

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

# 1994

*Volume II*  
*Part One*

*Documents of the forty-sixth session*

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UNITED NATIONS





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UNITED NATIONS  
New York and Geneva, 2001



## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook . . .*, followed by the year (for example, *Yearbook . . . 1992*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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The reports of the special rapporteurs and other documents considered by the Commission during its forty-fifth session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

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## ABBREVIATIONS

ECE	Economic Commission for Europe
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
OECD	Organisation for Economic Co-operation and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNIDROIT	International Institute for the Unification of Private Law (Institut international pour l'unification du droit privé)

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## NOTE CONCERNING QUOTATIONS

In quotations, words or passages followed by an asterisk were not italicized in the original.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

## **FILLING OF CASUAL VACANCIES (ARTICLE 11 OF THE STATUTE)**

[Agenda item 1]

**DOCUMENT A/CN.4/456**

**Note by the Secretariat**

[Original: English]  
[10 January 1994]

1. Following the election on 10 November 1993 of Mr. Abdul G. Koroma and Mr. Jiuyong Shi as Judges of the International Court of Justice, two seats have become vacant on the International Law Commission.

2. In this case, article 11 of the Commission's statute is applicable. It prescribes:

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this statute.

Articles 2 and 8, to which article 11 refers, provide that:

### *Article 2*

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

### *Article 8*

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principle legal systems of the world should be assured.

3. The terms of the two members to be elected by the Commission will expire at the end of 1996.





# STATE RESPONSIBILITY

[Agenda item 3]

## DOCUMENT A/CN.4/461 AND Add.1-3\*

**Sixth report on State responsibility  
by Mr. Gaetano Arangio-Ruiz, Special Rapporteur**

*[Original: English]  
[19 and 26 April,  
14 June and 21 July 1994]*

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## Introduction

1. The present report deals with a number of issues relating to the dispute settlement provisions which are to be embodied in parts 2 and 3 of the State responsibility draft articles, in conformity with the orientation which the Commission has adopted since its thirty-seventh (1985) and thirty-eighth (1986) sessions. We refer to the important choices made in the 1985-1986 and 1992-1993 debates concerning the matter,<sup>1</sup> and particularly to the Commission's decisions to refer to the Drafting Committee, first, the preceding Special Rapporteur's draft article 10 of part 2<sup>2</sup> and draft articles 1 to 5 and the annex of part 3<sup>3</sup> and, subsequently, draft article 12 of part 2<sup>4</sup> and draft articles 1 to 6 and the annex of part 3, as proposed by the present Special Rapporteur.<sup>5</sup>

2. Article 12 of part 2 was formulated by the Drafting Committee at the forty-fifth session:

### *Article 12. Conditions of recourse to countermeasures*

1. An injured State may not take countermeasures unless:

(a) It has recourse to a [binding/third-party] dispute settlement procedure which both the injured State and the State which has committed the internationally wrongful act are bound to use under any relevant treaty to which they are parties; or

(b) In the absence of such a treaty, it offers a [binding/third-party] dispute settlement procedure to the State which has committed the internationally wrongful act.

2. The right of the injured State to take countermeasures is suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased.

3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

However, a further study of the matter carried out by the Special Rapporteur, including a reappraisal of some shortcomings of his own original formulation of article 12, leads him to believe that some of the issues touched upon by the reformulation of the 1993 Drafting Committee, or left out thereof, could usefully be reconsidered. This in the light of both the problems left unresolved in that formulation—too many key sentences which, *inter alia*, have remained between square brackets—and the problems arising from the relationship between article 12 of part 2, on the one hand, and part 3 as proposed in 1993, on the other.

3. The relationship between the *pre*-countermeasures settlement obligations set forth in article 12 and the *post*-countermeasures settlement obligations dealt with in Part Three was stressed last year by some of the members of the Drafting Committee.<sup>6</sup> Those members actually suggested that article 12 would be more effectively considered together with part 3. However, the fact that the proposed part 3 was referred to it only at a later stage prevented the 1993 Drafting Committee from taking that course. Indeed, article 12 of part 2 and the provisions of part 3 are functionally distinct and interrelated at one and the same time and it is possible that some misunderstanding of the role of article 12 (as opposed to that of part 3) did arise in the 1993 Drafting Committee. The 1994

<sup>1</sup> For a summary of ILC debates, see *Yearbook* . . . 1985, vol. II (Part Two), paras. 108-163, *Yearbook* . . . 1986, vol. II (Part Two), paras. 40-65, *Yearbook* . . . 1992, vol. II (Part Two), paras. 105 to 276, and *Yearbook* . . . 1993, vol. II (Part Two), paras. 193 to 335. For a detailed summary of its work on this topic, see *Yearbook* . . . 1985, vol. I, 1890th to 1902nd meetings, *Yearbook* . . . 1986, vol. I, 1952nd to 1956th meetings, *Yearbook* . . . 1992, vol. I, 2265th to 2267th, 2273rd to 2280th, 2283rd, 2288th and 2289th meetings, and *Yearbook* . . . 1993, vol. I, 2305th to 2310th, 2314th to 2316th and 2318th meetings.

<sup>2</sup> See *Yearbook* . . . 1990, vol. II (Part Two), para. 321; for the text of draft article 10 of part 2, *ibid.*, p. 78, footnote 291.

<sup>3</sup> See *Yearbook* . . . 1986, vol. II (Part Two), para. 63; for the text of articles 1 to 5 and the annex to part 3, *ibid.*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1, chap. I, sect. A.

<sup>4</sup> See *Yearbook* . . . 1992, vol. II (Part Two), para. 119; for the text of draft article 12, proposed by the Special Rapporteur, *ibid.*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3, para. 52.

<sup>5</sup> See *Yearbook* . . . 1993, vol. II (Part Two), para. 205; for the text of draft articles 1 to 6 and of the annex to part 3, *ibid.*, notes 116, 117, 121 to 123 and 125.

<sup>6</sup> *Yearbook* . . . 1993, vol. II (Part Two), para. 257.

Drafting Committee, which will have before it the draft articles of part 3, could more appropriately consider both sets of provisions at the same time.

4. Considering that the Commission did not debate, at its forty-fifth session, the consequences of the international "crimes" of States contemplated in article 19 of part 1 of the draft,<sup>7</sup> the Special Rapporteur cannot avail himself at this time of the guidance he expected from the Commission on the many difficult issues illustrated in

<sup>7</sup> For the text of article 19 of part 1, provisionally adopted by the Commission, see *Yearbook* . . . 1980, vol. II (Part Two), p. 32.

chapter II of his fifth report.<sup>8</sup> However, he intends to address those issues briefly in chapter II of the present report.

5. The present report consists of two chapters. Chapter I is devoted to a reappraisal of the solutions so far envisaged for pre-countermeasures dispute settlement provisions, namely the 1993 Drafting Committee's formulation of article 12 and the proposals of the present Special Rapporteur and his predecessor concerning the said settlement provisions. Chapter II is devoted to the consequences of international crimes referred to in paragraph 4 above.

<sup>8</sup> See *Yearbook* . . . 1993, vol. II (Part One), p.1, document A/CN.4/453 and Add.1-3.

## CHAPTER I

### Pre-countermeasures dispute settlement provisions so far envisaged for the draft on State responsibility: A reappraisal

#### A. Formulation adopted by the 1993 Drafting Committee for article 12 of part 2 of the draft articles

##### 1. PARAGRAPH 1 (a)

6. By far the most important feature of the 1993 Drafting Committee's formulation of article 12 is the abandonment of that main point of the 1985, 1986 and 1992 proposals, which was the *prior* exhaustion of available dispute settlement procedures as a condition of lawful resort to countermeasures. According to the 1993 Drafting Committee's formulation, "An injured State may not take countermeasures unless: (a) it has recourse to a [binding/third-party] dispute settlement procedure" [. . .], with nothing being said about the time element. It seems that it is up to the State which resorts to countermeasures to choose the moment when it complies with the requirement in question. In other words, recourse to such means could well accompany or follow, instead of preceding, resort to countermeasures.<sup>9</sup>

<sup>9</sup> The formulation adopted by the 1993 Drafting Committee for article 12 marks thus a significant departure from the proposals made by the previous Special Rapporteur in 1985 and 1986 and the present Special Rapporteur in 1992, both referred to the Drafting Committee. It will be recalled that paragraph 1 (a) of draft article 12, as proposed in 1992, provided that no countermeasures shall be taken by the injured State "prior to: (a) the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter and any other dispute settlement instrument to which it is a party" (A/CN.4/444 and Add.1-3 (footnote 4 above), para. 52). The envisaged dispute settlement procedures thus included all the means listed in Article 33 of the Charter of the United Nations, from the simplest forms of negotiation to the most elaborate judicial settlement procedures.

By making the concept of "available procedures" all-embracing instead of confining it, as had been envisaged by the previous Special Rapporteur, to third-party settlement procedures susceptible of being unilaterally initiated, paragraph 1 (a) of article 12 was intended to cover

7. A less pessimistic reading seems indeed to be suggested in the statement of the Chairman of the Drafting Committee at the forty-fifth session. According to that statement, the Drafting Committee found it preferable "not to spell out the temporal element in the text and had opted for a formulation which *emphasized the conditions that had to be met from the start\** in order for resort to countermeasures to be lawful".<sup>10</sup> However, this seems to

any dispute settlement obligations deriving, for the injured State, from any sources *other* than the State responsibility convention.

On the other hand, the severity of this requirement was considerably attenuated by the exceptions spelled out in paragraph 2 of the same draft article, according to which the condition of prior recourse to dispute settlement procedures would not apply:

"(a) where the State which has committed the internationally wrongful act does not cooperate in good faith in the choice and the implementation of available settlement procedures;

"(b) to interim measures of protection taken by the injured State, until the admissibility of such measures has been decided upon by an international body within the framework of a third-party settlement procedure;

"(c) to any measures taken by the injured State if the State which has committed the internationally wrongful act fails to comply with an interim measure of protection indicated by the said body."

These exceptions, unfortunately, did not receive, in our view, adequate consideration in the 1993 Drafting Committee. The same must be said about the condition of "adequate response" in draft article 11 (*ibid.*). These and other elements of flexibility are discussed in paragraphs 63 et seq. below.

While in the course of the 1992 debate many members of the Commission found merit in the attempt to strengthen the requirement of prior resort to amicable means of settlement, some members viewed the requirement as too strict. They objected, in particular, to the extension of the requirement to all available procedures, to the vagueness of the concept of "availability" and to the term "exhaustion": three points on which some adjustment could be sought despite the necessity not to detract unduly from Article 2, paragraph 3, and Article 33 of the Charter (as read, for example, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex)). The said points are considered in paragraphs 63 et seq. below.

<sup>10</sup> *Yearbook* . . . 1993, vol. I, 2318th meeting, para. 14.

be an understatement of the legal impact of a provision in which nothing is said about the temporal element. That omission would inescapably be understood in the sense that, in so far as article 12 is concerned, the temporal relationship between resort to countermeasures and recourse to dispute settlement procedures would be immaterial; it would be left to the discretion of the allegedly injured State.

8. To the abandonment of the prerequisite of resort to dispute settlement procedures, one must add that further major change (from both original proposals) which is the narrow definition of the sources of the dispute settlement obligations of which the injured State should take account. The dispute settlement procedures to be resorted to would be, according to article 12 (1) (a), those which the States involved “*are bound to use\* under any relevant\* treaty to which they are parties*”.

9. If one reads this provision in conformity with the ordinary concept of legal relevance, one should conclude that a relevant treaty would be any treaty in force between the parties binding them to have recourse to amicable means, namely means, so to speak, “short” of unilateral countermeasures. If such were to be the case, the loose obligation deriving from the temporally undetermined requirement of recourse to dispute settlement procedures would become at least less vague in its object, namely, the dispute settlement procedures to be used. These would include—subject to the further specifications provisionally enclosed in square brackets and to which we shall refer below—any dispute settlement procedures that the parties may be bound to use under any dispute settlement treaties, such as the Charter of the United Nations, multilateral regional dispute settlement arrangements and, of course, bilateral instruments of arbitration, conciliation and/or judicial settlement.<sup>11</sup> Considering that a dispute over an international tort would be a legal dispute, there would be a high degree of probability that one or more of such multilateral or bilateral treaties would meet the “relevance” requirement.

10. However, it appears that this was not the intent pursued by the members of the Drafting Committee who were successful in including the word “relevant” in paragraph 1 (a). First of all, it is not certain that the expression “relevant treaty” would also cover the Charter of the United Nations, an instrument generally referred to by its name. Secondly, in the statement of the Chairman of the Drafting Committee (para. 7 above), “the word ‘relevant’” (to be further elaborated on, presumably, in the commentary to the article before its adoption in plenary) “refers to a *treaty applicable to the area to which the wrongful act and countermeasures relate\**”.<sup>12</sup> In other words, the only treaties relevant for the purpose of the injured State’s loose dispute settlement obligation would be those covering the subject matter affected by the wrongful act and the countermeasures in question in each concrete case. If such were to be the reading of paragraph 1 (a) of article 12, the injured State would be entitled to

completely disregard, for the purposes of resort to countermeasures, not only Article 2, paragraph 3, and indeed the whole Chapter VI of the Charter of the United Nations, but also any general treaties of conciliation, arbitration or judicial settlement in force between the parties, not to mention the general declarations of acceptance of the jurisdiction of the International Court of Justice under Article 36, paragraph 2 of the Statute of the Court (the so-called “optional clause”). There would remain only the compromissary clauses embodied in the treaties covering the area or matter affected by the wrongful act and the countermeasures in question. We wonder whether the Drafting Committee really intended to go so far in the restriction. It is true that under Article 103 of the Charter, the dispute settlement obligation under Article 2, paragraph 3, would prevail over the obligations under the State responsibility convention. It would, however, be highly regrettable for the International Law Commission to present States with a draft lending itself to interpretations that would make it incompatible with fundamental provisions of the Charter.

11. Although the statement of the Chairman of the Drafting Committee is, in a very broad sense, a piece of “authentic” interpretation of the provision in question, one cannot but wonder on what basis, once the text had been adopted in a convention, it could be said, for example, that a general treaty envisaging compulsory conciliation, arbitration or judicial settlement (“compulsory” meaning that the procedure can be initiated by unilateral request or application) was not “relevant” for a dispute, simply because the dispute happened to involve an alleged international tort. The same question could be asked with regard to a case where the dispute over the wrongful act in question were indisputably covered by a jurisdictional link between the allegedly injured State and the allegedly law-breaking State by virtue of their acceptance of the optional clause of the ICJ Statute.

12. Considering, however, that the text under review has been presented in those terms by the Chairman of the Drafting Committee, it would be difficult to expect that a broad interpretation of the term “relevant” could prevail in the plenary unless the matter were taken up again in depth therein and referred again to the Drafting Committee for a clarification of the text. The text should also be clarified with regard to the apparent omission of any reference to the Charter: an awkward gap in a project emanating from an organ of the United Nations.

13. The restriction deriving from the term “relevant” qualifying the treaties of which the injured State must take account for the purposes of paragraph 1 (a) of the 1993 Drafting Committee’s article 12 would be further aggravated if one accepted in particular as also “authentic” that part of the explanation offered by the Chairman of the Drafting Committee which consists of the phrase “area to which the wrongful act *and\** countermeasures relate”. If the “and” means what it ordinarily means, the treaty should be doubly relevant, both to the wrongful act *and* the countermeasures. One wonders, therefore, *quid juris* where “wrongful act” and countermeasures fall in different areas. Considering that most countermeasures do not belong to the class of the so-called “reciprocity” measures, the possibility of non-coincidence is far from remote. So, what if the two areas are subject to different

<sup>11</sup> The definition of the dispute settlement procedures to be used would thus be analogous—*mutatis mutandis*—to the definition resulting from the term “available” used in draft article 12, paragraph 1 (a) as proposed by the Special Rapporteur in 1992.

<sup>12</sup> *Yearbook . . . 1993*, vol. I (footnote 10 above), para. 11.

settlement regimes? What, in particular, if the wrongful act's area or subject matter is covered by a compromissary clause and the countermeasure is not, or vice versa? We wonder, again, what was the intention behind the above-mentioned phrase—another point that could usefully be clarified by the Drafting Committee at its forty-sixth session in 1994.

14. If the term "relevant" were to remain in paragraph 1 (a) of article 12 as adopted by the 1993 Drafting Committee, the future State responsibility convention might well amount to a major weakening, if not partial abrogation, of amicable settlement obligations existing between the parties to that convention.

15. Authorizing countermeasures implies authorizing non-compliance with international obligations as a means of coercing a party in a dispute over cessation/reparation of a tort. To do so without providing at least for prior compliance with existing settlement instruments would put into question, albeit indirectly, the obligations deriving from such instruments. The entry into force of a State responsibility convention could thus mark a step backwards in the law of amicable settlement and the Commission would as a result contribute, in this area, to a regressive development of international law. We shall return to this most crucial matter below.<sup>13</sup>

16. Going back to that even more crucial aspect of the 1993 Drafting Committee's formulation which consists in the abandonment of the requirement of "*prior* recourse to dispute settlement procedures", an explanation of that significant change of approach is to be found in the above-mentioned statement of the Chairman of the Drafting Committee to the plenary. After noting that the "point most widely discussed" in the Drafting Committee was "whether or not the use of a settlement procedure should necessarily precede resort to countermeasures" and adding, even more importantly, that "*the first solution . . . was unquestionably preferred by a large number of members\**", the Chairman stated that a different choice had prevailed in view of the fact that the preferred solution (i.e. prior recourse to a settlement procedure) "might . . . give rise to several problems", namely: (a) a requirement of prior recourse "would be unjustifiable in cases where the internationally wrongful act continued"; (b) that requirement would not take account of the fact that "interim measures of protection", such as freezing assets, might have to be taken by the injured State without prior recourse to a settlement procedure"; and (c) there were, according to "some members", situations (outside those of a continuing tort and interim measures of protection) "in which it would not always be justified to require that resort to dispute settlement should precede the taking of countermeasures".<sup>14</sup>

17. Since these were the reasons behind the important choice that was made, it seems appropriate, for a proper understanding of the text, to take a closer look at them.<sup>15</sup>

18. To begin with the first point, the continuing tort hypothesis should not exclude, in our view, the possibility that the State responsibility project envisage in principle an obligation, on the part of an allegedly injured State, to have recourse to dispute settlement procedures *prior* to resort to countermeasures.

19. In the first place, not all breaches of international obligations are of a continuing character. Even if the requirement of prior recourse to dispute settlement procedures had to be waived for continuing breaches—a point which is less certain than it may seem at first sight—it is difficult to see why it should not be insisted upon *at least* for non-continuing breaches.

20. Secondly, it is far from certain that the requirement of prior recourse to dispute settlement procedures could not usefully be extended to continuing breaches. It must not be overlooked that although one speaks, for the sake of brevity, of the "injured State" and the "State which committed the internationally wrongful act" it would be more correct always to speak—or at least to *think*—in terms of *allegedly* injured and *allegedly* law-breaking States. As no certainty exists at the outset as to whether a wrongful act has been or is being committed by the allegedly law-breaking State, one should only speak, until the issue is resolved in one way or another, of an *alleged* obligation to cease and an *alleged* obligation to provide reparation. Now, there is really not much difference, from this viewpoint, between cessation and reparation. They are both the object of a claim on the part of one or more allegedly injured States. It follows that in most cases of ordinary breaches (and except for interim measures of protection), an immediate resort to countermeasures is not necessarily more justified for cessation of a continuing breach than it is justified for reparation of a completed breach. In both cases, resort to countermeasures should be preceded in principle not only by a demand but also by an attempt at dialogue and possibly settlement by amicable means. For a continuing breach—as well as for urgent reparation of a very serious breach—the answer should be interim measures, about which something must at this point be said.

21. Regardless of the preceding considerations, an injured State's obligation of prior recourse to amicable means must not necessarily be viewed as absolute in any case. Whether the alleged tort is a completed or a continuing one, some room should be left for any measures which may be necessary in order to ensure a provisional protection of the right of the allegedly injured State. It is true that interim measures are not easy to define—a point to which we shall return further on<sup>16</sup>—but the difficulty of so doing (not tackled by the Drafting Committee at its forty-fifth session any more than by the plenary) was surely not a justification for abandoning—for either kind of alleged breaches—any idea of a prior recourse to dispute settlement procedures.

22. As acknowledged by the Chairman of the Drafting Committee in his statement, draft article 12 proposed in 1992<sup>17</sup> did provide for the interim measures exception to the general rule of prior recourse to dispute settlement

<sup>13</sup> See paragraphs 48 to 61 below.

<sup>14</sup> *Yearbook . . . 1993*, vol. I (footnote 10 above), para. 14.

<sup>15</sup> One might thus have a better chance properly to understand what was meant in the statement quoted when it described the adopted text of paragraph 1 (a) as emphasizing "the conditions which must be met *from the start\** for countermeasures in order for resort to countermeasures to be lawful" (*ibid.*).

<sup>16</sup> See paragraphs 73 et seq. below.

<sup>17</sup> *Yearbook . . . 1992*, vol. II (Part Two), p. 27, footnote 61.

procedures. Paragraph 2 (a) of that draft article stated that the "condition [of prior recourse to legally available dispute settlement provisions] does not apply

(b) to interim measures of protection taken by the injured State, until the admissibility of such measures has been decided upon by an international body within the framework of a third-party settlement procedure";

[...]

According to the statement of the Chairman of the Drafting Committee,

The Special Rapporteur had, admittedly, addressed this hypothesis [the issue of unilateral protection measures] by way of an exception [...] to the general rule of prior resort [...]. However, the Drafting Committee did not find it appropriate to follow that approach in view of the vagueness of the concept of "interim measures of protection taken by the injured State".<sup>18</sup>

It seems odd, however, that while interim measures were thus rejected (because of the vagueness of the concept), that notion was in practice maintained, as indicated in the quoted statement of the Chairman of the Drafting Committee, within the framework of the Committee's own reasoning.

23. Indeed, it is difficult to see in what sense the vagueness of the concept of interim measures could have induced the Drafting Committee to dispose of the problem of continuing breaches by abandoning the requirement of prior recourse to dispute settlement procedures. The lamented, and partly unavoidable, vagueness of the concept of interim measures as used by the Special Rapporteur could only favour the position of the allegedly injured State. The vaguer the concept of interim measures, the greater the possibility for the latter to avail itself of the exception to the requirement of prior recourse. Assuming that one considered this to be undesirable, one should have made at least an attempt to reduce the uncertainty surrounding the concept, but nothing of the kind was done. It is therefore even more difficult to understand how the 1993 Drafting Committee could have been persuaded instead that the broadness of the interim measures exception to a requirement of "prior recourse" (particularly in the case of a continuing breach) should be remedied, for any kind of breach, by a total abandonment of that requirement.

24. Coming now to the third reason indicated, we find it difficult to understand in what situations, aside from continuing breaches and other cases calling for interim measures, "some members" believed that "it would not always be justified to require that resort to dispute settlement should precede the taking of countermeasures".<sup>19</sup> Again, it is difficult to see why, if the requirement of prior recourse could not be made into a steadfast rule, exceptions could not have been provided either by permitting possibly better defined interim measures of protection or by expressly allowing any kind of countermeasures whenever the allegedly law-breaking State failed to "cooperate in good faith in the choice and the implementation of available settlement procedures" (as envisaged in paragraph 2 (a) of draft article 12) proposed in 1992 by the Special Rapporteur. One fails to see in what sense the

opposite approach, i.e. setting aside *any idea* of prior resort to amicable means relying exclusively on the discretion of the allegedly injured State, was viewed as inescapable.

