only in limited circumstances and be subject to the exclusive authority of the international Tribunal.

The above are the comments of the Government of Chile on the text under study. The foregoing is without prejudice to possible further comments which may be formulated or required in the future.

# GERMANY

[Original: English]

[24 March 1994]

Germany is one of the countries that for years have been advocating stronger jurisdiction in international relations. In the various multilateral organizations, especially the United Nations, Germany has regularly explained why it considers the creation of an international criminal court necessary. The unbearably large number of regional conflicts which lead to massive violations of human rights and humanitarian international law shows the urgency of practical steps to establish a universal system of criminal jurisdiction. Developments of recent years justify the hope that this goal can now be attained.

The German Government welcomed the resolutions of the Security Council calling for the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia and has assisted in their implementation. It considers that Tribunal's inception as a major contribution to the strengthening of criminal jurisdiction within the framework of the United Nations.

This development has undoubtedly and lastingly inspired the work of the International Law Commission (ILC) on a statute for an international criminal court. In the work of that court it will be crucial to apply the practical experience which the international community will gain from the Yugoslavia tribunal.

The draft convincingly shows that it should be possible to establish an international criminal court if the legal and technical problems can be solved. In response to the Secretary-General's note of 4 January 1994, the German Government submits the following comments on fundamental provisions of the statute:

1. A major question is that of the court's legal character. The answer will inevitably affect the substance of a number of the draft's provisions. Neither the commentary on article 2 by the ILC's Working Group nor the discussion on this point in the Legal Committee during the forty-eighth session of the General Assembly indicates any clear preference.

The German Government has on several occasions proposed that an international criminal court should be founded on a separate international treaty. However, this basic approach should not prejudice the possibility of establishing a close link between the court and the United Nations. The scope for this afforded by the provisions of the Charter of the United Nations should be used to the full, though not extended. The German Government therefore supports those proposals which would base this interrelationship on a separate instrument.

Another possible status for the international criminal court as a permanent institution, at least for the initial stage of its ad hoc activity, in relation to the United Nations would be one similar to that of the Permanent Court of Arbitration in The Hague. But whatever the ILC's ultimate choice, it should give the court the legitimacy and universality it needs to exercise such criminal jurisdiction. And it is particularly important to ensure that the nature of the court's close link with the United Nations does not impair its independence and integrity, including that of the judges.

2. The core of the international criminal court's statute is without doubt its jurisdiction rationae materiae. The German Government considers that the court's jurisdiction should be as comprehensive as possible. It welcomes in principle the criterion for defining the court's jurisdiction chosen by the ILC's Working Group and incorporated in articles 22 and 26. Article 22 establishes the court's jurisdiction in regard to the category of crimes defined in accordance with the provisions of relevant international instruments. There arises the question, however, whether this actually meets the requirement of adequate specificity that is an indispensable principle of such jurisdiction. In the light of the statute for the International Tribunal for crimes in the former Yugoslavia, this statute, too, should contain a more precise definition of crimes.

Article 21 (b) offers a basis on which to broaden the scope of the international criminal court's jurisdiction established by article 22, should the parties to the statute consider this necessary. Such a provision should be conducive to the progressive development of international legal practice and law-making. Article 21 acquires additional significance merely in view of the ILC's further work on the Draft Code of Crimes against the Peace and Security of Mankind. While the Code is still important, its conclusion should not be linked to the adoption of a statute for the international criminal court. Nonetheless it should automatically fall within the jurisdiction of the court as soon as it enters into force.

Article 26 touches upon crimes under general international law and crimes under national law which the ILC Working Group regards as an additional legal foundation for the court's jurisdiction. In the discussion of the draft in the Legal Committee during the forty-eighth session of the General Assembly, the proposal that it should be possible to prosecute under criminal law crimes falling within the ambit of international customary law evoked misgivings, particularly because of their indefinability. Considering the desirability of giving the court comprehensive scope, it would hardly be justifiable to exclude from its jurisdiction crimes under general international law not covered by article 22. Moreover, the usually serious nature of such crimes, such as violations of the laws or customs of war as well as crimes against humanity, would be grounds for criminal prosecution of those responsible. It would undoubtedly be advisable for the International Law Commission to provide in this case too for a precise description of relevant crimes. The solution found in articles 3 and 5 of the statute of the International Tribunal for the prosecution of crimes in the former Yugoslavia would seem to offer a suitable basis.