25. In addition to the abandonment of the requirement of prior recourse to dispute settlement procedures (contemplated in 1985, 1986 and 1992), the 1993 Drafting Committee formulation presents other very important features to which the Commission may wish to give some further thought.

26. Closely related to the abandonment of the prior recourse requirement is the elimination of any obligation for the allegedly injured State to inform the allegedly wrongdoing State of its intention to apply countermeasures. Paragraph 1 (b) of draft article 12 proposed by the Special Rapporteur in 1992, a simplification of the previous Special Rapporteur's very detailed provisions on notification, enjoined the injured State not to resort to countermeasures prior to giving "appropriate and timely communication of its intention" to the wrongdoing State. The point was presumably not considered by the 1993 Drafting Committee for lack of time.

27. Another important point is the failure of the 1993 formulation to meet the problem of defining, in addition to the "relevant treaties", the nature of the dispute settlement procedure to which an allegedly injured State should have recourse. As indicated by the presence of square brackets in the relevant parts of paragraph 1 (a) and (b), not to mention, at this point, paragraph 2, the text of the 1993 Drafting Committee leaves that issue open for the Commission to decide. More than three possibilities must thus be envisaged.

28. One alternative would be that paragraph 1 (a) and paragraph 1 (b) envisage *any* amicable dispute settlement procedures, ranging from ordinary negotiation, mediation and conciliation to arbitration, judicial settlement and recourse to universal or regional political bodies. A second alternative would be that both these paragraphs envisage only *third-party* settlement procedures including, however, both binding and non-binding procedures. This alternative would encompass conciliation as well as arbitration and judicial settlement. A third possibility (judging from the words within square brackets) would be that both paragraphs envisage only, as the object of the injured State's rather loose obligation of recourse to amicable means, *binding* third-party procedures, namely arbitration and judicial settlement only.

29. These are, however, not the only possibilities. As rightly noted in the statement of the Chairman of the 1993 Drafting Committee, some members of the Drafting Committee favoured one solution for paragraph 1 (a) and a different solution for paragraph 1 (b). Such a diversification would open the way to an additional number of alternatives.<sup>20</sup>

<sup>18</sup> See footnote 14 above.

<sup>19</sup> Ibid.

<sup>20</sup> If, for example, paragraph 1 (a) envisaged *any* dispute settlement procedure while paragraph 1 (b) only envisaged third-party procedures, or vice versa, and paragraph 2 envisaged one or the other, or even a third solution. The possible combinations would obviously be very numerous.

30. For the sake of brevity, we shall confine ourselves to the three main alternatives. If article 12, paragraph 1 (a) and (b), were to be read in such a broad sense as to cover *all* dispute settlement procedures, it would subject the injured State's discretion to a degree of restraint relatively close, *mutatis mutandis*, to that envisaged in draft article 12 as proposed by the Special Rapporteur and referred to the Drafting Committee in 1992. The amicable settlement effort obligation would extend in principle to *any* dispute settlement procedures, from mere negotiation to any kind of judicial or political, binding or non-binding third-party procedures.

31. Two capital differences would, however, still distinguish the formulation of the 1993 Drafting Committee from the 1985, 1986 and 1992 proposals which were both before it. One difference is, of course, the crucial, already noted disappearance of the requirement of the *prior* recourse to dispute settlement procedures.<sup>21</sup> The injured State would remain free to determine whether recourse to amicable means should precede, accompany or follow resort to countermeasures. The second, equally crucial, difference resides in the likely loosening of the already loose obligation of the injured State which would derive from the expression "*relevant treaty*" discussed above. The injured State's obligation might prove to be very limited indeed. It would encompass neither the means provided for by such general instruments as the Charter nor the means provided for by general, bilateral or multilateral dispute settlement treaties. The prior, contemporaneous or subsequent recourse to such procedures would only be mandatory, according to article 12 paragraph 1 (a) as adopted by the Drafting Committee, to the extent that it was obligatory under the compromissary clause of the treaty allegedly infringed by the wrongful act and the countermeasures.

32. The requirement of recourse to dispute settlement procedures would be even less strict if article 12 (1) (a), as adopted by the Drafting Committee in 1993, were to be read, under the second and third alternatives, as referring to *third-party* procedures only or, even worse, to *binding* third-party procedures only. Considering the further limitation deriving from the proposition that the requirement of resort to dispute settlement procedures refers only to those procedures envisaged by "*relevant*" treaties, in the presumably narrow sense of that term, the obligation of the injured State would be far narrower than the obligation that the same provision would envisage in the first alternative. A fortiori, it would be narrower than the obligation deriving from draft article 12 (1) (a) as proposed by the Special Rapporteur in 1992. Under the second alternative the injured State would only be obliged to have recourse to conciliation, arbitration or judicial settlement envisaged by "*relevant*" treaties (in the narrow sense as explained above); under the third alternative it would only be obliged to have recourse to arbitration and judicial settlement envisaged by the said "*relevant*" treaties.

<sup>21</sup> The question whether the requirement should be spelled out in terms of recourse, implementation or "exhaustion" (the latter concept appearing in the draft article proposed by the Special Rapporteur in 1992) should be more carefully debated in the Commission than it has been so far. See paragraphs 62 to 81 below.

## 2. PARAGRAPH 1 (b)

33. Paragraph 1 (b) of article 12 as formulated by the Drafting Committee in 1993 provides for the case where no "*relevant*" settlement obligation existed between the parties in a responsibility relationship. In such a case, presumably a frequent one especially if the choice of the Commission were to fall upon the second or third of the alternatives left open by the Drafting Committee in paragraph 1 (a),<sup>22</sup> the injured State is enjoined to offer to the other party resort to a dispute settlement procedure. Considering that the kind of procedure to be offered is defined in paragraph 1 (b) by the same square-bracketed language as appears in paragraph 1 (a), one faces again a number of alternatives. Here too, the main alternatives would seem to be three, namely: (a) *any* dispute settlement procedures; (b) *any* third-party dispute settlement procedures; and (c) only *binding* third-party dispute settlement procedures.<sup>23</sup>

34. According to the statement of the Chairman of the 1993 Drafting Committee, the possibility covered by paragraph 1 (b) of that Committee's formulation was not provided for in the Special Rapporteur's 1992 proposal. This is *formally*, and *prima facie*, correct, in the sense that that proposal did not envisage *expressly* the case where no dispute settlement procedures were available to the injured State by way of an applicable international legal rule. However, the tenor of article 12 as proposed by the Special Rapporteur in 1992 was such as to make the very possibility of such a "gap" in the parties' dispute settlement obligations extremely improbable, if not non-existent.

35. Indeed, by enjoining the injured State to have recourse to *any* dispute settlement procedures *legally available* under general international law, the Charter of the United Nations or any other dispute settlement instrument in force between the parties, the Special Rapporteur's text covered, unlike the restrictively interpreted "*relevant treaties*" formula, such a broad *spectrum* of dispute settlement procedures that the injured State would *at least* be bound to try negotiation, *and thereby*, if nothing else was "*available*", it could also propose to move to more effective means among those contemplated in Article 33, paragraph 1, of the Charter. The theoretical gap would thus be filled in practice thanks at least to the latter provision. A fortiori, the "gap" would be filled by the dispute settlement obligations existing between the parties by virtue of general treaties of conciliation, arbitration or judicial settlement, or by virtue of compromissary clauses or declarations of acceptance of the jurisdiction of the International Court of Justice.

36. The real difference between the formulation of article 12, paragraph 1 (b) adopted by the Drafting Committee in 1993 and the text proposed by the Special Rapporteur in 1992 is not to be found in the above considerations. It resides, as explained in paragraphs 3 and 6, in the temporal element. Under the 1992 text, any offer would have to *precede* resort to countermeasures. Under the 1993 text, an offer *following* or *accompanying* countermeasures would meet the prescribed requirement.

<sup>22</sup> See paragraphs 32 above and 37 below.

<sup>23</sup> *Ibid.*



37. A further difference would arise if the Commission, in finalizing the paragraph in question, chose to exclude the first alternative (*any* dispute settlement means), leaving open only the second (*any third-party* procedures) or the third (*only binding third-party* procedures). The injured State's offer would thus have to be restricted to more effective means than negotiation under the second alternative or conciliation under the third alternative. In that *very modest* measure, the solution proposed by the 1993 Drafting Committee might appear, were it not for the crucial "gap" represented by the "relevant" treaty clause in paragraph 1 (*a*), more demanding for the injured State. Considering, however, the temporal element, i.e. the fact that the injured State is not required to make a third-party or binding third-party settlement offer *before* resorting to countermeasures, that *apparent* advantage seems to be illusory. Be that as it may, it would be advisable that, before eliminating the first alternative, more careful consideration be given to the negative consequences that might arise from the exclusion of such an important means of settlement as negotiation.

### 3. PARAGRAPH 2

38. While abandoning the requirement of *prior* recourse to dispute settlement procedures, the 1993 Drafting Committee's formulation of article 12 does make an attempt to restrict the injured State's *faculté* to resort to countermeasures. To that effect, paragraph 2 of the article provides that that *faculté* is "suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased". The term "agreed" seems to refer, as explained by the Chairman of the 1993 Drafting Committee in his statement,

"both to procedures under pre-existing obligations as envisaged in paragraph 1 (*a*) and to procedures accepted as a result of an offer under paragraph 1 (*b*)".<sup>24</sup>

39. It is difficult to analyse the function of this provision owing to some obscurities in the text. The main obscurity derives from the fact that paragraph 2, unlike paragraphs 1 (*a*) and (*b*), does not use the word "binding" in conjunction with the phrase "third-party". It would nevertheless seem that the intention of the Drafting Committee members who wished to leave out non-binding procedures was to exclude not only conciliation but also negotiation from the range of procedures the initiation of which would suspend the injured State's *faculté* to resort to countermeasures. The formulation of paragraph 2 as adopted by the Drafting Committee would thus embody two alternatives. Under one alternative, the said *faculté* would be suspended as a result of the implementation of an arbitration or judicial settlement procedure. Under the other alternative, it would also be suspended following the initiation of conciliation or negotiation.

40. Prohibiting the use of countermeasures while an amicable settlement is being pursued, and suspending any countermeasures already taken, seems to be a correct

solution. It is also natural that the suspension should not be mandatory where the allegedly law-breaking State does not pursue the procedure in good faith. This requirement seems to be particularly appropriate when a settlement is being sought by negotiation or conciliation. It is less so, perhaps, where the parties are engaged in an arbitral or judicial procedure, where the procedural good faith of both parties is subject to the adjudicating body's vigilance and measures. The good-faith requirement would remain essential, however, first, in the phase of preparation of the arbitral or judicial procedure, secondly, in the case of indication, by the tribunal, of interim measures of protection and thirdly, at the moment when the tribunal issued a decision which would have to be complied with in good faith by both sides.

41. We are less sure, for the reasons indicated in paragraph 20 above, about the appropriateness of that second condition of suspension which would be, according to the Drafting Committee's formulation of paragraph 2, the cessation of the allegedly unlawful conduct on the part of the alleged wrongdoer.

42. As explained above, this requirement would be fully justified if there were no doubt as to the existence and attribution of the unlawful act, nor to the absence of any circumstances excluding wrongfulness. Here again, cessation should not ordinarily be dealt with any differently from reparation. Although this seems to be especially correct whenever the pending procedure is a third-party procedure, it should be the right solution even where negotiations are being pursued in good faith by the alleged wrongdoer.<sup>25</sup>

### 4. PARAGRAPH 3

43. According to paragraph 3 of the formulation of article 12 adopted by the 1993 Drafting Committee,

... a failure by the [wrongdoing State] to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

Although the term "interim measure" does not appear, it is presumably to interim measures that this provision refers when it speaks of "a request or order emanating from the dispute settlement procedure", and it is surely appropriate that a failure by an allegedly wrongdoing State to comply with such a request or order should lift the suspension of the injured State's *faculté* to take countermeasures.

44. It must be noted, however, that the only dispute settlement procedures from which an interim measures "request or order" could emanate are third-party procedures, and in principle only judicial procedures. It follows that this provision might require some reconsideration in the event that the settlement procedures envisaged

<sup>24</sup> See *Yearbook* . . . 1993, vol. I (footnote 10 above), para. 15.

<sup>25</sup> This point would be covered, we submit, not only by the "good-faith" reference in paragraph 2 (*a*) of draft article 12 as proposed by the Special Rapporteur in 1992, but also by the "adequate response" requirement indicated as a condition of lawful resort to countermeasures in draft article 11 as proposed by the Special Rapporteur in the same year. The latter concept was also set aside as too vague by the 1993 Drafting Committee (see *Yearbook* . . . 1993, vol. I (footnote 10 above), para. 6). On these and other flexibility elements in the 1992 proposal, see paragraphs 62 to 81 below.



as suspending the right to take countermeasures (in paragraph 2 of article 12) were to include, once the alternatives within square brackets were resolved, any procedures not envisaging the possibility of interim measures. Such would be the case for negotiation and, in principle, ordinary conciliation and the ordinary forms of arbitration.

##### 5. MAIN SHORTCOMINGS OF THE FORMULATION ADOPTED BY THE 1993 DRAFTING COMMITTEE FOR ARTICLE 12

45. In addition to the obscurities and uncertainties noted above, the main shortcomings of the formulation adopted by the 1993 Drafting Committee for article 12, leaving aside for the moment article 11,<sup>26</sup> are, in our submission, the following.

46. First of all, the Drafting Committee's formulation almost totally *fails to counterbalance* the legitimization of unilateral countermeasures by sufficiently strict obligations of *prior* recourse to available amicable dispute settlement procedures. On the contrary:

(a) An allegedly injured State would remain free, under the future State responsibility convention, to resort to countermeasures *prior* to recourse to any amicable settlement procedure;

(b) Such a State would in addition only be obliged, except, of course, for the "offer" hypothesis envisaged in paragraph 2 (b) of the 1993 Drafting Committee's text, to have recourse (at any time it might choose) to such means as are provided by a "relevant" treaty (in the narrow sense as explained above);

(c) The obligation so narrowly circumscribed would be further narrowed down if the future State responsibility convention were to confine it to such means as *third-party* procedures or, even worse, to *binding* third-party procedures, thus overlooking the crucial role which is, and should be, played by negotiation;

(d) Furthermore, the formulation adopted by the 1993 Drafting Committee completely ignores the problem of prior and timely communication, by the injured State, of its intention to resort to countermeasures. This requirement was set forth in paragraph 1 (b) of draft article 12 as proposed by the Special Rapporteur. According to the Drafting Committee's formulation, the injured State would instead be relieved of any burden of prior notification of countermeasures (and the law-breaker would be denied any opportunity for "repentance").

47. Secondly, but not less importantly, by not outlawing resort to countermeasures *prior* to recourse to dispute settlement procedures to which the injured State might be bound to have recourse under instruments *other than* the State responsibility convention itself (which is *all* that was envisaged in the 1985, 1986 and 1992 proposals), the formulation of the 1993 Drafting Committee would seem to relieve such States, in so far as the State responsibility convention is concerned, from their dispute settlement obligations. The mere fact of not requiring recourse to available dispute settlement procedures *prior to countermeasures*, which inevitably undermines the said dispute

settlement obligations, would be further aggravated by (a) the "relevant" treaties clause and (b) the exclusion of given dispute settlement procedures under the second and third alternatives discussed in paragraph 37 above.

##### B. The crucial issue of the requirement of prior recourse to dispute settlement procedures

48. However difficult it may be to make significant steps forward in the development of both the law of State responsibility and the law of dispute settlement, one cannot fail to be impressed by the degree to which the formulation adopted by the 1993 Drafting Committee for article 12, not to mention article 11,<sup>27</sup> falls short of any measure of progress in such vital areas. Indeed, that formulation marks a major departure not only from the essential features of the proposals of the present Special Rapporteur which were referred to the Drafting Committee in 1992,<sup>28</sup> but also from those of the not very dissimilar draft article 10 proposed by his predecessor and referred to the Drafting Committee almost a decade ago.<sup>29</sup> While ready to abide, as he obviously must, by any choices of the Commission, the Special Rapporteur also feels duty bound fully to express his views before a final choice is made. This is especially true with regard to such a difficult and delicate matter as the relationship to be established, in the State responsibility draft, between the right of an injured State to take unilateral countermeasures and its dispute settlement obligations.

49. The requirement of "prior recourse to dispute settlement procedures" is, in our view, as indispensable to the State responsibility convention as the rules setting forth the admissibility and regulation of countermeasures. Although the latter point has been emphatically contested (for presumably different reasons), first, by some members of the Commission itself<sup>30</sup> and, later, by various representatives in the Sixth Committee in 1992,<sup>31</sup> it would be extremely difficult to accept the notion that the draft should confine its treatment of the consequences of internationally wrongful acts to the rights and obligations relating to cessation and reparation. Whether the injured State's prerogative to resort to reprisals or countermeasures is technically qualified as a right or a *faculté*, it represents an integral part of the consequences of an internationally wrongful act under any theory of international responsibility. In particular, the prerogative in question remains an integral part of the said consequences regardless of whether it is classified as a "substantive" or, much more appropriately, as an "instrumental" consequence of an internationally wrongful act. To say that the regime of countermeasures should not be covered by the State responsibility convention would be tantamount to saying

<sup>27</sup> Ibid.

<sup>28</sup> See *Yearbook* . . . 1992, vol. I, 2288th meeting.

<sup>29</sup> See footnote 2 above.

<sup>30</sup> See *Yearbook* . . . 1992, vol. II (Part Two), p. 20, paras. 124 et seq.

<sup>31</sup> See, for example, the statement made by the representative of France at the forty-seventh session of the General Assembly, *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 26th meeting, paras. 5 et seq.

<sup>26</sup> For a discussion of some important elements of article 11, see paragraphs 62 et seq. below, especially paragraphs 67 and 69.

that countermeasures are not contemplated by customary rules of international law as a right or *faculté* of an injured State. Furthermore, it would be tantamount to saying that customary international law does not impose conditions and restrictions in the use of countermeasures.<sup>32</sup>

50. If the draft is to cover the regime of countermeasures, as the Commission and the Drafting Committee itself have agreed without difficulty that it should, then it must also provide for some measure of dispute settlement obligations. Of course, the nature of the dispute settlement obligations to be envisaged in the draft depends to some extent on the degree of progressive development one wants to achieve. In this regard, the Commission, as an international "legislator", will need to decide whether to follow the maximalist or the minimalist approach discussed in our fifth report.<sup>33</sup>

51. It is essential that the State responsibility convention include *as a minimum* the dispute settlement obligations that would be necessary *to preserve the validity and effectiveness* of any such obligations by which the allegedly injured State is bound under international rules *other than* those contained in the State responsibility convention. Otherwise, the very fact of declaring the *ipso facto* admissibility of countermeasures on the mere condition of the existence of an internationally wrongful act would in effect nullify the dispute settlement rules by which the future States parties are bound. Since the dispute would most likely be settled by the solution imposed on the wrongdoer by means of countermeasures, there would be little or no role for dispute settlement procedures. Such would be the result if the convention were to legitimize countermeasures without requiring *prior* resort to available, namely *legally prescribed*, dispute settlement means. Such would precisely be the effect of a convention including a provision such as paragraph 1 (a) of article 12 as formulated by the 1993 Drafting Committee.

52. To avoid any misunderstanding with regard to the nature of the requirement of prior recourse to dispute settlement procedures, it is important to emphasize that such a requirement (as formulated in 1992 by the Special Rapporteur in paragraph 1 (a) of draft article 12 as well as, *mutatis mutandis*, article 10 as proposed by the preceding Special Rapporteur in 1985-1986) would not impose any *new* dispute settlement obligations upon the States ultimately participating in a State responsibility convention. Such a provision would merely preserve any settlement obligations of an allegedly injured State existing independently of the State responsibility convention from the otherwise inevitable negative implications resulting from the codification of the admissibility of countermeasures.

53. Arguably, the provision in question is not even really a matter of progressive development. In this respect, a marked difference must be emphasized between

article 12 of part 2 and the draft articles of part 3.<sup>34</sup> The latter articles would introduce *new* settlement obligations which would clearly constitute progressive development. In contrast, draft article 12 as proposed by the Special Rapporteur would merely preserve and prevent any undermining, or even restrictive interpretation of, existing dispute settlement rules the object of which is to ensure more impartial and just solutions than those that would be imposed by coercion. The States participating in the convention would not be subject to any additional dispute settlement obligations by virtue of article 12, which does not create new dispute settlement obligations but merely preserves any existing such obligations as well as the possibility of their further development.

54. To use an image, the exclusion of a provision such as paragraph 1 (a) of draft article 12 as proposed by the Special Rapporteur or, *mutatis mutandis*, draft article 10 proposed by the previous Special Rapporteur in 1985 and 1986, would entail not so much *lucrum cessans* in terms of the progressive development of the international law of dispute settlement. Such *lucrum cessans* would occur if part 3 were not adopted or were significantly curtailed, but also, to a very serious degree, *damnum emergens*, as is briefly explained below.

55. The negative impact of the absence, in article 12 of part 2 of the draft, of a requirement of "prior recourse to dispute settlement procedures" is more serious than it may appear to be. It could be argued, *prima facie*, that the fact that a State responsibility convention did *not* require *prior* recourse to dispute settlement procedures provided for by instruments in force between the parties, as would be the case under the formulation adopted by the 1993 Drafting Committee for paragraph 1 (a) article 12, would not affect the parties' obligations under such instruments. It could be argued, for example, that since armed reprisals are prohibited—a rule of customary law that the convention could not fail to codify—the countermeasures to which an injured State might lawfully resort should not contravene the general (and practically universal) obligation to settle disputes by *peaceful* means as embodied in Article 2, paragraph 3, of the Charter of the United Nations. There can be no doubt that lawful countermeasures must be limited to peaceful ones under article 14 of part 2 of the draft.<sup>35</sup>

56. We wonder, however, whether such a consideration dispels any doubt. Leaving aside the question of the extent to which resort to countermeasures prior to recourse to dispute settlement procedures would be compatible with that further requirement of Article 2, paragraph 3, of the Charter that international disputes must be settled in such a manner "that international peace and security, and justice, are not endangered",<sup>36</sup> the legitimization of countermeasures embodied in the formulation adopted by the 1993 Drafting Committee for article 12, paragraph 1 (a) does not seem to be compatible with *positive* dispute settlement obligations. We refer, for example, to the general obligations of all Member States

<sup>32</sup> Countermeasures would thus be, and should remain, outside the realm of the law—a manifestly absurd proposition. One would have to wonder, if such were the case, whether countermeasures were not addressed in the convention because they were unlawful, as suggested by some members of the Commission, or because they were lawful *a priori* and thus not amenable to any control or regulation, as suggested by some representatives in the Sixth Committee.

<sup>33</sup> *Yearbook . . . 1993*, vol. II (Part One), pp. 19 et seq., document A/CN.4/453 and Add.1-3, paras. 62 et seq.

<sup>34</sup> For the text of the draft articles of part 3, see footnotes 3 and 5 above.

<sup>35</sup> For the text of article 14 of part 2, see *Yearbook . . . 1992*, vol. II (Part Two), p. 31, note 69.

<sup>36</sup> This point was covered by the ill-fated Special Rapporteur's draft article 12, paragraph 3 (see paragraphs 59 and 66 below).

set forth in Article 33 of the Charter as well as to any specific obligations binding States in an actual or alleged responsibility relationship as a result of their bilateral dispute settlement treaties or compromissary clauses. Notwithstanding the "free choice" of means principle under the generally accepted interpretation of Article 33, paragraph 1, of the Charter, it is difficult to accept the notion that resort to countermeasures before seeking a solution by one of the means listed in Article 33, paragraph 1, of the Charter would be compatible with existing customary law or the Charter.<sup>37</sup>

57. Immediate resort to countermeasures would be clearly incompatible with a specific treaty or a compromissary clause providing for the arbitration of legal disputes not settled by diplomacy. This would be particularly true in the presence of a jurisdictional link between the States concerned deriving from their recognition

as compulsory *ipso facto* and without special agreement [of the] jurisdiction of the [International Court of Justice] in all legal disputes concerning:

[...]

c. the existence of any fact which, if established, would constitute a breach of an international obligation; [ or ]

d. the nature or extent of the reparation to be made for the breach of an international obligation.<sup>38</sup>

According to most dispute settlement instruments, the "triggering mechanism" of the settlement obligation, namely, of the obligation to have recourse to the envisaged procedure, is the existence of a dispute not settled by "negotiation" or by "diplomacy". It is difficult to imagine that resort to countermeasures could be considered to be part of negotiation or diplomacy.

58. It is important to note that the limitative reference to relevant *treaties* in article 12, paragraph 1 (a), as formulated by the Drafting Committee would not only undermine a considerable part of the existing and future *conventional* instruments on amicable dispute settlement, but would also cast an "authoritative" doubt over any existing rules of *general international law* on the subject.

59. There are several important issues that require serious consideration with regard to the present state of the law of dispute settlement and its development:

(a) Assuming that Article 2, paragraph 3, of the Charter of the United Nations has become a principle of customary international law, the continuing existence and further development of such a principle may be affected by a

provision contained in a convention (or even, for that matter, a draft codification prepared by the Commission) which authorizes any allegedly injured State to resort to countermeasures *ipso facto*, namely without any *prior* attempt to settle the dispute by negotiation or any available third-party procedures (and even without any prior communication). This raises the question whether Article 2, paragraph 3, of the Charter has merely the *negative* effect of condemning resort to *non-peaceful* means or also, as we are inclined to believe, the *positive* effect of requiring the use of available settlement means with a view to achieving "justice". The authorization to disregard available settlement procedures, such as those expressly referred to in the Charter, may affect the degree of *justice* attained in an eventual settlement.<sup>39</sup> Even if the continued validity of the general principle in question is not affected, paragraph 1 (a) of the text under review may hinder its further development;

(b) There is also the question of the extent to which the Commission can or should ignore the relevant resolutions, namely the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and the Manila Declaration on the Peaceful Settlement of International Disputes,<sup>40</sup> adopted by the General Assembly, of which the International Law Commission is a subsidiary organ. Given this relationship, these solemn declarations should arguably have a decisive impact on any dispute settlement provisions to be embodied by the Commission in its draft, notwithstanding the non-binding character of those declarations;

(c) Furthermore, there is the question of the extent to which the Commission should take into consideration the provision of the second paragraph of principle V of the Declaration on the Principles Governing Mutual Relations between Participating States, contained in the Helsinki Final Act,<sup>41</sup> according to which litigant states "will endeavour in *good faith*\* and a *spirit of cooperation*\* to reach a rapid and equitable solution *on the basis of international law*\*". The members of the Conference on Security and Cooperation who participated in the drafting of the Final Act were generally of the view that the principles embodied in the Declaration were in full conformity with the law of the Charter of the United Nations. This gives rise to the more specific question of whether the paragraph quoted constitutes a significant step in the development of the United Nations law of dispute settlement or whether the requirements of good faith and a spirit of cooperation referred to therein can be overlooked. There would appear to be an inherent contradiction between the idea of a good-faith attempt to reach a rapid solution in a spirit of cooperation *on the basis of international law*, on the one hand, and the idea of immediate resort to countermeasures, on the other. Whether the phrase "on the basis of international law" refers to substantive or procedural law, or both, this reference would presumably have at least some impact on the

<sup>37</sup> It could hardly be argued that since Article 33, paragraph 1 of the Charter of the United Nations refers to disputes "the continuance of which is likely to endanger the maintenance of international peace and security", many disputes arising in the area of State responsibility would not be of such a nature as to fall under the general obligation set forth in that provision. The first paragraph of the second principle of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (see footnote 9 above), which is surely not insignificant for the purposes of a contemporary interpretation of the Charter, should dispose of any such argument *at least* for a United Nations body like the Commission (if not *de lege lata* at least *de lege ferenda*). For a discussion of the relevant provision contained in the Final Act of the Conference on Security and Cooperation in Europe held at Helsinki, see paragraph 59 (c) below.

<sup>38</sup> Article 36, paragraph 2, of the Statute of the International Court of Justice.

<sup>39</sup> The reference to justice was covered, in the Special Rapporteur's 1992 proposal, by paragraph 3 of article 12. On this provision see paragraphs 56 above and 66 below.

<sup>40</sup> General Assembly resolution 37/10 of 15 November 1982, annex.

<sup>41</sup> *Final Act of the Conference on Security and Cooperation in Europe*, signed at Helsinki on 1 August 1975 (Lausanne, Imprimeries Réunies).

conditions required for lawful resort to countermeasures, namely that existing dispute settlement obligations should be complied with *before* resorting to countermeasures.

60. To conclude the discussion of this crucial question, the present issue is not whether any requirement of prior resort to dispute settlement procedures should be embodied in article 12 of part 2 of the State responsibility draft by way of progressive development of the law of dispute settlement *or* of the law of State responsibility. That issue is one that the Commission will have to tackle in dealing with part 3 of the draft, namely with dispute settlement procedures after the taking of countermeasures. The present issue which arises in the context of article 12 is whether a State responsibility draft should not completely rule out any provisions the adoption of which by the Commission and eventually by States would undermine the effectiveness of dispute settlement procedures which, in addition to being prescribed by existing rules, are by nature more likely to lead to impartial and just solutions than are unilateral measures.<sup>42</sup> Given the significance generally attributed to the draft articles emanating from the Commission, the negative consequences would be felt not only at the time of adoption of the future State responsibility convention, but already at the step of adoption on first reading of article 12 as formulated by the 1993 Drafting Committee. This would strike a severe blow to the existing international law of dispute settlement, as well as to the prospects for the further development of that law during the period required to complete the second reading and ultimately to adopt the State responsibility convention, possibly at a diplomatic conference.

61. With all due respect, we believe that the limited number of members of the 1993 Drafting Committee who favoured the abandonment of the requirement of "prior recourse to dispute settlement procedures" in article 12 of part 2 could usefully be invited by the Commission to give further consideration to this question in the light of the preceding paragraphs as well as to the relevant discussion contained in the fourth report.<sup>43</sup> It is our humble but considered view that they may have simply overlooked the inevitable impact of the codification of countermeasures on the international law of dispute settlement and its future development. It is vital to stress that the law of dispute settlement is the area of international law where progress is less difficult to achieve than in such impervi-

ous areas as law-making and collective security.<sup>44</sup> It follows that, even if one assumed, as we are unable to do, that the obligation to settle disputes by given means does not imply at present the obligation not to resort to countermeasures prior to recourse to dispute settlement procedures, it would still be imperative, for a body like the Commission, to provide for that obligation so as to avoid at the very least hindering progressive development in the area of dispute settlement.

### C. Other important matters relating to the pre-countermeasures dispute settlement issues to be dealt with in article 12 of part 2

62. Assuming we have managed to express our position more clearly with regard to the requirement of "prior recourse to dispute settlement procedures", we can now take a fresh look at the main controversial elements of draft article 12 as proposed and discussed since 1992,<sup>45</sup> namely: (a) the terms "exhaustion", "all" and "available" in paragraph 1 (a) of that draft article; (b) the reference to "interim measures" in paragraph 2 (b); (c) the so-called "exception to the exceptions" set forth in paragraph 3; (d) the expression "adequate response" in draft article 11, as proposed in 1992;<sup>46</sup> and, more generally, the importance of maintaining a degree of flexibility in the provisions of article 12 (as ensured by the above terminology). Further consideration is also suggested with regard to the requirement of a prior communication or notification of the countermeasures.

#### 1. USE OF THE TERMS "EXHAUSTION", "ALL" AND "AVAILABLE"

63. The concern of some members, expressed in the 1992 debate, over the excessively demanding tenor of paragraph 1 (a) of article 12 focused in particular on the terms "exhaustion" and "all". These terms would have implied, in the opinion of those members, too lengthy a process for the injured State to follow before being allowed to resort to a unilateral measure.<sup>47</sup> The intention of the Special Rapporteur, which perhaps could have been clarified in the Drafting Committee, was not to impose upon an allegedly injured State the unbearable burden of successively exhausting all of the dispute settlement procedures listed, for example, in Article 33 of the Charter of the United Nations. The intention was to call for a *serious* effort to make *full* use of any dispute settlement procedures available to the States concerned, based on their existing treaty obligations in the light of the Declaration on Principles of International Law concerning Friendly

<sup>42</sup> It is evident that dispute settlement procedures and countermeasures differ dramatically in terms of the propensity to ensure a proper implementation of the law. Dispute settlement procedures, particularly third-party procedures, are by nature the most likely to ensure a correct and equitable solution of any dispute. As for countermeasures, they are surely intended in theory as an acceptable "device" of general international law to redress the wrongdoing. Their nature, however, makes them very questionable as a means of enforcement of rights. In the first place, they present the undesirable feature of legitimizing breaches of international obligations. Secondly, and most importantly, the unilateral nature of countermeasures is likely to favour the more powerful States to the detriment of the less powerful States. These and other drawbacks of countermeasures were exhaustively denounced, as noted in the Special Rapporteur's fifth report (A/CN.4/453 and Add.1-3 (see foot-note 33 above), paras. 10 et seq.), by a very great majority of representatives in the Sixth Committee of the General Assembly's debate of 1992.

<sup>43</sup> See document A/CN.4/444 and Add.1-3 (footnote 4 above), paras. 24-51, especially paras. 32 et seq.

<sup>44</sup> This widely shared view is illustrated in masterly fashion in H. Kelsen's invaluable *Peace through Law* (University of North Carolina Press, 1944), esp. pp. 13 et seq. and other parts of the book (as opposed to pp. 3-13), as well as in the author's earlier works cited at pp. 14-15.

<sup>45</sup> See footnote 4 above.

<sup>46</sup> See document A/CN.4/444 and Add.1-3 (footnote 4 above), para. 52.

<sup>47</sup> See *Yearbook* . . . 1992, vol. I, 2274th meeting, para. 11, 2277th meeting, para. 9, 2279th meeting, paras. 4 and 21, and 2280th meeting, para. 32. See also paragraph 6 above.

Relations and Co-operation among States in accordance with the Charter of the United Nations and other relevant instruments.

64. As for the term "available", we understood this term to be used in a rather broad sense. With regard to draft article 10 proposed by the previous Special Rapporteur in 1985 and 1986,<sup>48</sup> the term "available" appears to have been intended to cover only those (possibly binding) third-party procedures that could be unilaterally initiated by the injured State. The present Special Rapporteur understood the term more broadly as covering all dispute settlement procedures available under any multilateral or bilateral treaty in force between the parties. The term "available" used in that sense would also include negotiation and conciliation. The requirement of availability was not intended to be understood merely in the sense of a purely legal availability. It should also be measured on the basis of the degree of the law-breaking State's disposition towards the use of settlement procedures such as negotiation, conciliation or even arbitration, which cannot be initiated unilaterally. Thus, paragraph 1 (a) should have been read in conjunction with both the "good-faith" requirement spelled out in paragraph 2 (a) of the same draft article and the "adequate response" condition indicated in draft article 11. Admittedly, this interrelationship was not clearly spelled out in the proposed text. However, a more satisfactory way to express the idea could have been found if the Drafting Committee had been able to devote more time to the matter.

## 2. USE OF THE TERM "TIMELY COMMUNICATION"

65. It will be recalled that draft article 12 paragraph 1 (b) as proposed by the Special Rapporteur in 1992 provided that the injured State should communicate its intention to resort to countermeasures to the law-breaking State in a timely manner. Since the 1993 Drafting Committee may have overlooked the question of prior notification as a result of lack of time during the session, the point could usefully be taken up at the forty-sixth session.

## 3. EXCEPTIONS TO THE REQUIREMENT OF "PRIOR RECOURSE TO DISPUTE SETTLEMENT PROCEDURES"

66. The exceptions to the requirement of "prior recourse to dispute settlement procedures" set forth in paragraphs 2 (b) and (c) of article 12 (concerning interim measures and reaction to non-compliance with an interim measure of protection ordered in the framework of a "third-party" settlement procedure) would not be applicable wherever the measures envisaged were not in conformity with the obligation spelled out in Article 2, paragraph 3, of the Charter of the United Nations. The Special Rapporteur initially abandoned this provision, which was considered to be unclear by some members of the Commission. On reflection, however, he believes that the provision should be reconsidered. It is meant to be one of the elements of flexibility referred to in point 1 above and point 6 of section C below. It is also important from the viewpoint of the progressive development of the law of both State responsibility and dispute settlement.<sup>49</sup>

<sup>48</sup> See footnote 2 above.

<sup>49</sup> See paragraphs 56 and 59 above.

## 4. USE OF THE TERM "ADEQUATE RESPONSE"

67. One of the main changes introduced by the 1993 Drafting Committee in draft article 11 as proposed by the Special Rapporteur in 1992 has been the elimination of the concept of "adequate response", which figured prominently in that draft.<sup>50</sup> The proposed provision would have allowed the alleged lawbreaker to escape countermeasures by accepting in principle some degree of responsibility for the wrongful act or continuing negotiations on the question. The allegedly injured State would be precluded from resorting to countermeasures as long as the allegedly wrongdoing State at least pursued dialogue in good faith. This possibility seems to be excluded by the formulation adopted by the 1993 Drafting Committee for article 11. According to that formulation, the allegedly injured State's *faculté* to resort to countermeasures would continue "as long as" the alleged lawbreaker "has not complied with its obligations" of cessation or reparation. Countermeasures, and not just interim measures, would seem thus to be admissible even where the alleged lawbreaker responded in a positive way, albeit not yet finally or completely, to the allegedly injured State's protests or demands. In other words, the "failure to comply" formula gives the injured State too much discretion in resorting to countermeasures notwithstanding the willingness of the wrongdoing State to attempt to resolve the matter. First, with regard to cessation, this phrase implies that an injured State may resort to countermeasures as from the very first moment that it believes, rightly or wrongly, that a continuing wrongful act is being committed by the allegedly wrongdoing State, without any opportunity being given to the wrongdoer to explain, for example, that there is no wrongful act or that the wrongful act is not attributable to it. The notion of an "adequate response" would provide more of an opportunity for dialogue. Secondly, with regard to reparation, the "failure to comply" condition seems to mean that countermeasures would be allowed to continue until the wrongful State had made full reparation for the injury resulting from the wrongful act. Unless the wrongdoing State is capable of instantaneously providing full and complete reparation, which would most likely be exceptional, it might continue to be a target of countermeasures even *after* full admission of liability and even while in the process of providing reparation and/or satisfaction.

68. The Special Rapporteur submits that this provision could also be usefully reconsidered in the Drafting Committee at the forty-sixth session.

## 5. A FEW REMARKS ON THE NEED FOR FLEXIBILITY

69. Much as one may wish to see the imperfections of the present inter-State system compensated by precise, clear-cut rules to be easily applied by States themselves, the absence of effective institutions is an obstacle to the very acceptance of such rules. International legal rules are thus characterized by a relatively higher degree of generality and vagueness than the rules of municipal law. For this reason, the rules of the inter-State system often rely

<sup>50</sup> For the text of article 11, see *Yearbook . . . 1993*, vol. I (footnote 10 above), para. 3.

on such concepts as “reasonable”, “due”, “appropriate”, “adequate”, or, with regard to the regime of countermeasures, “adequate response” (draft article 11), the law-breaking State’s “good-faith” cooperation in the implementation of settlement procedures (draft article 12), the “availability” of such procedures (paragraph 1 (a) of draft article 12), as well as such imprecisely defined terms as “interim measures” of protection (paragraph 2 of draft article 12) and “justice” (paragraph 3 of draft article 12).

70. The function of these concepts is, in our view, to *limit the constraints* inherent in the requirement of prior resort to available dispute settlement procedures contained in article 12, paragraph 1 (a).<sup>51</sup> In addition to responding to the concerns expressed by some, the Special Rapporteur wished to incorporate in the said requirement some flexible elements which would permit adjustment to the objective and subjective circumstances of each case.

71. The requirement would of course be applied by the party or parties who would be called upon to give effect to the relevant articles at various stages in a given case, as follows: first of all the allegedly injured State, following its demand of cessation/reparation; secondly, the allegedly lawbreaking State in responding to the other party’s demand; thirdly, the allegedly injured State again, when reacting to the other side’s response, and so on. At one point, application of the requirement to a particular case may be the subject of a disagreement between the parties, which may be followed by resort to countermeasures and the beginning of their dispute thereon. Failing an agreed solution, the application of the requirement of resort to dispute settlement procedures would result in the involvement of a third party (conciliation commission, arbitral tribunal or ICJ) competent to deal with the dispute under the relevant provisions of part 3 (as proposed by the Special Rapporteur in 1993).<sup>52</sup>

72. While the Special Rapporteur is unable to determine with certainty whether the above-mentioned elements of flexibility were the right ones, he thought that he had done his tentative best in the belief that either the Commission or the Drafting Committee would reflect on the meaning and impact of each one of those elements with a view to providing constructive criticism and improving the text. It is not too late to make such an effort.

## 6. THE IMPORTANT ISSUE OF INTERIM MEASURES

73. Something more needs to be said, mainly but not exclusively in the context of the problem of pre-countermeasures dispute settlement, on the role that may or should be played by interim measures. One must of course distinguish between interim measures indicated or ordered by a third party and interim measures taken unilaterally by the injured State.

74. Beginning with the former, the general rules on the subject of the United Nations are the well-known Arti-

cle 41 of the Statute of the International Court of Justice and Article 40 of the Charter of the United Nations, both of which use the expression “provisional measures”. In the Special Rapporteur’s proposals, interim measures resulting from a third-party procedure are envisaged mainly in part 3, namely, within the framework of *post*-countermeasures dispute settlement obligations. Under the provisions of that part, the third party called upon to resolve a post-countermeasures dispute would be empowered by the future convention to *order* interim measures. This would apply to the conciliation commission as well as to the arbitral tribunal or the International Court of Justice. Third-party indications or orders of interim measures are also considered, together with unilateral interim measures, in the text proposed in 1992 by the Special Rapporteur for article 12, paragraph 2 (b).

75. As regards unilateral interim measures, resort thereto by the injured State is contemplated in the Special Rapporteur’s proposal of 1992 as an exception to that State’s obligation of prior recourse to available dispute settlement procedures. The injured State’s *faculté* to adopt unilateral interim measures is restrictively qualified—under paragraph 2 (b) of the above-mentioned article—by two conditions. One condition is that the object of the measure be the *protective* purpose which is inherent in the concept of interim measures. This requirement would be met, for example, by a freezing, as distinguished from confiscation and disposal, of a part of the allegedly law-breaking State’s assets; by a partial suspension of the injured State’s obligations relating to customs duties or import quotas in favour of the allegedly lawbreaking State; or, more generally, by recourse to the *inadimplenti non est adimplendum* principle to be applied, of course, as a provisional measure. The second requirement is that the injured State’s *faculté* to adopt interim measures can only be exercised temporarily, namely “until the admissibility of such measures has been decided upon by an international body within the framework of a third party settlement procedure”.

76. Considering that the concept of interim measures of protection might prove to be too vague, as rightly pointed out by some members in the course of the 1992 debate,<sup>53</sup> some further precision could be achieved in the paragraph in order to reduce the possibility of abuse by the injured State. Although interim measures are not easy to define *in abstracto*, a serious attempt at definition could be made by the 1994 Drafting Committee.

77. Be that as it may, even with a more precise definition, a high degree of discretion will inevitably remain with the injured State. This is, however, no good reason for the opponents of the requirement of prior recourse to dispute settlement procedures who are apparently anxious to preserve the injured State’s prerogatives, to delete any reference to the possibility of unilateral interim measures. Interim measures were contemplated in the Special Rapporteur’s draft proposal precisely in order to add some flexibility, in the interest of the injured State, to a demanding requirement of “prior recourse to dispute settlement procedures”. The result was thus more balanced, in our

<sup>51</sup> A further element of flexibility might be achieved, perhaps, by deleting the word “all” in paragraph 1 (a) and finding a less stringent substitute for the word “exhaust”.

<sup>52</sup> A/CN.4/453 and Add.1-3 (see footnote 33 above), para. 106.

<sup>53</sup> See *Yearbook . . . 1992*, vol. I, 2274th meeting, para. 7, 2276th meeting, paras. 34 and 37, 2277th meeting, paras. 9 and 28, and 2279th meeting, para. 4.



view, than it appears to be in the formulation adopted by the 1993 Drafting Committee.

78. Three factors should, in any case, induce the injured State's authorities to show reasonable restraint in availing themselves of the interim measures derogation.

79. One factor should be an accurate, bona fide assessment, by the injured State, of the alleged wrongdoer's response to the demand for cessation/reparation. This factor is relevant to several aspects of the Special Rapporteur's proposals of 1992 with regard to any kind of countermeasures, including, of course, interim measures. It is, first, inherent in the general concept of an "adequate response" from the allegedly lawbreaking State (in draft article 11).<sup>54</sup> It furthermore appears in paragraph 2 (a) of article 12 with respect to the condition of good faith on the part of the lawbreaking State in the choice and implementation of available settlement procedures.

80. A second factor, within the framework of the Special Rapporteur's proposals of 1992, is the ruling out, in paragraph 3 of article 12, of any measure (including an interim measure) "not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice\*, are not endangered".<sup>55</sup>

81. The third and most important factor is represented, again within the framework of the Special Rapporteur's proposals of 1992, by the post-countermeasures dispute settlement system of part 3 of the draft. Any third-party body called upon to deal with a dispute under part 3 of the draft (conciliation commission, arbitral tribunal or the Court) would be empowered by the future convention not only, as noted above, to order interim measures but also to suspend any measures previously taken by the allegedly injured State.

#### D. PROPOSALS OF THE SPECIAL RAPporteur CONCERNING ARTICLES 11 AND 12 OF PART 2 OF THE DRAFT ARTICLES

##### Article 11

1. Subject to the provisions of articles 12-14 [the following articles], the injured State whose demands under articles 6-10 *bis* have not met with an adequate response from the State which committed the internationally wrongful act is entitled not to comply with one or more of its obligations towards that State as necessary to induce it to comply with its obligations [under articles 6 to 10 *bis*].

2. An adequate response may either:

(a) remove the basis for any reasonable belief by the victim State that an internationally wrongful act has been committed by the State against which the countermeasures are envisaged; or

(b) offer a means of resolving the dispute within a reasonable time.

However, a response does not become [shall not be deemed] inadequate merely because it fails to meet all the demands of the injured State [in particular demands for reparation] [forthwith].

3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

<sup>54</sup> See paragraph 67 above.

<sup>55</sup> See paragraphs 56, 59 and 66 above.