More serious doubts arise, in the opinion of the German Government, from criminal prosecution by the international criminal court of crimes under national law as provided for in article 26 (2) (b) of the draft statute. It is difficult to perceive any compatibility with the principle of nullum crimen sine lege. Especially, the fact that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances is merely mentioned as an example makes it appear doubtful whether the necessary determination can be imparted.

3. As already mentioned, the activity of the international criminal court should be based upon a comprehensive jurisdiction. It would therefore be meaningful for that jurisdiction to have universal acceptance in the community of nations. In this context the "opting-out" system in alternative B of article 23 would seem the most appropriate basis for a broadly accepted jurisdiction.

4. Articles 25 and 27 of the draft concern the undoubtedly sensitive relationship between the international criminal court and the Security Council. The German Government supports the basic view that the Security Council should be in a position to submit specific cases to the court. Since criminal prosecution is only envisaged in relation to persons, the statute should make clear that the Security Council is in this case drawing attention to situations in the immediate context of which the crimes defined under article 22 might be involved. At the same time, consideration should be given to the question whether the possibility provided for in article 25 does not require enlargement in the light of the Security Council's competence in accordance with the Charter of the United Nations. This applies especially in cases of grave violations of humanitarian international law and crimes against humanity. It would also seem conceivable for the Security Council to exhort countries to cooperate with the criminal court.

5. Article 45 (non bis in idem) should likewise be the subject of careful examination. The aim pursued by the Working Group in paragraph 2 seems quite plausible. Doubt exists, however, whether it can be put into practice without affecting the sovereignty of the country concerned.

Furthermore, the international criminal court would in all cases referred to in article 45, paragraph 2, have to assume the role of a superior court and review already completed proceedings as to whether the acts committed by the person sentenced were wrongly characterized as ordinary crimes, whether the proceedings were impartial or independent or were designed merely to shield the accused from international criminal responsibility or the case was diligently prosecuted. Such review proceedings would probably present considerable difficulty. From the point of view of criminal procedure, consideration should be given to the possibility of making the non bis in idem principle generally applicable.

6. Articles 19 and 20 vest the international criminal court with the right to determine its own rules and procedures. There are no objections to the court's establishing rules that have no external implications. Germany shares the view of a number of countries, however, that the provisions governing investigation and trial procedures should be subject to approval by the parties to the

statute. At least the core provisions in this regard should be made integral parts of the statute. It is also felt that there is good reason, partly with a view to article 40 (fair trial), to specify in the statute the interests of victims and witnesses, especially their need for protection. On the other hand, the rights of the accused would appear adequately provided for in article 44.

7. Article 53 (applicable penalties) raises the question of defining suitable punishment (nulla poena sine lege) which was also thoroughly discussed in the process of establishing the International Tribunal for crimes in the former Yugoslavia. It is fair to point out in this connection that the relevant international instruments do not as a rule contain the clear-cut definitions of penalties necessary for international jurisdiction. To the extent that the provision in article 53, paragraph 2, is to be understood to mean that it in no way limits the range of punishment, it would not satisfy the requirement that not only the punishability but also the penalties valid at the time of the commission of the crime must be determined by law. Provision should therefore be made for the imposition of the penalties provided for under the national law of the States referred to in paragraph 2. To this catalogue of penalties should be attached the penalties provided for under the law of the State of which the victim is a national.

8. The German Government has already expressed its rejection of proceedings in absentia in connection with the elaboration of the statue for the International criminal Tribunal for crimes in the former Yugoslavia. This view received substantial support during the discussion of the present draft statute in the Sixth (Legal) Committee at the forty-eighth session of the General Assembly. Should the possibility of proceedings in absentia meet with the approval of the majority, further provisions would have to be incorporated in the statute which would fully clarify all questions arising in this connection.

9. The German Government agrees with the points made in connection with article 56 (proceedings on appeal) during the debate in the Sixth (Legal) Committee at the forty-eighth session of the General Assembly. Paragraph 1 merely provides that the Bureau shall set up an Appeals Chamber as soon as notice of appeal has been filed. However, the statute should contain further provisions on the activity of the Chamber. With regard to appeal proceedings as a whole, provision should be made for the establishment of a separate chamber from the outset.

---