82. The Special Rapporteur considers that one of the main changes introduced by the 1993 Drafting Committee in draft article 11 as proposed by the Special Rapporteur in 1992 has been the elimination of the concept of "adequate response", which figured prominently in that draft. According to the Drafting Committee's formulation, the allegedly injured State's *faculté* to resort to countermeasures would continue "as long as" the alleged lawbreaker "has not complied with its obligations" of *cessation or reparation*. Countermeasures, and not just interim measures, would seem thus to be admissible even where the alleged lawbreaker responded in a *positive* way, albeit *not yet finally or completely*, to the allegedly injured State's protests or demands.

83. First, with regard to cessation, the Drafting Committee's phrase implies that an injured State may resort to countermeasures as from the very moment that it believes, rightly or wrongly, that a continuing wrongful act is being committed by the allegedly wrongdoing State, without any opportunity being given to the wrongdoer to explain, for example, that there is no wrongful act or that the wrongful act is not attributable to it. The notion of an "adequate response" would provide more of an opportunity for dialogue.

84. Secondly, with regard to reparation, the "failure to comply" condition seems to mean that countermeasures would be allowed to *continue* until the wrongful State had made full reparation for the injury resulting from the wrongful act. Unless the wrongdoing State is capable of instantaneously providing full and complete reparation, which would most likely be exceptional, it might continue to be a target of countermeasures even *after* full admission of liability and even while in the process of providing reparation and/or satisfaction.

85. It is submitted that this provision could be usefully reconsidered in the Drafting Committee at the forty-sixth session.

##### Article 12<sup>56</sup>

1. [Except as provided in the following paragraph], the injured State shall not resort to [counter]measures prior to:

(a) Complying [in good faith] with its international obligations relating to the [negotiated or third party] settlement of international disputes;

<sup>56</sup> Subsequent to the Commission's decision to refer to the Drafting Committee his proposals for articles 11 and 12 as contained in addendum 2 to his sixth report, the Special Rapporteur submitted a revised version of article 12 which reads as follows:

1. The injured State shall not resort to countermeasures prior to the conclusion of:

(a) a binding third party settlement procedure to which it is entitled to accede by unilateral initiative under a treaty or other dispute settlement instrument in force;

(b) failing such a title, a binding third party procedure offered to and accepted by the State which committed the internationally wrongful act.

2. The conditions set forth in the preceding paragraph

(a) do not apply to such urgent, temporary measures as are required to protect the rights of the injured State or limit the damage caused by the internationally wrongful act;

(b) cease to apply where the State which committed the internationally wrongful act:

(Continued on next page.)

(b) Appropriate and timely communication of its intention to the law-breaking State.

2. The restrictions set forth in the preceding paragraph do not apply:

(a) To urgent interim [provisional] measures that the injured State may take in order to protect its rights infringed by the internationally wrongful act [breach] or limit [reduce] the damage deriving therefrom;

(b) where the law-breaking State does not cooperate in good faith in the negotiation or third party procedure proposed by the injured State in compliance with paragraph 1 (a) of the present article.

3. The right [*faculté*] of the injured State to take measures is suspended as soon as a [binding] third party dispute settlement procedure has been initiated and power to order interim measures of protection is vested in that party.

86. The Special Rapporteur considers that, as compared with paragraph 1 (a) of the original proposal,<sup>57</sup> the provision of paragraph 1 (a) reduces drastically—and to a bare minimum—the injured State's onus of prior amicable settlement. In particular:

(a) It leaves out: (i) "exhausting", (ii) "all", and (iii) the references to "general international law" and the "United Nations Charter";

(b) By merely referring to compliance with the injured State's (*existing*) dispute settlement obligations, it *leaves* the *concrete solution* of the temporal question to the *interpretation* of such obligations, obviously to be made case by case on the basis of the relevant dispute settlement instruments in force between the parties;

(c) It leaves some room for future developments of the international law of dispute settlement by encouraging States (contrary to what a text that did not mention the priority question would do) to try to resolve that question in their future mutual dispute settlement agreements;

(d) It expressly refers to negotiation (as advocated by a number of members also in the 1993 Drafting Committee)

(Footnote 56 continued.)

(i) does not accept the offer of the binding third party procedure under paragraph 1 (b) of the present article;

(ii) does not cooperate in good faith in establishing or implementing the binding third party procedure envisaged in paragraph 1 (a) and (b) of the present article;

(iii) fails to honour a request or order emanating from that procedure; or

(iv) does not comply with the decision rendered by that procedure.

3. Except in the case of urgent temporary measures envisaged in paragraph 2 (a) of the present article no countermeasures shall be resorted to by the injured State without appropriate and timely communication of its intention to the State which committed the internationally wrongful act.

<sup>57</sup> See footnote 17 above.

tee) as a basic dispute settlement procedure in addition to third party means.

87. The provisions of paragraph 1 (b) reintroduce the "prior communication" requirement left out by last year's Drafting Committee.

88. Paragraph 2 exempts the injured State from the requirements of both prior dispute settlement measures and prior communication whenever:

(a) It is a matter of "interim measures of protection" (a broad concept that should reduce considerably the restriction of the injured State's freedom of choice);

(b) The law-breaking State does not cooperate in good faith in dispute settlement.

89. In either case the injured State's *faculté* to resort to countermeasures would remain practically unhampered, even the onus of prior communication disappearing.

90. It must be stressed that the concept of interim measures of protection is a rather broad one. It encompasses such measures as the freezing or seizure of assets, the imposition of a ban on export of given goods *et similia*. There is thus sufficient room for the injured State to protect its rights from jeopardy until the matter is settled by negotiation or third party procedure.

91. The concern that the discretionary power thus left to the injured State with regard to interim measures would nullify the obligations set forth in paragraph 1 appears to be unjustified because the concept of interim measures cannot be stretched beyond reasonable limits and unreasonable interim measures could be condemned by the third party in any eventual dispute settlement procedure (and reparation ordered). Some protection would thus be provided also for the law-breaking State. Obviously, better a small progress (towards more civilized practices) than no progress at all.

92. It is of course not suggested that, as is the case before the International Court of Justice, interim measures should not be available where damages would be a sufficient remedy.

93. In conformity with the 1993 Drafting Committee text, the provision of paragraph 3 suspends the injured State's *faculté* to resort to countermeasures as soon as a [binding] third party settlement procedure is initiated. Thus, that *faculté* would not even be suspended, for instance (unless agreed), in the course of negotiation.

## CHAPTER II

### Main issues to be considered in the forthcoming debate on the consequences of internationally wrongful acts characterized as crimes under article 19 of part 1 of the draft articles on State responsibility

94. According to plans, the forty-sixth session of the Commission is to devote part of its time to a debate on the consequences of State crimes, as defined in article 19 of part 1 of the draft articles on State responsibility;<sup>58</sup> this is

on the basis of the Special Rapporteur's fifth report.<sup>59</sup> Considering the great difficulty of the subject and the high number of issues raised in the said report, it was thought useful, together with Mr. Bowett, to list those issues in logical order with a view to favouring an orderly and

<sup>58</sup> For the text of articles 1 to 35, adopted on first reading at the thirty-second session of the Commission, see *Yearbook... 1980*, vol. II (Part Two), pp. 30 to 34.

<sup>59</sup> See footnote 33 above.



fruitful debate. It would thus be easier, for the Special Rapporteur, to draw from the debate the necessary guidance for the following work on the subject.

95. The list of questions, which is accompanied by references to the relevant paragraphs of the fifth report, is set out below.

#### A. Can the crimes be defined?

96. Article 19 of course contains a "definition". But paragraph 2 is somewhat "circular", referring to a breach which *is* recognized as a crime by the international community; the question remains, what crimes are so recognized?

97. Paragraph 3 of article 19 identifies four categories on the basis of the law in force, namely:

(a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

98. In addition to doubts as to whether the very notion of international crimes of States should be retained at all,<sup>60</sup> the question is very likely to arise whether the list of crimes in article 19, paragraph 3, ever was and currently is the most satisfactory.<sup>61</sup> Although this question may seem to pertain exclusively to article 19, it would be difficult not to take some account of the issue at the present time in determining the consequences of the wrongful acts in question. The definition, therefore, should receive some attention as a preliminary point in the expected debate at the forty-sixth session.<sup>62</sup>

#### B. Assuming an agreed definition can be reached, who determines that a "crime" has been committed?

99. A clear distinction would seem to suggest itself between crimes such as aggression and other crimes.<sup>63</sup>

<sup>60</sup> See document A/CN.4/453 (footnote 33 above), paras. 250 to 267.

<sup>61</sup> Ibid., para. 269 (b).

<sup>62</sup> Ibid., paras. 268 and 269.

<sup>63</sup> Ibid., para. 269 (a).

#### 1. CRIMES SUCH AS AGGRESSION

100. In the case of such crimes, the determination could be made by:

(a) The State victim of the aggression,<sup>64</sup> albeit on a provisional basis, as part of the State's decision to invoke the right of self-defence;

(b) Other States assisting the victim pursuant to the right of collective self-defence,<sup>65</sup> here again on a provisional basis;

(c) The Security Council. In fact the Security Council has never, as yet, characterized a State as an "aggressor". If it did so, would this finding be definitive or only provisional in the sense that a definitive finding would be left to an international court? And in that case, which court?<sup>66</sup>

#### 2. OTHER CRIMES

101. In the case of other crimes, the determination could be made by:

(a) The victim State—an unlikely solution, violating the maxim *nemo iudex in sua causa*;

(b) Other States—an equally unattractive solution, unless those States acted through some authoritative and internationally recognized body;

(c) The General Assembly, even though the Assembly, notwithstanding evidence that it claims such power in relation to crimes such as apartheid or colonialism, remains a highly political body and would lack power to make a binding finding;<sup>67</sup>

(d) The Security Council, even though the link with Chapter VII of the Charter is far from clear, and this organ, too, is political;<sup>68</sup>

(e) An international court. However, no such court exists. The International Court of Justice is unsuitable because its jurisdiction rests on consent and such consent is unlikely to be forthcoming from a State accused of a crime.<sup>69</sup> The newly proposed court is designed to deal with individuals, not States.

#### C. What are the possible consequences of a finding of crime?

102. The possible consequences of a finding of crime might relate first to the specific type of remedies available and to the *faculté* of resort to countermeasures and, secondly, to the conditions under which all States, rather than the actual victim, might be allowed to seek remedies or to resort to countermeasures.<sup>70</sup>

<sup>64</sup> Ibid., paras. 171 et seq.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., paras. 160 to 166 and 210 to 217.

<sup>67</sup> Ibid., paras. 208 and 209.

<sup>68</sup> Ibid., paras. 160 to 164 and 210 et seq., especially paras. 218 to 223.

<sup>69</sup> Ibid., paras. 214 to 217.

<sup>70</sup> Ibid., paras. 119 et seq.

# 1. REMEDIES AVAILABLE AND *FACULTÉ* OF RESORT TO COUNTERMEASURES

## (a) Remedies available

103. In his fifth report, the Special Rapporteur indicated that as far as cessation was concerned, it did not seem that crimes presented any special character in comparison with "ordinary" wrongful acts.<sup>71</sup> As regards reparation *lato sensu*, the Special Rapporteur has raised in relation to restitution in kind the question whether the limitations contained in article 7, paragraphs (c) and (d) of part 2<sup>72</sup> on disproportion in relation to compensation and on serious jeopardy to the State concerned should apply in the case of crimes.<sup>73</sup> As regards compensation, he has asked whether the ban in paragraph 3 of article 10 of part 2<sup>74</sup> on demands for satisfaction which would impair the dignity of the State concerned should apply in the case of crimes.<sup>75</sup>

104. Additionally, if crimes are to be treated as breaches *erga omnes*, are non-victim States entitled to these same remedies?<sup>76</sup> And, if so, is this entitlement dependent upon a decision of a competent United Nations organ, such as the Security Council, or can States demand these remedies on their own initiative?

## (b) *Faculté of resort to countermeasures*

105. Several questions arise in this context:

(a) Can all States take countermeasures in the case of crimes, i.e. do all States become "injured States" for the purposes of article 11?<sup>77</sup>

(b) Do the conditions of article 12 apply?

(c) Does proportionality apply as provided in article 13?<sup>78</sup>

(d) Do the prohibitions of article 14<sup>79</sup> apply, or, for example, should extreme measures of political and economic coercion, or even the use of armed force be permitted, either with or without the prior authorization of the Security Council?<sup>80</sup>

(e) Would departures from the normal conditions governing countermeasures be possible for all States, or only the actual victim of the crime?

# 2. CONDITIONS UNDER WHICH ALL STATES, AND NOT ONLY THE ACTUAL VICTIM, MIGHT, IN THE CASE OF A CRIME, BE ALLOWED TO SEEK REMEDIES OR TO RESORT TO COUNTERMEASURES

106. The question arises whether, in the case of a crime, any State should be allowed to seek remedies or to resort

to countermeasures on its own authority or on authority from the Security Council or further to an authorization from a competent court.

107. In the first alternative, the right conferred on the State would presumably have to be subject to the exercise by the Security Council of its powers under Chapter VII of the Charter of the United Nations and a State's obligations under Article 25 of the Charter.

108. In the second alternative, would the Security Council be competent outside the domain of crimes involving aggression or unlawful use of force?

109. The third alternative is a theoretical one since no court competent to deal with such matters currently exists.

# 3. POSSIBLE EXCLUSION OF CRIMES FROM THE SCOPE OF APPLICATION OF THE PROVISIONS IN CIRCUMSTANCES PRECLUDING WRONGFULNESS

110. This question arises in the case of consent (article 29 of part 1), *force majeure* (article 31 of part 1), distress (article 32 of part 1) and state of necessity (article 33 of part 1). As regards self-defence (article 34 of part 1),<sup>81</sup> it should be pointed out that the notion of crime and that of self-defence are incompatible.<sup>82</sup>

# 4. THE GENERAL OBLIGATION NOT TO RECOGNIZE THE CONSEQUENCES OF A CRIME<sup>83</sup>

111. The obligation not to recognize as legal any territorial acquisition resulting from aggression is already accepted. There remains the question whether the obligation is activated by a prior, authoritative finding by an impartial organ of the world community that the crime of aggression has been committed: is the Security Council the only organ empowered to make such a finding and is a specific call for non-recognition by the Security Council a prerequisite to the activation of the obligation?

# 5. THE GENERAL OBLIGATION NOT TO AID THE "CRIMINAL" STATE AND TO RENDER AID TO THE VICTIM<sup>84</sup>

112. Here too, the question arises whether the obligation in question arises spontaneously or as a result of specific decisions under the Charter of the United Nations, notably Article 2, paragraph 5, Articles 24 and 25, Chapter VII and Article 103.

113. The above list should of course be no obstacle to debating any other relevant issues dealt with in the fifth report or otherwise considered important by members of the Commission.

<sup>71</sup> Ibid., paras. 171-176.

<sup>72</sup> For the text of articles 1 to 6, 6 *bis*, 7, 8, 10 and 10 *bis*, see *Yearbook . . . 1993*, vol. II (Part Two), pp. 53-54.

<sup>73</sup> See document A/CN.4/453 (footnote 33 above), paras. 179-180.

<sup>74</sup> See footnote 72 above.

<sup>75</sup> See document A/CN.4/453 (footnote 33 above), para. 182.

<sup>76</sup> Ibid., paras. 122, 136 and 184 to 186.

<sup>77</sup> Ibid., paras. 226 to 240.

<sup>78</sup> See *Yearbook . . . 1992*, vol. II (Part Two), p. 30, footnote 67.

<sup>79</sup> Ibid., p. 31, footnote 69.

<sup>80</sup> See document A/CN.4/453 (footnote 33 above), paras. 192 and 198 to 213.

<sup>81</sup> See footnote 58 above.

<sup>82</sup> The Special Rapporteur, during the debate at the forty-sixth session of the Commission, drew the attention of members to the "false impression" that could be given by one reading of this paragraph. For further clarification, see *Yearbook . . . 1994*, vol. I, 2342nd meeting, para. 30.

<sup>83</sup> See document A/CN.4/453 (footnote 33 above), paras. 241 et seq.

<sup>84</sup> Ibid., paras. 244 to 249.

# DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 4]

## DOCUMENT A/CN.4/458 and Add.1-8

### Observations of Governments on the report of the Working Group on a draft statute for an international criminal court

[Original: Arabic, English, French, Russian, Spanish]  
[18 and 28 February, 11, 24 and 25 March, 11, 13 and 17 May,  
24 June and 10 August 1994]

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\* The reply submitted jointly by Denmark, Finland, Iceland, Norway and Sweden is reproduced under the heading "Nordic countries".

## NOTE

In the present document, the term "1992 Working Group" refers to the Working Group on the question of an international criminal jurisdiction, whose report appears in *Yearbook . . . 1992*, vol. II (Part Two), document A/47/10, annex. The term "1993 Working Group" refers to the Working Group on a draft statute for an international criminal court, whose report appears in *Yearbook . . . 1993*, vol. II (Part Two), document A/48/10, annex. Comments on the draft statute drawn up by the 1993 Working Group also appear in that report. The figures in parentheses are the paragraph numbers of the observations that the States concerned submitted regarding the report of the 1992 Working Group and which appear in *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/452 and Add.1-3.

**Multilateral instruments cited in the present document**

## Source

**Human rights**

Convention for the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, p. 277.
European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, p. 221.
European Convention on Extradition (Paris, 13 October 1957)	<i>Ibid.</i> , vol. 359, p. 273.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	<i>Ibid.</i> , vol. 660, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, p. 171.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968)	<i>Ibid.</i> , vol. 754, p. 73.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	<i>Ibid.</i> , vol. 1015, p. 243.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 51</i> , resolution 39/46, annex.
Model Treaty on Mutual Assistance in Criminal Matters (New York, 14 December 1990)	<i>Ibid.</i> , <i>Forty-fifth Session, Supplement No. 49</i> , resolution 45/117, annex.

**Privileges and immunities, diplomatic relations**

Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, <i>Treaty Series</i> , vol. 500, p. 95.
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**Law applicable in armed conflict**

Convention respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)	J. B. Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , 3rd edition (New York, Oxford University Press, 1918), p. 100.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, pp. 31 et seq.
Protocols additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of armed conflicts (Protocols I and II) (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, pp. 3 et seq.

**Law of treaties**

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , <i>Treaty Series</i> , vol. 1155, p. 331.
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*Source***Narcotics and psychotropic substances**

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)

Document E/CONF.82/15 and Corr.1 and 2.

**Civil aviation**

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)

United Nations, *Treaty Series*, vol. 974, p. 177.

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 24 February, 1988)

ICAO, document 9518.

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**Introduction**

1. At its forty-fifth session, in 1993, the International Law Commission decided that the draft articles proposed by the Working Group on a draft statute for an international criminal court<sup>1</sup> should be transmitted, through the Secretary-General, to Governments, in order for them to formulate observations on the subject, with a request that their comments be submitted to the Secretary-General by 15 February 1994.<sup>2</sup>

2. Pursuant to that request, the Secretary-General addressed to Governments a note verbale dated 6 October 1993 inviting them to submit written comments on the draft articles by 15 February 1994.

3. Furthermore, the General Assembly, at its forty-eighth session, adopted resolution 48/31 of 9 December 1993 entitled "Report of the International Law Commission on the work of its forty-fifth session", paragraphs 5 and 6 of which read as follows:

[*"The General Assembly,*

"5. *Invites* States to submit to the Secretary-General by 15 February 1994, as requested by the International Law Commission, written comments on the draft articles proposed by the Working Group on a draft statute for an international criminal court;

"6. *Requests* the International Law Commission to continue its work as a matter of priority on this question with a view to elaborating a draft statute, if possible at its forty-sixth session in 1994, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States."

4. Pursuant to paragraph 5 of resolution 48/31, the Secretary-General addressed a note verbale to Governments dated 4 January 1994, inviting them again to submit their written comments by 15 February 1994.

5. As at 22 July 1994, the Secretary-General had received 22 replies from Member States, and one from a non-member State; two additional replies from Member States were received after the close of the session. The texts of the observations are reproduced in the present volume.

<sup>1</sup> *Yearbook . . . 1993*, vol. II (Part Two), document A/48/10, para. 100, annex, sect. B.

<sup>2</sup> *Ibid.*, para. 100.

## I. Observations received from Member States

### Algeria

[Original: French]  
[14 February 1994]

1. Before making some comments on specific aspects of the draft statute for an international criminal court proposed by the Working Group of the International Law Commission, the Algerian Government wishes to recall, for fear that it may have been forgotten to some extent, the historical, logical and legal context in which the question is being considered.

#### A. Context in which the question is being considered

2. The establishment of an international criminal jurisdiction can hardly be separated from the main question, that of the elaboration of a draft code of crimes against the peace and security of mankind. Historically, the establishment of an international criminal jurisdiction has been envisaged in order to meet the need for a judicial body which would implement such a code. This choice stemmed from well-founded considerations which retain their full relevance and timeliness. While it is true that without a judicial body responsible for implementing and enforcing it, a code would be superfluous, it is also true that without a prior strict definition of the applicable law, a court would be merely an ineffectual body. What is involved here are two inseparable and complementary aspects of a single undertaking, namely, the punishment of crimes which, because they are singularly abhorrent and shocking to the world's conscience, cannot but be characterized as crimes against the peace and security of mankind.

3. The Algerian Government, which has continually declared its support for the establishment of an international criminal court, is all the more comfortable in stating that the establishment of such a court is not an end in itself. It has real meaning and scope only if this court is intended to punish acts which the international community agrees to recognize as crimes against the peace and security of mankind, and which it characterizes as such and as belonging to the jurisdiction whose establishment is envisaged.

4. Hence, the fact that the International Law Commission was given a mandate, in paragraph 6 of General Assembly resolution 47/33, of 25 November 1992, to undertake the project for the elaboration of a draft statute for an international criminal court does not in any way mean that work on the draft Code of Crimes against the Peace and Security of Mankind should be dropped or even slowed down. As the draft Code has been adopted by the Commission on first reading,<sup>1</sup> it would be highly desirable for the Commission to resume consideration of it in

accordance with its usual working methods, for this draft remains the foundation on which an international criminal jurisdiction would be built. A twofold operation is called for, and both aspects of the question should be worked on concurrently, with the same degree of interest and diligence. The ripeness of the topic and the present concerns of the international community provide conditions conducive to substantial and fairly rapid progress in both directions.

#### B. Comments on the draft articles

##### 1. THE NATURE OF THE FUTURE COURT

5. With regard to the nature of the court, the only option, in the view of the Government of Algeria, is a permanent court. Algeria cannot share the opinion that an embryonic structure that would meet sporadically, on an ad hoc basis, could be acceptable. The supporters of such an approach mainly raise considerations of a budgetary nature which, regardless of their importance, cannot be decisive in and of themselves, in view of the stakes involved. Recent international events have harshly revealed a lacuna in the structure of international relations: the absence of an international criminal court whose sole existence would probably have helped to defuse serious crisis situations. Clearly, what we have here is a legal vacuum which should be filled as soon as possible. One-shot solutions may have been found in some cases, especially through recourse to ad hoc bodies, but these are mere stopgap measures which one cannot make do with indefinitely or adapt as one pleases without a serious risk of dissipation of efforts and fragmentation of the international judicial system.

6. Furthermore, a permanent international criminal jurisdiction would have the advantage of ensuring an objective, uniform and impartial application of international law, while avoiding the hazards inherent in the establishment of jurisdictions following the occurrence of the reprehensible acts which are to be brought before them.

7. Lastly, only permanent international judges are in a position to place themselves above momentary political contingencies and the inevitable pressures linked to the sensitivity of the cases to be tried. An equal, independent and impartial justice can be ensured only by a permanent court composed of magistrates elected in order to try, with full awareness and in conformity with general and impersonal legal norms, the cases referred to them.

##### 2. THE COMPETENCE OF THE FUTURE COURT

8. With regard to the competence of the court, the Algerian Government shares the generally accepted view that the competence *ratione personae* should be limited to

<sup>1</sup> For the text, see *Yearbook* . . . 1991, vol. II (Part Two), pp. 94-97.

individuals. On the other hand, the competence *ratione materiae* seems unduly restrictive in the draft statute, in that none of the three alternatives proposed in article 23 (Acceptance by States of jurisdiction over crimes listed in article 22) meets the need to confer on the court sufficient authority, an authority commensurate with the task for which it is to be established. In Algeria's view, when a State accepts the court's statute, it should, *ipso facto*, accept the court's competence in regard to all the crimes identified as belonging to its jurisdiction. Any other solution would, in practice, be tantamount to calling into question the value of a State's very acceptance of the court's statute and making such acceptance meaningless.

### 3. APPLICABLE LAW

9. With regard to applicable law (a follow-up to the preceding question), the draft statute proposes a formula which deserves to be reviewed and supplemented. Article 22 (List of crimes defined by treaties) lists a number of crimes in respect of which the court may have jurisdiction on the basis of international conventions in force. This approach raises a number of questions, including that of the compatibility between the provisions of the court's statute and the provisions of these conventions with regard to the application of the "try or extradite" principle, which is the basic principle of the aforesaid conventions. A logical application of this principle, as it has been codified in these conventions, might result, in either scenario, in the practical impossibility of bringing a case before the court, inasmuch as States, even under their treaty obligations, are bound only to try the suspects or to extradite them to another country. An attempt has been made in the draft statute to go beyond this basic contradiction by establishing a kind of preferential jurisdiction for the court, but making this dependent solely on the good will of States. From this standpoint, the very usefulness of an international criminal court is called into question, for it can be anticipated that preference for the national jurisdiction would quite often prevail.

10. Moreover, the list of crimes in article 22, even as supplemented by the provisions of article 26, is far from being exhaustive or satisfactory. It does not include a whole series of crimes (e.g. international terrorism) though they are widely accepted by the international community, and by the Commission itself, as crimes against the peace and security of mankind.

11. In view of the foregoing, the only consistent approach which seems conceivable would be to establish exclusive jurisdiction for the court in respect of a number of crimes against the peace and security of mankind as previously identified in a universal code binding on all States.

### 4. RELATIONSHIP TO THE UNITED NATIONS

12. The question of the relationship between the future court and the United Nations has not received as much attention as it deserves, despite the fundamental importance attached to it in the report of the International Law Commission on the work of its forty-fifth session. The

Algerian Government believes that it is important for the court to be a United Nations body, not only in order to confer on it the moral authority of the Organization and to ensure its universal recognition, but also to give material expression to the indivisibility of international law and order. This would not in any way affect the court's independence and autonomy. The Statute of the International Court of Justice provides a cogent example with regard to the method of election of judges, their status, the automatic acceptance of the Statute of the Court by every Member of the United Nations, and the means by which cases are brought before the Court.

### Australia

[Original: English]  
[16 February 1994]

1. The following comments will deal with each of the seven parts of the 1993 Working Group draft on an international criminal tribunal.

#### PART 1: ESTABLISHMENT AND COMPOSITION OF THE TRIBUNAL

2. A number of articles in Part 1 raise issues of particular importance.

#### Article 2 (*Relationship of the Tribunal to the United Nations*)

3. Article 2 contains two alternative texts in square brackets. The first states that the tribunal is to be "a judicial organ of the United Nations". The second provides that the tribunal is to be "linked with the United Nations as provided for in the present Statute".

4. The Working Group's commentary on article 2 notes that there was disagreement among its members on what type of relationship the tribunal should have with the United Nations. Australia believes that the international criminal tribunal should be part of the United Nations system, preferably as a subsidiary judicial organ. Australia believes this could be achieved pursuant to article 7, paragraph 2, of the Charter of the United Nations. At the very least, Australia believes that the tribunal should be linked with the United Nations by an agreement analogous to those concluded with specialized agencies.

#### Article 4 (*Status of the Tribunal*)

5. Paragraph 1 provides that the tribunal is to be "a permanent institution . . . [which will] sit when required to consider a case submitted to it". This approach accords with the view Australia expressed in its interventions on this issue in the Sixth Committee in 1992 and 1993<sup>1</sup> and in its written comments on the 1992 Working Group report.

<sup>1</sup> *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee, 22nd meeting, paras. 30-38, and ibid., Forty-eighth Session, Sixth Committee, 20th meeting, paras. 53-63.*

*Article 5 (Organs of the Tribunal)*

6. Article 5 establishes the three organs of the tribunal: (a) the Court; (b) the Registry; and (c) the Procuracy. This structure is appropriate and identical to that employed for the International Criminal Tribunal for the former Yugoslavia.

*Article 9 (Independence of judges)*

7. Respect for the independence of judges is vital to the proper functioning of the tribunal. The Working Group may wish to list in article 9 examples of activities which would interfere with the “judicial functions” of judges or “affect confidence in their independence”. For example, paragraph 4 of the commentary on draft article 9 notes that “it was clearly understood that a judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government”.

*Article 11 (Disqualification of judges)*

8. Paragraph 6 of the Working Group’s commentary on this article notes that it would welcome comments from the General Assembly on “whether a limit should be placed on the number of judges whose disqualification an accused could request”. Setting a limit should not be necessary as it is unlikely that an accused could make out the grounds necessary for disqualifying more than one or two judges. Establishing a limit may also be seen as prejudicing the right of an accused to a fair trial before an impartial court.

9. The Working Group also requested comments as to the quorum required in the event that a judge be disqualified. Australia believes that, whether this disqualification occurs pursuant to article 11.2 or 11.3, a replacement should be provided so that the original quorum is maintained.

*Article 13 (Composition, functions and powers of the Procuracy)*

10. Paragraph 2 provides for States parties to nominate candidates for election as prosecutor and deputy prosecutor. Unlike draft article 7.2 which limits States parties to nominating one candidate for election as a judge of the court, article 13.2 places no such limitation on States parties in relation to nominating candidates for prosecutor and deputy prosecutor. It would be best also to limit States parties to nominating one candidate each for prosecutor and deputy prosecutor with the requirement that the candidates put forward would have to be of different nationality.

11. Paragraph 4 states that the procuracy is to act independently. Australia’s written comments on the 1992 Working Group report expressed support (paras. 58 and 59) for an independent prosecutorial system rather than the complainant State’s conducting prosecutions.

*Article 15 (Loss of office)*

12. Article 15 establishes the mechanism by which judges, the prosecutor, deputy prosecutor and registrar can be removed from office for misconduct or serious breach of the statute. In particular, draft article 15.2 provides that the prosecutor and deputy prosecutor can be removed by decision of two thirds of the Court. Australia believes that empowering the court to dismiss the prosecutor or deputy prosecutor threatens the independence of the procuracy and might lead to accusations of bias. A more suitable mechanism would be for the States parties to decide the question of whether the prosecutor or deputy prosecutor should be removed in any particular case.

*Article 19 (Rules of the Tribunal)**Article 20 (Internal rules of the Court)*

13. These provisions are akin to article 15 of the Statute of the International Criminal Tribunal for the Former Yugoslavia,<sup>2</sup> which calls for the judges of that tribunal to adopt rules of evidence and procedure. Security Council resolution 827 (1993), by which the Security Council adopted the statute of the International Tribunal for the former Yugoslavia, also called on States to provide comments on the rules of procedure and evidence of that tribunal which would be submitted to the judges for their consideration. It would be appropriate to consider whether a similar mechanism could be created to allow States parties the opportunity to have an input into the making of the rules of procedure and evidence for the international criminal tribunal.

*Article 21 (Review of the Statute)*

14. Such a provision would be best placed with the final clauses of the statute. The article provides for a review after five years at the request of an unspecified number of States parties. It will be difficult to set the number of States parties necessary to request a review, as the total number of States parties after five years will be hard to predict. Perhaps a better approach would be to set a fraction of States parties as the required number, e.g. one third or one quarter. It may also be appropriate to allow for subsequent reviews of the statute.

## PART 2: JURISDICTION AND APPLICABLE LAW

15. These provisions lie at the heart of the statute. These draft articles represent an expanded view of what should constitute the subject-matter jurisdiction of the court. In paragraph 57 of its report, the 1992 Working Group argued that “the Court’s jurisdiction should extend to specified existing international treaties creating crimes of an international character”. It expressed the view in paragraph 59 that “at the first stage of the establishment of a court, its jurisdiction should be limited to crimes defined by treaties in force”. In its intervention during debate on this issue in the Sixth Committee at the forty-seventh

<sup>2</sup> S/25704 and Corr.1, annex.



session of the General Assembly,<sup>3</sup> Australia noted its general support for this approach of the Working Group in dealing with the subject-matter jurisdiction of a court. The present draft articles now propose that the subject-matter jurisdiction of the court reach beyond treaties in force to crimes under general international law, certain crimes under national law which give effect to crime suppression conventions (e.g. the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances) and crimes referred to the court by the Security Council in certain cases. This represents a considerable change of attitude.

*Article 22 (List of crimes defined by treaties)*

16. Article 22 lists those crimes defined by certain treaties which are intended to form the basis of the court's jurisdiction. The following criteria for inclusion in the list are given in paragraph 2 of the Working Group's commentary on draft article 22:

(a) The fact that the crimes are themselves defined by the treaty concerned in such a way that an international criminal court could apply a basic treaty law in relation to the crime dealt with in the treaty; and (b) The fact that the treaty created, with regard to the crime therein defined, either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility that an international criminal tribunal try the crime, or both.

17. These criteria represent a filter for determining which crimes and treaties should be included in draft article 22. Because they adequately describe the elements of the crime and establish the principle of *aut dedere aut judicare* or universal jurisdiction, they largely meet the concerns expressed by Australia in its written comments (para. 36) on the 1992 Working Group report that:

Consideration will need to be given as to how specific offences which constitute a serious crime of an international character are to be deduced from the wide range of penal norms created by existing conventions. The elements of the criteria by which certain conduct defined in existing conventions would come within the jurisdiction of a court will need to be identified.

18. As noted in its statement to the Sixth Committee at the forty-eighth session of the General Assembly,<sup>4</sup> Australia believes that article 22 should not constitute an exhaustive list, and should allow for future expansion. We note that, at present, no general procedure has been established in any other part of the draft which would allow for future treaties to be included. This possibility should be explored. There seems no reason in principle to limit the court's jurisdiction in this regard to only those treaties currently included in the list.

19. One point remains unclear in relation to this draft article. This is whether it is intended that the court can have jurisdiction over the list of offences contained in the draft article on the basis that these are "international crimes" as defined by the various conventions (in which case the court's jurisdiction would not depend on a State's being a party to the relevant treaty), or whether it is intended that the court will only have jurisdiction in the event that jurisdiction is conferred upon it by a State

which is a party to a particular convention. Article 23 suggests that the former is the proper interpretation, but article 24 suggests that the latter is the proper interpretation. Moreover, the interrelationship between articles 22, 23 and 24 is crucial, but not clear as currently drafted. Unless clarified, the precise jurisdiction of the court will remain difficult to ascertain and may well lead to challenges to the jurisdictional competence of the court in individual cases.

*Article 23 (Acceptance by States of jurisdiction over crimes listed in article 22)*

20. Article 23 is intended to provide the mechanism by which States can accept the jurisdiction of the court over crimes listed in article 22. It lists three alternative approaches: alternative A, providing for States parties to opt in to the jurisdiction of the court; alternative B, requiring States parties to opt out of the court's jurisdiction; and alternative C, providing for a modified version of opting in to the jurisdiction. In paragraph 5 of its commentary, the 1993 Working Group has sought guidance from the General Assembly as to the system to be adopted.

21. In its comments on the 1992 Working Group report, Australia noted (para. 8) the importance of the court's having a voluntary jurisdiction whereby a State could become a party to the statute and by separate act accept the jurisdiction of the court. An opting-in mechanism would encourage greater participation in the statute. Alternatives A and C would facilitate this opting-in approach.

*Article 24 (Jurisdiction of the Court in relation to article 22)*

22. Australia agrees with the underlying principle of the present article 24 insofar as it takes account of the competing jurisdictional claims of States parties. In considering the court's jurisdiction, Australia agrees that, for practical reasons, the emphasis should be placed on the State in whose territory the accused is found or which otherwise can establish jurisdiction under the relevant treaty.

23. Australia is unclear as to the proposed scope of paragraph 2. Is it intended to give the court jurisdiction in situations where the suspect is located in a State which is not a party to the relevant treaty? As noted above, in our comments on article 22, it is unclear whether the court can have jurisdiction only in those cases in which such jurisdiction has been conferred by a State which is a party to the relevant treaty.

*Article 25 (Cases referred to the Court by the Security Council)*

24. Australia has no objection in principle to the idea of the Security Council's being able to refer complaints to the court. However, as currently drafted, the Security Council would have far greater powers in this regard than any individual State. On the face of it, article 25 seemingly allows the court to hear cases submitted to it by the Security Council regardless of whether the requirements

<sup>3</sup> See footnote 1 above.

<sup>4</sup> *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee, 20th meeting, para. 56.*

in article 24 have been met. If this is intended to be the case, it should be clear in the text of article 25.

*Article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22)*

25. Australia supports the principle expressed in article 26, as noted in Australia's statement to the Sixth Committee at the forty-eighth session of the General Assembly.<sup>5</sup>

PART 3: INVESTIGATION AND COMMENCEMENT  
OF PROSECUTION

*Article 29 (Complaint)*

26. Article 29 accords with the view put forward by Australia in its written comments (para. 59) on paragraph 122 of the 1992 Working Group report that the power of complaint to the tribunal should extend to any State party which has accepted the jurisdiction of the court with respect to the offence in question.

27. Australia is uncertain, however, as to which States are covered by inclusion in the present draft of the sentence "or other State with such jurisdiction and which has accepted the jurisdiction of the Court pursuant to article 23". Some clarification is requested. Paragraph 3 of the commentary at paragraph 1 refers to States initiating complaints in respect of offences at customary international law or municipal law. It may be that this is intended to pick up the provisions of article 26. However, that article confers jurisdiction only in very limited circumstances and does not in general confer jurisdiction over offences at customary international law or municipal law where these are not also treaty offences. Article 29 could also perhaps be more specific in relation to the types of supporting documents required to accompany a complaint.

*Article 30 (Investigation and preparation of the indictment)*

28. Paragraph 1 provides for the review by the bureau of the court of the prosecutor's decision not to proceed with a complaint. This reflects Australia's view expressed in its written comments (para. 58) on the 1992 Working Group report that there should be scope for review of a prosecutor's decision not to prosecute.

*Article 31 (Commencement of prosecution)*

29. Paragraph 1 provides that "upon a determination that there is a sufficient basis to proceed" the Prosecutor shall prepare an indictment. There is no mention of the prosecutor being satisfied that a "prima facie case" exists before preparing an indictment, although this is the standard mentioned in article 32 in relation to the court affirming an indictment. The meaning of "sufficient basis" should therefore be explored and, if different from

"prima facie case", as it is termed in article 32, reasons should be supplied.

*Article 33 (Notification of the indictment)*

30. Article 33 sets down the requirements for notification of an indictment to States parties and States which are not party to the statute. It permits the court to seek the cooperation of the latter in the arrest and detention of accused persons within their jurisdiction. Given the consensual nature of the court's jurisdiction, no greater obligation can be placed on States which are not parties to the statute.

*Article 35 (Pre-trial detention or release on bail)*

31. Article 35 allows the court to detain an accused in custody or to release him or her on bail. The provision, however, does not set out the criteria the court is to use in making this decision. This should be further explored.

PART 4: THE TRIAL

32. Unlike the statute of the International Criminal Tribunal for the Former Yugoslavia, the draft statute makes general provision for rules of procedure and evidence.

*Article 36 (Place of trial)*

33. Paragraph 1 provides for trials to be carried out at the seat of the tribunal, unless the court decides otherwise. Paragraph 2 provides for the court and a State, which need not have accepted the jurisdiction of the court or even be a party to the Statute, to reach an arrangement for the exercise by the court of its jurisdiction in the territory of the State. A State party, therefore, is not obliged to permit the court to exercise jurisdiction in its territory. This approach is preferable to that taken in relation to the International Criminal Tribunal for the Former Yugoslavia, which apparently allows the tribunal to sit in States without having to secure the agreement of the State concerned (see paragraph 6 of Security Council resolution 827 (1993)).

*Article 38 (Disputes as to jurisdiction)*

34. The commentary to article 38 states two questions on which the 1993 Working Group has invited comments. The first relates to whether all States parties or only those with a direct interest in a case should have the right to challenge the court's jurisdiction. Australia believes that only those States with a direct interest in a case should be able to challenge the court's jurisdiction. There is no benefit in a policy sense to be gained from allowing a challenge by all States parties.

35. The second question is whether pre-trial challenges by the accused as to jurisdiction and/or the sufficiency of the indictment should be included in the statute. Australia considers that challenges of this nature should be part of the trial process and should take place at the outset of the trial. In this regard, Australia does not agree with the provisions of article 38, paragraph 2 (b).

<sup>5</sup> See footnote 1 above.

36. The meaning of the second sentence in paragraph 3 is unclear. Once a decision has been made as to jurisdiction it should not be subject to further challenge during the hearing, irrespective of the identity of the party challenging the jurisdiction. Accordingly, the accused person should not be able to reopen the question of jurisdiction later in the trial once it has been adjudicated upon. Of course, jurisdiction may be challenged on appeal.

*Article 41 (Principle of legality (nullum crimen sine lege))*

37. Article 41 embodies the principle of *nullum crimen sine lege*. This meets the requirement of article 15 of the International Covenant on Civil and Political Rights which states in paragraph 1, *inter alia*, that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

The words contained in square brackets in subparagraph (a) should be retained without the brackets to make it clear that a given treaty provision must have been made applicable to the accused by whatever mechanisms different States may adopt.

*Article 44 (Rights of the accused)*

38. Paragraph (1) (h) appears to allow for the trial of a person *in absentia*. The 1993 Working Group has sought comment on this point. Australia is, as a general principle, opposed to trials *in absentia* and would prefer that the statute not allow for them. On this matter we refer to article 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights, which provides that an accused person is entitled to be tried in his or her presence.

39. We note further that the present draft does not contain any procedural safeguards in the event that trials may be held *in absentia*. These issues need to be canvassed.

*Article 45 (Double jeopardy (non bis in idem))*

40. Paragraph 2 (a) would allow the court to try a person who has been convicted by another court where the act in question "was characterized as an ordinary crime". The issue arises as to whether the principle of *non bis in idem* is being adhered to when the court can try a person again who has been properly tried by a national court solely on the ground that the offence concerned was characterized as an ordinary crime.

*Article 47 (Powers of the Court)*

41. Paragraph 1 (a) empowers the court to "require the attendance and testimony of witnesses". As drafted, the attendance of witnesses from any State party may be required, even if that State party is not otherwise involved in the action. The point should be made that, if adopted, this procedure would differ substantially from that usually followed where States may request assistance from other States in seeking the presence of witnesses, but where such presence is not compulsory.

42. The statute does not at present address the more mundane issues connected with this power, such as who is responsible for expenses of witnesses. Presumably these will be addressed, perhaps in the rules of court that will no doubt be developed.

*Article 51 (Judgement)*

43. Paragraph 2 provides that only a single judgement or opinion is to be issued. The prohibition on dissenting judgements is easier to accept in the context of a preliminary trial than it is in the determination of appeals (see comment on article 56 below).

*Article 53 (Applicable penalties)*

44. Paragraph 3 provides for the court to make orders relating to the proceeds of a crime but does not provide a mechanism for enforceability. That mechanism seems to be provided by article 65 which requires States parties to recognize and give effect to judgements of the court. These two provisions thus need to be read together.

## PART 5: APPEAL AND REVIEW

*Article 55 (Appeal against judgement or sentence)*

45. Article 55 provides for the accused to have the right of appeal with the right of the prosecutor to appeal inserted in square brackets. Provision should be made for the prosecutor to appeal the decision of a trial chamber to ensure that the acquittal of an accused is not legally flawed or based on errors of fact. This accords with national procedures the world over.

*Article 56 (Proceedings on appeal)*

46. Article 56 does not expressly provide for dissenting or separate opinions to the decision of the appeals chamber. Although views on this point will vary according to the legal traditions of the commentator, Australia's common-law heritage would dispose it to support provision for dissenting opinions.

47. The commentary on article 56 also reveals a difference of views in the 1993 Working Group as to whether there should be a separate and distinct appeals chamber akin to the one established by article 11 of the Statute of the international tribunal for crimes in the former Yugoslavia. A separate appeals chamber may be preferable, but the final position will no doubt be determined by the number of judges constituting the court and the expected caseload.

## PART 6: INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

*Article 58 (International cooperation and judicial assistance)*

48. Paragraph 1 places a general obligation on all States parties, whether or not they have accepted the court's

jurisdiction, to cooperate with the tribunal “in connection with criminal investigations relating to, and proceedings brought in respect of, crimes within the Court’s jurisdiction”.

49. Paragraph 2 places more onerous obligations on those States parties which have accepted the jurisdiction of the court, including the surrender of an accused to the tribunal in accordance with draft article 63. The Working Group might consider a more detailed list of the types of assistance a State party can be called on to provide under article 58, paragraph 2. At the same time some guidance might be given as to what constitutes cooperation under paragraph 1.

*Article 61 (Communications and contents of documentation)*

50. Article 61 is based on article 5 of the United Nations Model Treaty on Mutual Assistance in Criminal Matters.<sup>6</sup> The Working Group’s use of articles from the United Nations model mutual assistance and extradition treaties as precedents for provisions in the draft statute is supported.

*Article 63 (Surrender of an accused person to the Tribunal)*

51. Paragraph 3 obliges States parties which have accepted the court’s jurisdiction to surrender the accused person to the tribunal. This may be seen as cutting across generally accepted rules of extradition law where States retain the discretion not to extradite the person subject to the request. However, as regards the tribunal it may be argued that, by specifically consenting to jurisdiction, States have already agreed to the tribunal hearing the case and have given up the right not to hand over the accused person. The situation may therefore be distinguished from mere requests for extradition where no prior consent has been given to the exercise of jurisdiction by the courts of a foreign country and where, accordingly, it is entirely appropriate that the requested State retains the discretion not to extradite.

*Article 64 (Rule of speciality)*

52. This rule is a key provision in extradition treaties and its inclusion in the draft statute is essential.

PART 7: ENFORCEMENT OF SENTENCES

*Article 66 (Enforcement of sentences)*

53. Paragraph 1 requests States parties to offer facilities for imprisonment. This approach is acceptable. States should not be forced to accept prisoners. The housing of prisoners can present particular difficulties for countries, such as Australia, which have a federal system in which each of the individual state governments run prisons and there are no federal prisons.

<sup>6</sup> General Assembly resolution 45/117 of 14 December 1990, annex.

**Austria**

[Original: English]  
[20 June 1994]

*Article 2 (Relationship of the Tribunal to the United Nations)*

1. Article 2 provides two alternatives for the relationship of the tribunal to the United Nations. As desirable as it may be to institute the tribunal as a judicial subsidiary organ of the United Nations, Austria believes that the establishment of a separate institution is more realistic in view of the fact that otherwise a Charter amendment providing the tribunal as a judicial organ of the United Nations could be deemed necessary. Nevertheless it is inevitable to ensure a formal linkage to the United Nations system.

*Article 4 (Status of the Tribunal)*

2. Austria welcomes the provisions that the tribunal should sit only when required to consider a case. Austria does not share the view that such a concept is incompatible with the necessary stability and independence of the tribunal.

*Article 5 (Organs of the Tribunal)*

3. Austria believes that article 5 should not be understood as giving the tribunal the right to give directions to the procuracy.

*Article 7 (Election of judges)*

4. The 1993 Working Group’s commentary on article 7 notes that there was agreement to consider a sort of trade-off for the prohibition of the re-election of judges. Austria has no objection to the establishment of a shorter period for the term of office in connection with the admissibility of re-election. One can hardly envision an objective reason justifying a different term of office of the judges as compared with that of the prosecutors as provided in article 13, paragraph 2. Taking into account the need for balance of power of the tribunal’s organs, a re-election of judges could be envisaged.

*Article 9 (Independence of judges)*

*Article 10 (Election and functions of President and Vice-President)*

5. Changing the order of articles 9 and 10 should be considered for systematic reasons. The 1993 Working Group’s commentary on article 10 notes that some members of the Working Group argued strongly that the court should have a full-time president. However, Austria sees no necessity to provide for a full-time presidency.

*Article 11 (Disqualification of judges)*

6. The wording of paragraph 1 “. . . in which they have previously been involved . . .” could be interpreted as including actions according to article 52 (Determination of the sentence) and article 57 (Revision), which should definitely not lead to disqualification. It could be considered that the decision of disqualification should rest directly with the President. Austria believes that limiting the numbers of judges whose disqualification an accused is entitled to request is inappropriate in the case where the disqualification of judges beyond the proposed number seems to be justified. Provisions for such a limitation might be seen as prejudging the right of an accused to a fair trial before an impartial court.

*Article 13 (Composition, functions and powers of the Procuracy)*

7. It seems appropriate to include a provision similar to article 7, paragraphs 3 and 4 to ensure the independence of the Procuracy. The provision contained in article 13, paragraph 4, namely, that the prosecutor can neither be subject to instructions of the Tribunal nor give instructions, is of primary importance. Nevertheless the use of the term “Tribunal” in this context seems inappropriate, since it cannot be envisaged how the tribunal as such could give instructions unless it is through the court or the registry. Paragraph 7 states that the prosecutor shall not act in relation to a complaint involving a person of the same nationality. However, additional reasons for disqualification, e.g. accusation of bias, former involvement as judge, should also be foreseen in this respect.

*Article 15 (Loss of office)*

8. Austria expresses reservations concerning the provision that the prosecutor can be removed by an organ different from that which had elected him.

*Article 16 (Privileges and immunities)*

9. It is Austria's view that the different treatment of judges and prosecutors concerning privileges and immunities seems to be unfounded.

*Article 19 (Rules of the Tribunal)**Article 20 (Internal rules of the Court)*

10. Austria shares the view that a distinction should be made between the tribunal's rules of procedure and the internal rules of the court.

*Article 21 (Review of the Statute)*

11. Austria welcomes the provisions laid down in paragraph (b), which provide for a basis for incorporating new conventions into the scope of the court's jurisdiction.

*Article 22 (List of crimes defined by treaties)*

12. The list of crimes defined by treaties as enumerated in article 22 meets in general with our approval. Austria shares the view of members of the Working Group that the crime of torture as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, should be included. Furthermore Austria believes that article 22 should not be exhaustive and should envisage the possibility that new treaties define crimes falling under the competence of the court.

*Article 23 (Acceptance by States of jurisdiction over crimes listed in article 22)*

13. Austria clearly prefers alternative B providing an automatic conferral of jurisdiction over the crimes listed in article 22 to the court combined with an opting out system. However, alternative B should be amended to the effect that non-member States are entitled to accept the jurisdiction of the court by declaration as provided in alternative B.

*Article 24 (Jurisdiction of the Court in relation to article 22)*

14. In the light of its former commentary, Austria holds the view that the requirement of both conditions in order to accept the court's jurisdiction *ratione personae*, as laid down in article 24, paragraph 2, could weaken the effectiveness of the judicial system. It should therefore be restricted to one act of acceptance.

*Article 25 (Cases referred to the Court by the Security Council)*

15. The wording of article 25 leaves it open whether the Security Council may refer cases to the court whose jurisdiction States have not accepted or whether this possibility is excluded.

*Article 28 (Applicable law)*

16. Article 28 paragraph (c) should clarify which national law shall be the subsidiary source, e.g. national law where the crime has been committed, or the law of the State of which the accused, or respectively the victim, is a national.

*Article 29 (Complaint)*

17. Austria prefers that only the Security Council and member States of the tribunal shall have the right to institute proceedings. This would encourage States to become party to the statute. Austria welcomes the suggestion by one member of the Working Group to establish an indictment chamber consisting of three judges.

*Article 30 (Investigation and preparation of the indictment)*

18. In the light of the tribunal's objective to guarantee an independent and impartial jurisdiction, Austria expresses her reservations concerning the competence of the bureau, consisting of the president and vice-president of the court, to review decisions of the prosecutor. However, Austria shares the view that in cases of completely unreasoned complaints investigations should not be initiated.

*Article 31 (Commencement of prosecution)*

19. The commentary of the Working Group on article 31 states that a person may be arrested or detained under the statute, while the indictment is still in preparation, on the basis of a preliminary determination that there are sufficient grounds for the charges and a risk that the person's presence at the trial cannot otherwise be assured. It could be envisaged that the justifications for arrest be enlarged to include the case of danger of collusion or danger of recurrence.

*Article 32 (The indictment)*

20. Austria believes that the examination of the indictment should not rest with the bureau but with a separate "indictment chamber" (see commentary on article 29). Such a provision would also avoid the impression of bias concerning the president or vice-president who are members of the bureau, if they are involved in cases of appeal.

*Article 33 (Notification of the indictment)*

21. In view of the fact that the objective of paragraphs 2 and 3 consists in international cooperation and legal assistance, Austria believes that a reference clause to article 58, paragraphs 1 and 2, subparagraphs *b* and *c* should be inserted. Accordingly, article 33, paragraph 4, could refer to article 59. As to paragraph 5, a substitution for notification by other appropriate means could be envisaged (e.g. public notification).

*Article 37 (Establishment of Chambers)*

22. With regard to the 1993 Working Group's commentary on draft article 37, Austria shares the view of some members that the membership of the Chambers should be prefixed on an annual basis and should follow the principle of rotation according to the rule of a due process of law.

*Article 38 (Disputes as to jurisdiction)*

23. Austria believes that only States with an objective interest in a case should have the right to challenge the court's jurisdiction. Both the State concerned as well as the accused person should possess the right to challenge the jurisdiction of the court. To exercise this right should be permitted before or at the commencement of the trial.

It could also be considered to grant the accused the right to challenge the jurisdiction immediately after the notification of the indictment. By such provision the principal procedural rights of the accused are seen not to be affected since the accused is to be informed and provided with all the documents according to article 33, paragraph 1, in time to enable him to decide upon a possible challenge of jurisdiction even before the commencement of the trial. Austria suggests reconsideration as to whether the challenge should rest with the proposed indictment chamber (see commentary on article 29).

*Article 39 (Duty of the Chamber)*

24. Austria believes that the prosecutor should read the indictment at the commencement of the trial. Otherwise the impression of an identity of court and procuracy could arise.

*Article 41 (Principle of legality (nullum crimen sine lege))*

25. Austria believes that the text within square brackets in subparagraph *a* is not sufficiently appropriate to lay down precise and clear definitions; this text should therefore be deleted.

*Article 44 (Rights of the accused)*

26. Austria shares the view of some members of the Working Group that in situations as laid down under paragraph 3 (*b*) and (*c*) of the Working Group's commentary on article 44, the possibility of holding trials *in absentia* seems to be appropriate. However, clearer and more precise provisions for a case of trial *in absentia* seem necessary. Austria also shares the view that in cases of trials *in absentia* the judgments should be provisional in the sense that if the accused appears before the court at a later stage then a new trial shall be conducted in the presence of the accused.

*Article 45 (Double jeopardy (non bis in idem))*

27. It can be deduced only from the Working Group's commentary on article 45 that the principle of *non bis in idem* is solely applicable in cases of jurisdiction on the merits. Austria believes that the text of draft article 45 should be reformulated so as to state more clearly that this principle applies only in these cases and that this article is therefore not applicable with respect to a quashing of proceedings or a judgment of acquittal for formal reasons.

*Article 47 (Powers of the Court)*

28. Austria shares the view of the Working Group laid down in the commentary on article 47 that a complete and accurate recording of the trial proceedings is of great importance for the accused or the prosecutor in cases of appeal or revision. Therefore, Austria considers it necessary that the records should be transmitted to these persons. It could also be considered whether a provision

should be added which grants the aforementioned persons a right to receive a copy of the records.

*Article 48 (Evidence)*

29. In Austria's view it would be preferable that the competence to decide on forced testimony and perjury should rest with the court.

*Article 51 (Judgement)*

30. Austria joins the view of some members, expressed in the Working Group's commentary on article 51, that dissenting and separate opinions should not be allowed.

*Article 52 (Sentencing)*

31. Austria believes that the formula provided for in article 51, paragraph 2 should also be laid down in article 52.

*Article 53 (Applicable penalties)*

32. It should be taken into consideration whether the court may oblige the convicted person to bear the costs of the trial. Austria does not object to the court's right to return stolen property to the rightful owner.

*Article 55 (Appeal against judgement or sentence)*

33. As regards the right of the prosecutor to appeal, Austria believes that this right should be brought into conformity with the right of appeal of the accused. A limitation of the prosecutor's rights of appeal does not seem justified.

*Article 56 (Proceedings on appeal)*

34. Austria believes that the rule laid down in article 51, paragraph 2 should also be incorporated in article 56. Austria questions the role of the bureau in nominating the Appeal Chamber. She shares the view expressed in paragraph 5 of the Working Group's commentary on article 56 that there should be a separate and distinct Appeal Chamber. Consideration could be given to entitling the plenary, except the judges involved in the lower court decision, to constitute an Appeal Chamber.

*Article 58 (International cooperation and judicial assistance)*

35. Austria proposed that States should be required to state their reasons when requests for international judicial assistance are declined or delayed (see art. 4, para. 5 of the Model Treaty on Mutual Assistance and Criminal Matters).<sup>1</sup>

<sup>1</sup> General Assembly resolution 45/117 of 14 December 1990, annex.

*Article 61 (Communication and contents of documentation)*

36. Austria suggests that the following formula be added to paragraph 3 as a general clause:

"(f) such other information as is necessary for the proper execution of the request".

(See also art. 5, para. 1 (g) of the Model Treaty on Mutual Assistance in Criminal Matters)

*Article 62 (Provisional measures)*

37. Paragraphs *a* and *b* could be supplemented by the following wording:

"pending the transmittal of a formal request under article 58, paragraph 2, subparagraph *d*".

38. Furthermore, Austria believes that this article should indicate which content a request should include.

*Article 63 (Surrender of an accused person to the Tribunal)*

39. In Austria's view the wording of article 63 could be misunderstood in so far as the use of the expression "extradition" (para. 5) induces the application of a formal extradition procedure. In this case a national court would have to decide on the unlawfulness of the extradition according to its own rules (e.g. relating to the political nature of the crime). This consequence should be avoided.

*Article 67 (Pardon, parole and commutation of sentences)*

40. The system provided in paragraph 4 should be the norm so that the establishment of a Chamber solely for this purpose could be avoided.

## Belarus

[Original: Russian]  
[18 February 1994]

### GENERAL COMMENTS

1. The competent bodies of the Republic of Belarus (Ministry of Justice and other departments), further to their observations on the question of an international criminal jurisdiction, submit the following comments on the report of the Working Group on a draft statute for an international criminal court.<sup>1</sup>

2. Belarus notes with satisfaction the results achieved by the Working Group in 1993 and points out that the idea of an international criminal court, as set forth in the report, has become much more clearly defined. Positive trends can be identified in the process of creating the pro-

<sup>1</sup> Yearbook . . . 1993, vol. II (Part One), pp. 135 et seq., document A/CN.4/452 and Add.1-3, particularly pp. 144 et seq.

posed body and organizing its work. While many of these trends are deserving of support, some are in need of correction and further discussion.

#### SPECIFIC OBSERVATIONS

3. As to the establishment and composition of the court (part I of the draft statute), it is necessary to pause to consider the question of the relationship between the court and the United Nations. As pointed out earlier in our observations on the Working Group's 1992 report, close interaction between the international criminal court and the United Nations is a precondition for the court's effectiveness. In view of the fact that the basic channel for that interaction will be between the court and the Security Council (the appropriate changes being made in the character of the court), the interaction between the United Nations and the International Atomic Energy Agency could serve as a model for the relationship. This presupposes that the court will have close ties to the United Nations, without being a United Nations organ.

4. Extremely important questions are being raised with respect to the jurisdiction of the established body. A welcome development in that connection is the inclusion of alternative B in article 23 (Acceptance by States of jurisdiction over crimes listed in article 22), for it most closely approximates the proposed merging of two juridical acts: becoming a party to the statute and recognizing the court's jurisdiction. In this way, a State, by becoming a party to the statute, will automatically confer jurisdiction on the court over the crimes listed in article 22 (List of crimes defined by treaties). Obviously, as a first step, it will be necessary to grant States the right to exclude some crimes from such jurisdiction—once again, immediately on becoming parties to the statute. However, we are firmly convinced that such a right should not be unrestricted. In addition to the above-mentioned right, it will be necessary initially to reinforce the statute by including a limited number of the most serious and generally recognized international crimes, in respect of which it will be impossible for a State to reject the court's jurisdiction and still become a party to the statute. This will make it possible to create immediately a certain sphere of concurrent jurisdiction in relation to all States parties to the statute, and to expand that jurisdiction gradually over time.

5. Exclusive jurisdiction might be established over that limited number of crimes, since such jurisdiction derives logically from the nature of international crimes. In addition, the statute could leave room for a sphere of exclusive jurisdiction of the court for individual States, through declarations or agreements with the court.

6. In connection with paragraph 2 (a) of article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22), it is worth noting that a certain limited number of crimes under general international law (aggression and genocide, in the case of States not parties to the Convention on the Prevention and Punishment of the Crime of Genocide), where they fall within the sphere of exclusive jurisdiction of the court, will not require special consent in accordance with paragraph 1 of that article. This presupposes that definitions of such crimes will be present in the statute itself or in the protocols thereto.

7. As envisaged, with respect to the crimes specified in paragraph 2 (a) of article 26, special consent to jurisdiction is required from the same States which are referred to in article 24 (Jurisdiction of the Court in relation to article 22), the only difference in this case being that the basis for the jurisdiction derives not from a norm of an international treaty, but rather from a norm of international law which has been accepted and recognized by the international community of States as a whole. Accordingly, the provision in paragraph 3 (a) of article 26 needs to be reformulated.

8. Attention should also be given to the fact that the inclusion of the contents of paragraph 2 (a) of article 26 in article 25, which is discussed in paragraph 4 of the commentary to article 26, would lead to a change in the meaning of the current paragraph 2 (a). It is hardly worthwhile to make the referral of a case relating to crimes under general international law other than aggression contingent on a decision of the Security Council.

9. In connection with the determination of the jurisdiction of the court *ratione materiae*, a question is often raised about the relationship between the existing regime of universal jurisdiction under international treaties in force and the international jurisdiction that is being created. There is no doubt that it is possible to replace the first regime with the second (or to alter the first regime) in relations between States parties to the statute (see the Vienna Convention on the Law of Treaties, art. 30, para. 4). However, questions may be raised regarding States not parties to the statute that are parties to such treaties and have jurisdiction over an international crime that is subject to the jurisdiction of the court. In the draft statute, the proposed solution to this problem is based on the theory of "concessional jurisdiction". This theory, although very interesting, is hardly applicable to international crimes.

10. International crimes form a separate category in international law on the basis of general agreement among all members of the international community, and jurisdiction in respect of such crimes always derives from a treaty. It is specifically from an international treaty that the jurisdiction of an individual State, with regard to acts recognized by it as international crimes, derives; and it is from a treaty that the jurisdiction of the court will derive as well. However, in respect of international crimes the jurisdiction of an international body would be more in keeping with the nature of such crimes than the jurisdiction of any individual State. For that reason, it is justifiable to give priority to the statute over other international treaties.

11. In any case, bringing a suspect before the international court, despite a request for extradition by a State that is not a party to the statute but a party to the relevant treaty, could not be considered a violation of the treaty-law principle of "try or extradite". The obligation "to try" should not be understood in a literal sense. Its purpose is to ensure that offenders are brought to justice and prosecuted effectively. This obligation will be met if they are handed over to the court in accordance with all procedures for the protection of their right to due process.



12. The procedures for initiating prosecution by the court, as set forth in article 29 of the draft statute, are deserving of support. However, as to the authority to dismiss a case, the right to decide should belong not to the prosecutor but to the court, which should have an opportunity for subsequent review of the prosecutor's decisions. The outcome of such extremely serious cases as will be before the court should never be allowed to rest on the decisions of one man.

13. In regard to the initiation of investigations, we should like to repeat once again the proposal to conduct investigations through an independent body instead of through the prosecutor's office. Accordingly, the functions of the prosecutor's office would be curtailed and his staff reduced. As envisaged, this proposal—which represents a third alternative to the proposal made in the Commission to establish an investigative panel of judges, and to the assignment of investigative functions to the prosecutor's office—is the most acceptable solution. If this proposal is adopted, article 30 will have to be divided into two parts: one part entitled "Investigation" and the other entitled "Preparation of the indictment". The structure of the new body will also have to be altered.

14. In the light of the foregoing, it is essential that paragraph 2 of article 32 (The indictment) should provide a mechanism by which the prosecutor would be able to submit to the bureau for examination (or to the indictment chamber referred to in paragraph 6 of the commentary on article 29) not only the indictment, but also a report, if the evidence in the case justified dismissal.

15. In connection with article 38 of the draft statute (Disputes as to jurisdiction), it seems necessary to enhance the right of all States having jurisdiction over a specific crime to challenge the jurisdiction of the court. It would be logical to link closely the category of States having the right to initiate proceedings before the court and the category of States having the right to challenge the jurisdiction of the court.

16. It seems acceptable that the accused should be guaranteed an opportunity under the draft statute to bring preliminary challenges to the jurisdiction of the court. By all appearances, the establishment of a special indictment chamber, which would also be able to investigate the basis for an indictment or the report of the prosecutor requesting dismissal of a case, is an appropriate measure.

17. Objections may be raised to the inclusion of the words in square brackets in subparagraph (a) of article 41 (Principle of legality (*nullum crimen sine lege*)). Here, it is necessary to start from the premise that, in the case of international crimes, individual criminal responsibility stems directly from norms of international law.

18. With regard to the establishment of a system of appeal against judgement or sentence (art. 55), the granting of the right of appeal to the prosecutor as well as to the convicted person might merit support, since that would be consistent with the functions of indictment and with the appeals procedure in criminal proceedings. In order for the appeals process to take into account the particular features of the court, it would be useful to have appeals considered by the full court, with the exception of judges who participated in the decisions at first instance.

19. Likewise, provision should be made for the right of the convicted person (and also the prosecutor) to petition for revision of a decision of the court (art. 57).

20. Furthermore, with regard to earlier comments concerning the jurisdiction of the court *ratione materiae*, the provision in paragraph 4 of article 63 (Surrender of an accused person to the Tribunal) merits support. In addition to that provision, it would be useful to specify more precisely the priority status of requests for the surrender of an accused person. This could be accomplished by deleting the phrase "as far as possible" from paragraph 5. In any case, the rule regarding priority should be applied unconditionally in cases involving the surrender of persons accused of crimes within the sphere of exclusive jurisdiction of the court. It would be desirable to resolve in article 63 the question of the failure to surrender an accused person to the court, in violation of the provisions of the Statute. In such situations, the court should be granted the right to request the Security Council to obtain the surrender of the accused person.

21. There is a need to define how the rule of specialty (art. 64) would apply, depending on the crimes involved; for crimes falling under the exclusive jurisdiction of the court, it would not be necessary to apply this rule.

22. As presented, the provision of paragraph 4 of article 67 (Pardon, parole and commutation of sentences) would prevent effective monitoring of the execution of sentences. The settlement of all questions relating to pardon, parole and/or commutation of sentences should be performed exclusively by the court itself.

23. The Republic of Belarus hopes that these comments will help the International Law Commission to complete its work on the draft statute for an international criminal court. The Republic of Belarus reserves the right to state its position on the draft statute ultimately prepared by the Commission.

## Chile

[Original: Spanish]  
[22 March 1994]

## GENERAL COMMENTS

1. 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.

## I. CREATION OF THE TRIBUNAL

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

## II. COMPETENCE OF THE TRIBUNAL

7. 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.

8. Chile, like the draft statute, sees the tribunal as a means at the disposal of the States party, 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.

9. 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 prob-

lems for many States, that would imply an interference in their internal affairs.

10. For the foregoing reasons, the Government of Chile enters its reservation with respect to the provision in article 45, paragraph 2 (b) (Double jeopardy (*Non bis in idem*)), 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.

11. 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 permanence 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.

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

13. 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.

14. From that point of view, the Government of Chile considers that the provision of article 15 (Loss of office), paragraph 2, 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.

15. 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.

16. 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*.

17. 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 (Acceptance by States of jurisdiction over crimes listed in article 22), with the appropriate amendments in relation to mandatory jurisdiction.

18. In relation to the questions contained in the commentary to article 38 (Disputes as to jurisdiction), the Government of Chile 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.

19. 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 which 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.

### III. APPLICABLE LAW

20. The offences that should be dealt with by the tribunal would be those characterized by international treaties.

21. 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 (List of crimes defined by treaties), together with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

22. 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.

23. 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.

24. 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.

### IV. JUDGEMENT AND SENTENCING

25. 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 (Judgement) 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 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.

26. 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.

### CONCLUSION

27. The Government of Chile considers the foregoing as being without prejudice to possible further comments which may be formulated or required.

### Cuba

[Original: Spanish]  
[7 February 1994]

1. In the opinion of the Government of Cuba, the essential conditions do not yet exist for the establishment of an international criminal jurisdiction that would fulfil its objectives without, by its actions, adversely affecting the principle of sovereignty, which constitutes a basic premise for the existence of the United Nations.

2. The Government of Cuba considers that the draft statute submitted to the Assembly by the Working Group of the International Law Commission could be adopted only if it is presented in the form of a treaty to which the countries concerned could accede if they so wished; such a treaty should contain the requisite reservation clauses in respect of crimes which the parties do not wish to refer to an international jurisdiction.

3. Regarding the nature of the court to be established, the Government of Cuba is of the view that, if established, the court should be a permanent body, although it should sit only when required to consider a case. Recourse to ad hoc courts established to deal with situations already in existence would pose the risk that such courts might be influenced by the said situations, which would militate against their objectivity and impartiality.

4. If the said court is eventually established, the magistrates who constitute it should be elected on the basis of equitable geographical distribution. Furthermore, it should be borne in mind that the various legal systems should be represented on the court, so as to give it greater universality.

5. With regard to the jurisdiction to be conferred on the court, it should basically cover the list of crimes contained in the draft Code of Crimes against the Peace and Security of Mankind, since it was in the context of the draft Code, and with a view to its elaboration, that the decision to consider the possibility of establishing the said court was taken.

6. As to the rights of defendants before this international court, the Government of Cuba believes that they should be afforded all the guarantees of an objective and impartial trial. In this connection, it should be clearly established that such persons cannot be tried in their absence, unless it is fully proved that such absence reflects the intention to evade justice.

7. For the Government of Cuba, the question of the category of parties which can submit cases to the proposed criminal court is of special interest. To confer on the Security Council the power to refer cases to the court would constitute an extension of the functions entrusted to the Council under the Charter of the United Nations and, accordingly, a violation of the Charter. The Security Council should not assume functions which would make it equivalent to the prosecutor's office, especially if we consider that we would be dealing with charges not against States, but against individuals, whose conduct, however reprehensible and deserving of punishment, cannot endanger the peace and security of mankind.

8. Moreover, the possibility that the Security Council could submit cases to the international criminal court would conflict with the right of the country concerned to decide for itself whether it should submit a case to a national or an international jurisdiction; that, in turn, would undermine the voluntary nature of the court, which would be ensured through its establishment by means of a treaty. Accordingly, this would adversely affect the principle of sovereignty.

9. The Government of Cuba trusts that, in re-examining the topic, the International Law Commission will give proper consideration to the misgivings of a large part of the international community with regard to the role that the Security Council could play under the proposal submitted by the Commission, as demonstrated during the discussion of the draft statute in the Sixth Committee during the forty-eighth session of the General Assembly.

### Cyprus

[Original: English]  
[28 April 1994]

1. In article 22 (List of crimes defined by treaties) of the draft statute a new provision should be added to include as a crime the "organized, massive violation of human rights for political or religious reasons or reasons of race in time of either peace or armed conflict". Legal support for this crime can be found in the Nürnberg Court,<sup>1</sup> more precisely in article 6 (c) of the statute where there is reference to "crimes against humanity including inhuman activities against a civilian population before or after the armed conflict or prosecution for political or religious reasons or reasons of race".

2. The crime was linked with war crimes or crimes against peace<sup>2</sup> but the provisions of this draft statute for an international criminal court do not differ significantly from the proposed addition. This addition is also justified if recent developments in international law and human rights are taken into consideration. It could also be supported that the proposed international crime has been

<sup>1</sup> See United Nations, *The Statute and Judgement of the Nürnberg Tribunal, History and Analysis*, memorandum from the Secretary-General (Sales No. 1949.V.7).

<sup>2</sup> G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd ed. (London, Stevens, 1976), vol. III: *International Constitutional Law*, p. 496.

codified as part of customary international law as a result of Security Council resolution 827 (1993) of 25 May 1993, by which the Council decided to establish an Ad Hoc International War Crimes Tribunal for the Territory of the Former Yugoslavia. It should also be noted that the reference here is to "crimes against humanity" in relation to the application of article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) of the proposed statute, which refers to international crimes not covered by article 22.

3. Referring to article 23 (Acceptance by States of jurisdiction over crimes listed in article 22), the Government of Cyprus would like to support alternative C.

### Czech Republic

[Original: English]  
[13 May 1994]

#### STATUS OF THE TRIBUNAL AND THE RELATIONSHIP WITH THE UNITED NATIONS

1. The status of the international criminal tribunal should be governed by a multilateral international treaty which would at the same time provide for the relationship of the tribunal with the United Nations system. It would not be practical to establish the international criminal tribunal as one of the principal United Nations organs, because in such a case an amendment to the Charter of the United Nations would seem to be necessary. Now, when the establishment of the international criminal tribunal has become a realistic goal, it would not be wise to expose the results of long years of codification work to risks that the revision of the Charter implies.

2. The relationship of the tribunal with the United Nations could be similar to the relationship of specialized agencies with the United Nations. The Czech Republic therefore prefers the second alternative of article 2.

#### JURISDICTION OF THE TRIBUNAL *RATIONE MATERIAE*

3. As far as the jurisdiction *ratione materiae* of the tribunal is concerned, the draft statute puts special emphasis on crimes defined by international treaties. Nevertheless, after the Second World War, crimes under general international customary law were prosecuted before international tribunals and their punishment is envisaged also in the Statute of the International Criminal Tribunal for the Former Yugoslavia. Article 26 of the draft statute of the permanent international criminal tribunal extends the jurisdiction of the tribunal to this category of crimes too.

4. The Czech Republic agrees with this concept. However article 26 deals with two different questions at the same time: the jurisdiction *ratione materiae* in the case of crimes under general international law and the way of acceptance of this jurisdiction. There is no reason why the question of jurisdiction *ratione materiae* could not be fully and comprehensively dealt with in a single article of the statute article 22. It would be preferable to insert the

idea of article 26, paragraph 2 (a) in article 22 as its second paragraph.

5. The jurisdiction of the tribunal should in no case cover crimes under national law. The Czech Republic therefore recommends the deletion of subparagraph (b) of article 26, paragraph 2.

6. As to the list of treaties on the basis of which article 22 defines jurisdiction *ratione materiae*, it seems to be incomplete. Should the criteria for listing treaties in article 22 be the existence of a precise definition of the crime and the entry of the treaty into force as well as the treaty's largest acceptance by the international community, it is difficult to understand why the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Illicit Trade in Drugs and Psychotropic Substances are not on the list.

7. Another problem to be considered carefully is that not necessarily all the crimes defined by the above-mentioned treaties are so serious as to be brought before the tribunal. It would not be appropriate to overburden the tribunal with cases which can be effectively punished by States themselves. A certain degree of seriousness of the breach should therefore also be a precondition for the jurisdiction of the tribunal. The mechanism of the tribunal should be reserved for the most serious international crimes, especially in the event when prosecution before domestic courts cannot be guaranteed.

#### ACCEPTANCE OF THE JURISDICTION OF THE TRIBUNAL

8. From among the alternatives to article 23 proposed by the Working Group, the Czech Republic would prefer alternative B.

9. Nevertheless the statute should provide for the establishment of an obligatory jurisdiction of the tribunal which would be accepted *ipso facto* by the accession of the State to the statute for at least a small group of crimes.

10. Therefore the possibility should be considered to combine alternative B with the concept of *ipso facto* jurisdiction for a relatively small group of crimes, which are beyond all doubt perceived by the international community as the most serious ones, such as those prohibited by Geneva Conventions of 12 August 1949 on the Protection of Victims of War or the Convention on the Prevention and Punishment of the Crime of Genocide. In relation to all other crimes, the jurisdiction of the international criminal tribunal would be accepted by the "opting out" method.

11. Thus a kind of basic core of the jurisdiction *ratione materiae* would be created and States acceding to the statute would in a credible way demonstrate their resolution to put the mechanism of the tribunal into motion.

#### SECURITY COUNCIL

12. The Czech Republic agrees to the concept of the draft statute which enables the Security Council to submit complaints.

13. Despite the lack of an explicit provision to this end it would be appropriate for the Security Council to have the right to submit complaints to the tribunal only when alleged crimes were committed in situations envisaged in Chapter VII of the Charter. This should be clearly stipulated in the statute.

14. It should also be beyond doubt that the general provision requiring the acceptance of jurisdiction of States does not apply and that the right of the Security Council to submit complaints does not depend on the State's consent of the jurisdiction of the tribunal.

#### **Denmark**

[See *Nordic countries*]

#### **Finland**

[See *Nordic countries*]

#### **Germany**

[Original: English]  
[24 March 1994]

1. 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 urgent need for practical steps to establish a universal system of criminal jurisdiction. Developments in recent years justify the hope that this goal can now be attained.

2. The German Government welcomed Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993, respectively, calling for the establishment of an international tribunal for the prosecution of persons alleged to be responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and has assisted in their implementation. The Government of Germany considers that tribunal's inception to be a major contribution to the strengthening of criminal jurisdiction within the framework of the United Nations.

3. This development has undoubtedly and lastingly inspired the work of the International Law Commission 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 International Criminal Tribunal for the Former Yugoslavia. 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:

#### **LEGAL CHARACTER OF THE COURT**

4. 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<sup>1</sup> by the ILC's 1993 Working Group nor the discussion on this point in the Sixth Committee during the forty-eighth session of the General Assembly indicates any clear preference.

5. 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.

6. 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.

#### **JURISDICTION OF THE COURT**

7. 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 (List of crimes defined by treaties) 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 Criminal Tribunal for the Former Yugoslavia,<sup>2</sup> this statute, too, should contain a more precise definition of crimes.

8. Article 21 (b) (Revision of the Statute) 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

<sup>1</sup> See especially paragraph 4 of the commentary.

<sup>2</sup> S/25704 and Corr.1, annex.

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.

9. Article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) 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 Sixth 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 Criminal Tribunal for the Former Yugoslavia would seem to offer a suitable basis.

10. 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, paragraph 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.

11. 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 (Acceptance by States of jurisdiction over crimes listed in article 22) would seem the most appropriate basis for a broadly accepted jurisdiction.

12. Articles 25 (Cases referred to the Court by the Security Council) and 27 (Charges of aggression) 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 envisaged only 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 court.

13. Article 45 (Double jeopardy (*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, as to whether it can be put into practice without affecting the sovereignty of the country concerned.

14. 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 whether 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.

15. Articles 19 (Rules of the Tribunal) and 20 (Internal rules of the Court) 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, and especially their need for protection. On the other hand, the rights of the accused would appear adequately provided for in article 44.

16. 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 Criminal Tribunal for 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.

17. The German Government has already expressed its rejection of proceedings *in absentia* in connection with the elaboration of the statute 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 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.

18. The German Government agrees with the points made in connection with article 56 (Proceedings on appeal) during the debate in the Sixth 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.

### Hungary

[Original: English]  
[20 June 1994]

#### GENERAL COMMENTS

1. The establishment of an international criminal tribunal is not simply the establishment of a new legal institution in international law but, rather, a new type of challenge that States must face by legislation and legal practice. It seems that Hungary has already made a few steps in this respect. We should like to refer here to the decision adopted by the Hungarian Constitutional Court on 13 October 1993 which recognizes the rules of international criminal law and reinforces the precedence of the same over internal national law. In this decision, the Constitutional Court determines that the legal system of the Republic of Hungary accepts the generally recognized rules of international law, which represent an integral part of Hungarian law without any further transformation. Moreover the Constitutional Court further states that the norms regarding war crimes and crimes against humanity are a unique part of international law which does not simply regulate the relationships between States, but in which international law determines certain responsibilities and criminal liabilities for individuals. When we speak of war crimes and crimes against humanity, we speak of crimes which, in this qualification, do not originate as part of domestic law but, rather, the community of nations holds these to be crimes and the international community determines the manner in which they should be judged. The significance of these acts is so great that they cannot depend on the acceptance of individual States or their criminal law policies at any given point in time.

2. The decision of the Hungarian Constitutional Court is certainly unique in its handling of the question of international adjudication and the international criminal tribunal. It states that war crimes and crimes against humanity will be prosecuted and punished by the international community: on the one hand by way of the international courts, and on the other, those States which wish to be a part of the international community will have to bear the responsibility for apprehending the perpetrators.

3. The decision of the Constitutional Court speaks separately in Security Council resolutions 808 (1993) of

22 February 1993 and 827 (1993) of 25 May 1993, which serve as a basis for an ad hoc international criminal tribunal. In the opinion of the Constitutional Court, the statute of the tribunal determines and contains, in detail, international material law, the rules of which are, beyond a shadow of a doubt, integral parts of international customary law; thus the problem of the fact that not all the States are parties to certain treaties does not create a legal obstacle. The applicable law is, therefore, independent of the domestic laws of individual States. In keeping with this is the fact that the tribunal, in its authority to punish crimes, stands above the national courts.

4. The decision of the Hungarian Constitutional Court, in our opinion, demonstrates the fact that Hungary is committed to the ideals of the international criminal tribunal and, as far as her own legal system is concerned, she will do all in her power to take the needed legislative and practical steps to assist the work of the tribunal following its establishment.

#### COMMENTS ON SPECIFIC ARTICLES

5. In relation to the establishment of the court, it has been repeatedly emphasized that the legitimacy of such a body could be guaranteed only by way of a multilateral international treaty. It is Hungary's resolute opinion, therefore, that the Court must be established with the cooperation of the United Nations, but on the basis of a new treaty. Related closely to this point, is the fundamental question of whether the court should act as a judicial organ of the United Nations or, instead, outside of this organization. It is to be emphasized that the United Nations must play a significant role in both the establishment of the court and in its actual operations. At the same time, it is not considered absolutely necessary that the court is to be organized within the framework of the United Nations. This opinion has both formal and conceptual reasons behind it. The formal one is the oft repeated fact, which we also agree with, that the approach which would place the court within the United Nations would require the amendment of the Charter of the United Nations, which would probably delay the realization of the goal. On the other hand, the court's establishment need not happen within the United Nations from a conceptual point of view, either, in so far as the points of contact which would ensure the active participation of the United Nations do exist. Here, we refer primarily to the authority of the Security Council contained within article 25 (Cases referred to the Court by the Security Council).

#### *Article 2 (Relation of the Tribunal to the United Nations)*

6. Summarizing the above, Hungary therefore supports the second version of article 2, according to which the tribunal would have ties with the United Nations, but not be a part thereof. We understand, at the same time, that this solution would make the operations of the tribunal more complicated, as it would clearly require greater administrative activity and its financing would occur separately from that of the United Nations.



*Article 5 (Organs of the Tribunal)*

7. The structure of the court raises some very difficult questions. At the present time, we do not know the size of the case load which will be placed before the tribunal or the types of cases this would consist of. As a result, it is difficult to determine the optimal number of judges or the optimal structure. Despite everything, the number of 18 judges as determined in article 5 seems insufficient. These 18 judges would not only be responsible for adjudicating cases at the first instance but at the highest instance as well, and the members of the bureau would also come from among their number. Assuming that for one reason or another, certain judges could also have to be disqualified from adjudication for reasons of conflict of interest, this number seems rather small.

8. Regarding the structure of the tribunal, we are more or less in agreement with the units as listed in article 5. Hungary considers a court established in this manner to be viable. We would add, however, that the creation of a committee which would consist of the delegates of the signatory States would be worth considering. This committee could be responsible for those tasks which would depend on the decisions of the States parties anyway, namely the selection of the judges, the selection of prosecutors and the determination of the budget, and would serve, further, as a forum of communication between the tribunal and the member States on matters of a political nature.

9. There is no doubt for even a moment that it is necessary to separate the court proper from the procuracy within the tribunal. Fair proceedings cannot otherwise be guaranteed. This necessity is not, however, affected by the fact that the procuracy may be found within the bounds of the tribunal.

*Article 6 (Qualifications of judges)*

10. In our opinion, there will be little to debate about the listing of the principles governing the selection of judges. The general principles which would serve as guidelines for the member States can be found in article 6. Beyond these, we would add one more criterion, one which would relate to judicial experience. Namely, we would consider it necessary to determine a minimum age limit, which we would set at 45 years of age. We agree with the opinion that the judges of the tribunal must represent the largest legal systems in existence. This would be a significant factor especially if the tribunal were to utilize the rules of international law, in accordance with article 28 (Applicable law), as a supplementary source. In relation to this question, we would consider it as a positive effect if the various regions of the world were also represented in the tribunal.

*Article 8 (Judicial vacancies)*

11. Article 8 deals with the filling of vacated judicial seats. It is Hungary's position that it would be a bit tedious to repeat the procedure outlined in article 7 (Election of judges) in the event of a seat's being vacated. It would, in our opinion, serve the goal better to establish a system of

alternative judges. The alternative judges would be selected simultaneously with the ordinary judges of the tribunal and would automatically step in to fill a vacated seat. We would note that the establishment of the previously mentioned committee (para. 7) would, in and of itself, be a factor simplifying the procedure which would need to be followed in the event of a seat's becoming vacant.

*Article 10 (Election and functions of the President and Vice-Presidents)*

12. Article 10 of the statute refers to the bureau. The Government of Hungary agrees with the content and manner of election of the bureau, but we have certain doubts as to the tasks which would be given to it. In our opinion, we should return later to the question of whether another organizational unit should take over the responsibilities of the prosecutorial council from among the tasks. In relation to the selection of the bureau, we find the regulations to be lacking in that there is no mention of re-election or the conditions thereof. In the opinion of Hungary, there is no obstacle to re-election.

*Article 11 (Disqualification of judges)*

13. Article 11 of the statute regulates the question related to the conflict of interest. Hungary agrees with this, although we would expand the sphere of those authorized to initiate hearings as to conflict of interest. Paragraphs 2 and 3 give this right only to the judge and the defendant. It is, however, our opinion that this should be expanded to include the prosecutor and the complainant as well. It is quite clear that questions may be raised from the point of view of both the procuracy and the complainant representing the victim which could serve as grounds for the disqualification of a given judge from a given case.

*Article 12 (Election and functions of the Registrar)*

14. Article 12 deals with the election and functions of the registrar. It is our opinion that the election of the registrar is a task which is typically that type of task which would be placed within the authority of the committee proposed by us. We agree with the right of the bureau to make proposals. The convocation of all judges is not a body, however, which should be forced to deal with such administrative questions. Added to this, it is a fact that the judges would represent only a small fraction of the States parties and therefore this right should be transferred to a broader body. Paragraph 2 (b) would give the registrar the opportunity to fill other positions within the United Nations with the permission of the bureau. We do not consider this solution to be satisfactory, nor is it in harmony with our idea that the tribunal shall not be an organ of justice of the United Nations, but a separate and independent body which works in close cooperation with the United Nations.

*Article 13 (Composition, functions and powers of the Procuracy)*

15. The same positions which we outlined above regarding the election of judges also apply to the election of prosecutors and deputy prosecutors. At the same time, Hungary has doubts regarding the concept that there would be only one prosecutor and one deputy prosecutor. We consider the election of at least one more deputy prosecutor necessary and should like to see more detailed regulations regarding the prosecutor's staff, as well. We support all points which come to be regulated as to prosecutorial independence and conflict of interests.

*Article 15 (Loss of office)*

16. At the same time, we consider paragraph 2 of article 15 to be problematic. This point would give the tribunal the opportunity to remove the prosecutor and the deputy prosecutor from their posts by a two-thirds majority vote. The statute emphasizes that the prosecutor and the organization of the procuracy within the tribunal, as the organ which is responsible for investigation and prosecution, should operate separately and independently. This regulation in paragraph 2 would question this separateness and independence. It is our opinion that the tribunal should instead have the right only to propose such a step and the decision should be left to the States parties or to the permanent committee of States parties, if such exists.

*Article 21 (Review of the Statute)*

17. It is not absolutely necessary to maintain a five-year time limit regarding re-evaluation of the statute, especially if the re-evaluation would pertain to the crimes listed in article 22. At the same time, we would think it worth considering whether the Member States can re-evaluate any question relating to the statute at the request of one third of all the Member States.

18. One of the key questions to the future fate of the entire statute is the proper determination of the jurisdiction of the tribunal and the law which will be applicable by the tribunal. It is our position that the international criminal tribunal must, by its very nature, deal with the most serious of all crimes under international law. The question of which crimes would fall into this category may be raised. It is Hungary's opinion that at least the following conditions must be satisfied:

(a) The given crime must affect not only the interests of a certain nation or nations, but the fate of all of humanity or the international community;

(b) The acts must be considered to be crimes under the internationally recognized principles of criminal law and this nature should be recognized by all concerned;

(c) The struggle against these crimes must, at least, involve cooperation between nations which would lead to proceedings by the international criminal court calling the perpetrators to task.

19. It can easily be seen that in the three criteria listed above, several principles, including such classical crimi-

nal law principles such as *nullum crimen sine lege* or *nulla poena sine lege* are also included.

*Article 22 (List of crimes defined by treaties)*

20. As far as the crimes listed in article 22 are concerned, it is Hungary's opinion that all of these satisfy the above-mentioned criteria. We should consider it a satisfactory solution, also, if the statute were to refer to those international treaties which define such acts and which further contain the conditions of joint international pursuit. We should add, however, that we consider it lacking that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is missing from this list, as it is our opinion that the said convention contains a crime the nature of which would definitely place it within the sphere of article 22. We should add that we agree with the remarks of the Working Group that mercenary acts are left out only because the convention in question is not yet in force, but that following the entering into force of this instrument, the acts covered by the same should without a doubt be included in the crimes listed in article 22.

21. In relation to article 22, beyond general agreement, we have a few doubts. There is no doubt that genocide, war crimes, apartheid and crimes against internationally protected individuals are crimes which are of such gravity, independent of the circumstances, that they would form a basis for the jurisdiction of the international criminal court. This is not necessarily the case for the various crimes of terrorism. The taking of hostages or an aircraft hijacking does not necessarily have to belong to the jurisdiction of the court. Such acts could be brought to the jurisdiction of the court only if the individuals who perpetrate such acts do so in the name of or with the authority of a State. In other cases, we find it sufficient for a national court to prosecute them, which must naturally be assisted by way of international cooperation among organs of criminal justice.

22. Here, we must make mention of the relationship to the draft code of crimes against the peace and the security of humanity. Hungary greatly values the work which the International Law Commission has done to date in the preparation of the code and it is our opinion that the present status of the work offers hope as to completion. It is our determined opinion that there is a need for the code and its text should be adopted as soon as possible. We do not, however, connect the establishment of the international criminal court to the adoption of the code. It is our opinion that the statute and particularly the provisions of article 22 do sufficiently outline the sphere of crimes which would be adjudicated by the international tribunal. In and of itself, article 22 contains a much more narrow sphere, but it is our opinion that it is sufficient for the criminal tribunal to begin its work with the crimes listed therein and perhaps to expand these within the bounds set forth in article 26.

*Article 23 (Acceptance by States of jurisdiction over crimes listed in article 22)*

23. Alternative A of article 23 seems to be logical in and of itself, but we still support alternative B instead. In our opinion, despite the difficulties in the beginning, it is this alternative which would guarantee the actual operations of the tribunal and its broader legitimacy.

*Article 25 (Cases referred to the Court by the Security Council)*

24. Article 25 discusses a basic problem, without a doubt. This article authorizes the Security Council to submit to the tribunal individual cases of the crimes listed in articles 22 and 25. As mentioned earlier, Hungary does not support an approach which would place the tribunal within the structure of the United Nations, but we do consider strong relations with the United Nations to be necessary. It is our opinion that the authority of the Security Council as defined in article 25 would be a good example for this. We must add, however, that this authority cannot prejudice facts or legal questions, at least as far as the perpetrators are concerned. To guarantee this, perhaps it would not be unhelpful clearly to define such a provision.

*Article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22)*

25. Article 26 is perhaps the most delicate part of the draft. There is no doubt that international customary law contains a number of elements which may be part of international criminal law. Aggression, in particular, may be considered to be among these. Hungary understands and supports the position that would allow individual States which are not otherwise parties to the international treaties listed in article 22 to recognize jurisdiction over such crimes on the basis of customary international law.

26. At the same time, however, we cannot consider a general clause in the statute which speaks of the general recognition of the criminal law norms under international customary law to be entirely unquestionable as far as the realization of the principles of human rights are concerned. It is our opinion that this is a definition the scope of which is too broad and therefore the principle of *nullum crimen sine lege* could not easily be maintained in the present wording. This wording creates uncertainty which cannot be permitted in criminal law proceedings. As a result, we do not find the provisions made in article 26, paragraph 2 (a) to be fully sufficient.

27. The 1993 Working Group mentioned, as an alternative to paragraph 2 (a), a solution which would resolve this point by the jurisdiction of the Security Council as defined in article 25, on the basis of which the Security Council would be authorized to submit such matters to the tribunal. Hungary finds this to be only partially proper, in the light of the opinions expressed therein, as this seems to be practical in matters of aggression, but not in other cases.

28. We have grave doubts as to the provisions of paragraph 2 (b). It is our opinion that, while dealing in

narcotics is a serious crime, it cannot fall into the same category as the international crimes listed in article 22 of the statute or as aggression.

29. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances sees the problem of pursuit of narcotics dealers to be one which can be solved at a national level with international assistance. It is our opinion that this group of crimes cannot, in any event, be placed under article 22. It is even questionable whether the jurisdiction of the tribunal should be extended, under present circumstances, to this group of crimes. The above-mentioned Convention does not sufficiently define these crimes.

*Article 27 (Charges of aggression)*

30. Article 27 of the statute is in close connection with article 25. This article states that no one may be accused of the commission of the crime of aggression until the Security Council decides that the State in question is truly guilty of this act. Hungary considers this solution to be proper, but if we approach the question from the angle of the independence and impartiality of the court, this approach may create some difficulty. Such a decision would be difficult to separate from the facts and legal questions which belong to the jurisdiction of the tribunal. Conflict may arise, for example, if the court wishes to declare that an individual person has not committed the crime of aggression. It is our opinion that the resolution of this question requires further thought and examination.

*Article 28 (Applicable law)*

31. The question of applicable law is settled by article 28. We recognize the fact that the statute cannot answer all questions which may arise. It is, therefore, necessary to recognize international law and (as secondary law) the laws of various nations as a subsidiary source. Hungary would add, however, that in relation to paragraph b of article 28, the same objections arise as those to article 26.

*Article 29 (Complaint)*

32. The initiation of proceedings has been conferred by article 29 to the States parties and to the Security Council. This is in harmony with the spirit of the entire Statute, although we should add that Hungary does not consider it undesirable to have proceedings initiated *ex officio*, i.e. by the authority of the tribunal, as well.

*Article 30 (Investigation and preparation of the indictment)*

33. Paragraph 1 of article 30 would grant an important role in this activity to the bureau, which would, in practice, see to the supervision of the legality of the investigation and the actions of the prosecution. As a matter of fact, the bureau would practise the authority of a certain type of "judge in charge of investigation". We find this to be a bit worrisome on our part, since the members of the bureau are given a role in the Council of Appeals.

*Article 31 (Commencement of prosecution)*

34. Hungary considers important the rules in article 31 regarding taking suspects into preventive detention. Paragraph 2 states that the tribunal may place the defendants into custody for a period of time of its own choosing.

35. The rules of preventive arrest are not detailed enough. We find lacking, for instance, a determination of the period of time for which a person may be taken into custody and further, the period after which the arrest must be re-evaluated or extended. Hungary thinks such provisions should be included as guarantees.

*Article 32 (Indictment)*

36. Paragraph 2 of article 32 names the bureau as the body which would act as an indictment chamber. According to our previously expressed opinion, the general competence of the members of the bureau is incompatible with this assignment. The indictments should rather be handled by a separate council of prosecution organized within the tribunal.

*Article 33 (Notification of the indictment)*

37. Within the framework of article 33, Hungary would define three groups of States by their relations to the statute. The third group is composed of States which are not parties to the statute. These States may only be requested to cooperate. The statute does not resolve the question of what should happen if a given State is not willing to cooperate. In this event, various possibilities could be considered including, perhaps, the suspension of the trial.

*Article 35 (Pre-trial detention or release on bail)*

38. Article 35 gives the tribunal the opportunity to release the defendant on bail. We find the institution of bail to be generally acceptable; however, we have doubts as to the advisability of allowing perpetrators of crimes as grave as those regulated by the statute to avoid custody in return for bail once prior arrest has been made. It is especially worth considering whether this opportunity given to the defendant would not endanger the success of the trial.

*Article 37 (Composition of the Chambers)*

39. Regarding article 37, there is a unique rule of disqualification which would not allow a judge to participate who is a citizen of either the State submitting the complaint or that of which the accused is a national.

40. Hungary has certain doubts as to the provision which would have the bureau name the members of the chambers for individual cases. We would consider it better if permanent chambers were established and cases would be handed to these as they arrive. The bureau would naturally have the proper authority in establishing the permanent chambers.

*Article 38 (Challenge to jurisdiction)*

41. The challenge to jurisdiction is an important guarantee factor. The provisions of article 38 would allow the accused to challenge the jurisdiction at any time during the trial and a State party to do so at the commencement of proceedings. In our opinion, this is too wide a sphere. Beyond a doubt, some States parties, must be given this right; however we agree with the opinion that only States having a direct interest should be allowed to challenge jurisdiction. The sphere of interested States need not, naturally, be interpreted narrowly, but could include not only the States where the crimes were committed, and the States to which the defendant belongs, but all States which played an active or passive role during any phase of the proceedings (supplying of evidence, offering legal assistance, etc.).

42. The commentary states that in the absence of the chambers, the bureau must evaluate the defendant's petition. Hungary finds this to be worrying from a guarantee point of view. The bureau cannot engage in such activity, in our opinion, as this would constitute a conflict of interests. A prosecution chamber must be created for the evaluation of such complaints and this type of decision would belong to its jurisdiction during the period prior to the trial proper.

43. The aforementioned do not conflict with the fact that this right of the defendant need not delay the trial unnecessarily. In the interest of the above, it would be necessary to establish a rule which would allow the dismissal of the defendant's complaints without prejudice if he continually makes these with the same arguments.

*Article 40 (Fair trial)**Article 41 (Principle of legality (nullum crimen sine lege))**Article 42 (Equality before the Tribunal)**Article 43 (Presumption of innocence)**Article 44 (Rights of the accused)**Article 45 (Double jeopardy (non bis in idem))*

44. The provisions of articles 40 to 45 deal with the defendant's right to a fair trial and with the guarantees of the accused's rights. These provisions are, for Hungary, extraordinarily important from the point of view of the entire statute. It is our opinion that the regulations are, in general, in accordance with the principles generally accepted in international law, that is, those which the various international documents contain. Hungary would add, however, that we would further develop certain provisions of the regulations, that is, we are believers in a more detailed and exact text. This would apply especially to article 41, which, considering the unique regulations, takes on new dimensions as compared to the traditional interpretation.

45. Article 44 lists the individual rights of the accused. We find lacking the right to submit a general complaint,

in which the defendant might challenge the procedural decisions taken during the course of the trial which he considers damaging to himself but which are not of a verdict nature.

46. One of the most debated questions of the procedure is that of a verdict *in absentia*. Article 44, paragraph 1 (h) gives the court the opportunity to determine the absence of the accused as being deliberate and the court may then hold the trial. This provision seems worrying to Hungary. A verdict *in absentia* would constitute a limit on the right to a defence such as would make questionable the fairness of the entire procedure. We are aware that the resources for forcing a defendant to appear before it are much more limited in the case of an international criminal court than for a national court. We also recognize the fact that the verdict of an international court has a great deal of value in principle and, therefore, the goal is not simply the conviction of the defendant, but the message which the community of nations would thus communicate. In some way, a rational compromise must be found which would protect the principle of a fair trial and still not endanger the operation of the court. One of these possible routes might be if the court were allowed, as an exception, and we emphasize exception, to hold the proceedings *in absentia*.

47. In those exceptional cases when it seems necessary to hold the trial anyway, the verdict can, naturally, be only conditional. In the event of the later appearance of the defendant, the proper measures, in our opinion, would be the setting aside of the original verdict and the repetition of the entire trial.

48. Article 45 states the prohibition against double jeopardy. Hungary agrees with this provision entirely, although we must say openly that in the event of international crimes, the jurisdiction of the international court takes precedence over the jurisdiction of the national court. It is as a result of this that paragraph 2 (b) of article 45 was drafted. Hungary considers it proper, in the event of a second trial, to take into consideration the penalty which the person has actually already served. However, guidelines would be necessary as regards this provision.

#### *Article 46 (Protection of the accused, victims and witnesses)*

49. Only one objection can be raised to article 46 and that is the principle of direct evidence. It is a limit to the accused's rights if evidence such as electronically-recorded testimony is introduced, since it may deny his right to cross-examination or the opportunity to practise other rights of defence. For this reason, Hungary considers that article 46 must be reworded in order to protect fully the rights of both the accused and the victim.

#### *Article 48 (Evidence)*

50. Hungary agrees entirely with the provisions contained in article 48, which deal with the evaluation of evidence. Hungarian law also states that evidence gained by way of illegal means is not admissible in court. However, no provisions in the statute would regulate who can and

cannot be a witness and who can deny testimony. It is our opinion that in certain cases the witness can be rejected, for instance if he is to accuse himself or a member of his family with a crime. In such a case, testimony cannot be forced. A problem is also caused by the fact that the consequences of perjury are not set out.

#### *Article 53 (Applicable penalties)*

51. Article 53 satisfies the principle of *nulla poena sine lege*. The statute allows for the imposition of two penalties: imprisonment and monetary fine.

52. Hungary supports the opinion of the Working Group according to which no capital punishment was authorized by the statute. At the same time, certain doubts remain as to the penal system. Monetary fines are found in all forms of domestic law and are often used. It is doubtful, however, whether monetary fines can be utilized in the event of a crime under international law. The crimes listed in the statute are the most serious of all crimes, crimes which breach the peace and security of humanity. It would be a bit paradoxical to punish the perpetrators of such crimes only with monetary fines. Our position is that there are no mitigating circumstances which would justify such a penalty.

53. Hungary considers imprisonment to be the basic manner of penalty in the sentencing practice of the court. We agree with the opinion that the upper limit of imprisonment should be life imprisonment. We are not, however, convinced that a minimum limit should not have to be established. We do not see the point in sentencing one who is guilty of a crime under international law to a few weeks or months in prison. Instead, we should like to see a lower limit of at least six months set forth in the statute.

#### *Article 55 (Appeal against judgement or sentence)*

54. We think the possibility for appeal is vital as a guarantee. The provisions of article 55 satisfy our expectations only partially. As concerns the sphere of those who are given the right to appeal, it is our concerted opinion that the prosecutor and the defence attorney, in the interests of, but separate from, the convicted person, should be given the right to appeal. Hungary also considers it necessary to regulate that if there is an appeal only by the defence, the tribunal of second resort should not be allowed to hand down a verdict any more serious than that which was handed down in the initial trial.

### PART 6 (INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE)

55. Part 6 of the statute discusses a fundamental question from the point of view of the functioning of the tribunal. International cooperation and judicial assistance is a key question because practical work cannot even be considered without the proper cooperation of the States concerned. Hungary agrees with most of the provisions of part 6 regarding judicial assistance and we consider these provisions realizable. We do, however, feel that those articles which refer to extradition and arrest for surrender

need to be re-examined. It may not be undesirable to undertake an examination which would collect and reflect the positions of the States.

56. The critical point of every court proceeding is the enforcement. This is especially true in the case of the international criminal court, which, by its very nature, does not have an apparatus for enforcement. Article 65 contains a unique provision which would oblige States parties to recognize the judgements of the court. Although this may cause problems with some of the States parties, Hungary would like to indicate that with only minimal amendments, Hungarian criminal law will give effect to the requirements of article 65.

#### CONCLUSIONS

57. It goes without saying that this commentary could not deal with all the provisions of the statute. It may also appear to some readers that most of the remarks have been of a critical nature. At the same time it should be emphasized that the draft statute is an outstanding result of jurisprudence and constitutes a worthy foundation for the establishment of an international criminal court.

#### Iceland

[See *Nordic countries*]

#### Japan

[Original: English]  
[13 May 1994]

#### GENERAL COMMENTS

1. The system of law enforcement in international criminal law, such as investigation, prosecution and punishment of criminals, has been developed since the Second World War by obliging States, through the international law concerned, to make an act a crime under national law and to ensure that the perpetrator is prosecuted and punished by national courts. However, when we observe the poor situation concerning the punishment of war criminals so far, it is clear that the above-mentioned mechanism is not always effective.

2. Japan, based on the recognition that a fair and neutral international criminal court, if duly established with the support of the international community and in order to prosecute the criminal responsibility of individuals who have committed crimes under international law, represents the final goal of international criminal law, wishes to be a supporter of its establishment. It is necessary, on the other hand, that its establishment should pay due consideration to the current state of development in international criminal law, States' sovereignty, and the constitutional requirements of States. At the same time, the tribunal should be an organ which represents the highest standard of protection of human rights, based on the results achieved by the international community in this field.

3. The following three points should be secured in establishing an international criminal court:

(a) The general principles of criminal law including the principle of legality (*nullum crimen sine lege*), fairness of the trial and the protection of human rights should be respected;

(b) The effectiveness of the court's activities should be assured;

(c) The court should be a realistic and flexible organ complementary to the existing system.

4. Japan appreciates the draft statute prepared by the Working Group of the ILC at its forty-fifth session (1993) as a good basis for future deliberations and as a proposal paying due consideration to the above-mentioned three points and to the ILC's basic propositions enumerated in the 1992 Working Group report.<sup>1</sup>

5. In order that the tribunal be truly effective, it should be established by a treaty, in which participation by as many States as possible is essential. It is also important that the establishment of the tribunal does not interfere with the system, such as that adopted in the case of drug-related crimes in which the existing international law enforcement system has functioned rather well. In this connection it is appreciated that the ILC adopts a realistic approach in which the tribunal, at least at the beginning, should not have compulsory jurisdiction, in a sense of jurisdiction *ipso facto* and without further agreement from a State party to the statute.

6. Japan wishes to make some comments on draft articles in the hope of providing some guidance to the future work of the ILC. The ILC is requested to take into consideration these comments, and to give careful revision and elaboration to the current draft articles. Tasks to be completed by the ILC might be difficult ones. However, Japan trusts that the ILC will give successful answers to these points and fulfil the mandate given to it by the General Assembly to complete the elaboration of the statute at its forty-sixth session. Japan reserves its right to present further comments on the future work of the ILC on this item.

#### COMMENTS ON SPECIFIC ARTICLES

##### Article 2

7. Creation of the tribunal as a judicial organ of the United Nations as proposed in article 2 is desirable in order to secure a solid base and full support of the international community to the tribunal, while there remains the technical issue of how to reconcile this objective under the existing provisions of the Charter of the United Nations. Since the tribunal is in principle an organ established by States parties to its statute, it seems more practicable, at the moment, for the Commission to establish the tribunal as an organ having some sort of a formal linkage with the United Nations by a treaty of cooperation.

<sup>1</sup> *Yearbook* . . . 1992, vol. II (Part Two), p. 59, annex.

## Articles 6 to 13

8. Independence and fairness of the judges and the prosecutor is one of the most important elements of the tribunal. As for article 13, the measures adopted in its subparagraphs 2, 4 and 5 in order to enhance the independence of the prosecutor are welcome. On the other hand it should be clearly indicated in the statute that the prosecutor and the deputy prosecutor may not be nationals of the same State.

## Article 15

9. In relation to the independence of the prosecutor and the deputy prosecutor, the court should not have the authority to remove these persons from office. Other systems should be prescribed for such removal, such as by majority vote of the States parties.

## Article 19

10. Rules of procedure and evidence have a direct influence on the rights of suspects/accused. Therefore they should not be left to the discretion of the court but should be dealt with more concretely and precisely in the statute itself.

## Articles 22 to 26 and 29

11. The structure of this part of the statute is somewhat complicated. Japan, trying not to modify the content, has reorganized this part to make it clearer. Japan's comments on this part of the statute will consequently make reference to the following new article numbers (in parentheses are the numbers corresponding to the draft articles of the 1993 Working Group).

"The Court shall have jurisdiction over crimes listed in articles I, II and III when such jurisdiction *is conferred to it* in accordance with articles I', II', III' and X.

A complaint shall be submitted in accordance with article Y in order that the proceeding of a specific case should be brought before the Tribunal.

ACCEPTANCE OF JURISDICTION BY STATES IN CASES OF  
CRIMES COVERED BY INTERNATIONAL CONVENTIONS*Article I. List of crimes defined by treaties*

(Art. 22)

The court may have jurisdiction conferred on it in respect of the following crimes:

(a) Genocide and related crimes as defined by articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide;

(b) Grave breaches of:

(follows the text of article 22 of the Working Group statute).

## Article I'

(Art. 24)

1. JURISDICTION OF THE COURT IN RELATION TO  
ARTICLE I

The Court has jurisdiction under this Statute in respect of a crime referred to in article I, provided that such jurisdiction has been ceded to it in accordance with paragraph 2 below:

(a) By any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts;

(b) In relation to a suspected case of genocide, by any State party to the Convention on the Prevention and Punishment of the Crime of Genocide.

(The Working Group draft statute has a second paragraph here concerning consent of some States.)

2. ACCEPTANCE BY STATES OF JURISDICTION OVER  
CRIMES LISTED IN ARTICLE I

(Art. 23)

## Alternative A

(a) A State which is a party to this Statute and which has jurisdiction over one or more of the crimes referred to in article I in conformity with the relevant treaty may, by declaration lodged with the Registrar, at any time *cede to the court its jurisdiction over that crime/those crimes*;

(b) A declaration made under subparagraph (a) may be limited to:

(i) Particular conduct alleged to constitute a crime referred to in article I or

(ii) Conduct committed during a particular period of time,

or may be of general application.

(c) A declaration may be made under subparagraph (a) for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case six months' notice of withdrawal must be given to the Registrar; withdrawal does not affect proceedings already commenced under this Statute;

(d) A State not a party to this Statute which is a party to the respective treaties concerned may, by declaration lodged with the Registrar, at any time *cede to the Court its jurisdiction* over a crime referred to in article 22 which is or may be the subject of a prosecution under this Statute.

(Alternatives B and C are also eligible in place of alternative A.)

SPECIAL ACCEPTANCE OF JURISDICTION BY STATES IN  
CASES NOT COVERED BY ARTICLE I

*Article II*

(Art. 26, para. 2 (a))

Crimes under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals.

*Article II'*

(Art. 26, para. 3 (a))

Both the State on whose territory the suspect is present, and the State on whose territory the act or omission in question occurred notify the Registrar in writing that they specially consent or cede to the Court, in relation to that crime, jurisdiction over specified persons or categories of persons.

*Article III*

(Art. 26, para. 2 (b))

Crimes under national law, such as drug-related crimes, which give effect to provisions of a multilateral treaty, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, aimed at the suppression of such crimes and which having regard to the terms of the treaty constitute exceptionally serious crimes.

*Article III'*

(Art. 26, para. 3 (b))

The State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts notifies the Registrar in writing that it specially cedes to the Court, in relation to that crime, its jurisdiction over specified persons or categories of persons.

*Article X. Jurisdiction conferred to the Court by  
the Security Council*

(Art. 25)

Subject to article 27, the Court also has jurisdiction under this Statute over crimes referred to in articles I or II if the Security Council (under Chapter VII of the Charter of the United Nations) *decides that such jurisdiction should be ceded to the Court* (by a specified State).

*Article Y. Complaint*

(Art. 29)

Any State which has ceded its jurisdiction to the Court pursuant to articles I', II', III' of the Statute with respect to the crime or the Security Council in the case of article X may by submission to the Registrar bring to the attention of the Court in the form of a complaint, with such supporting documentation as it deems necessary, that a crime, within the jurisdiction of the Court, appears to have been committed."

12. This part is the central core of the statute. The jurisdiction of the court is given rise to when the jurisdiction inherent to a State is ceded to the court by the State. In other words, the statute is based on the ceded jurisdiction principle. This is the theory through which the current international criminal law system is best reflected in the sense that it is only States which have and exercise criminal jurisdiction, and this court's jurisdiction is the one ceded from such States and exercised by the court on behalf of these States. The principle also enables an individual to be brought before an international court by way of establishing rights and duties of *States* (and not of individuals concerned) through a treaty.

13. Although it is apparent that this principle underlies the statute, it is not expressly stated in its articles, thus leading to a possible misinterpretation of this part of the statute. It is important that the ILC revises the articles to make them clearly reflect this principle. The articles reorganized in paragraph 11 above might offer a possible solution to this question.

14. It is appreciated, on the other hand, that the statute enables each State to have a free choice whether to cede its jurisdiction to the court or not, although it is a natural consequence which should have been indicated in the statute that once the jurisdiction is ceded to the court, jurisdiction of the ceding State does not exist any more, or, at least, the court's jurisdiction is preferential to the jurisdiction of the domestic courts of the ceding State.

15. As for the crimes under the jurisdiction of the court, Japan appreciates a flexible and realistic system adopted in the statute in which the crimes under international law prescribed by existing treaties are the central core and the main subject of the statute, and, at the same time, the court's jurisdiction can be extended, at the request of some qualified States, to the crimes under general international law or crimes under national law, such as drug-related crimes, which give effect to provisions of a multilateral treaty.

16. According to the statute, three steps must be successfully accomplished for the court actually to try an offender: (a) Determination that the court has jurisdiction over a case; (b) The complaint is brought before the court by some qualified States or by the Security Council; (c) When the accused is not present in the complainant States or States which have ceded jurisdiction over the crime to the court, the accused should somehow be brought before the court. The statute currently prescribes the first step rather restrictively so that too much burden



would not be put on the third step, an idea which is agreeable to Japan. However, the first step should not be too restrictive, because the court will never function effectively if there are too many requirements to be fulfilled for the court to have jurisdiction. Japan is of the view that the requirements currently prescribed for the first and the second steps in articles I'(1), II', III' and Y above (arts. 24, 26, paras. 3 (a) and (b) and 29 of the statute) are generally acceptable and appropriate except for the requirement prescribed in article 24, paragraph 2 of the statute, on which its view is expressed in paragraph 22 below.

#### *Article I (Art. 22)*

17. It is important that the crimes listed in this article be limited to "crimes under international law", the commission of which constitutes a breach of a fundamental legal interest of the international community. Therefore, it is not appropriate to include in this list drug-related crimes including those dealt with in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances for two reasons: one is that drug-related crimes are not "crimes under international law"; the second is that since an international cooperation mechanism is established for the suppression of such crimes, conferring on the court an extensive ability to acquire jurisdiction over these crimes is neither necessary nor desirable.

18. Inclusion in this article of the crimes related to international terrorism for which the current law-enforcement system under universal jurisdiction is effectively functioning should also be looked at again carefully by the ILC.

19. New treaties prescribing crimes under international law which will be concluded after the statute is in force might have provisions, such as article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid, referring to, in one way or another, the possible use of the court's jurisdiction as among States parties to the statute and to the treaty concerned. It would be worth considering an inclusion of a new provision in the statute which could accommodate such a use without necessarily going through the review process of the statute in accordance with article 21. This is an idea of how to make best use of forthcoming new treaties as if they were protocols to the statute valid as among States parties to the statute and to the treaties concerned.

#### *Article I', paragraph 1 (Art. 24)*

20. Paragraph 1 (a) refers to "any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts", a notion which requires explanation. Among treaties listed in article I (art. 22), there are some treaties, for example the Convention Against the Taking of Hostages, which, depending on the situation, confer three types of jurisdiction: (a) in which establishment of some types of jurisdiction is discretionary to States parties (art. 5, para. 1 (d)); (b) the primary jurisdiction (art. 5, para. 1 (a) and (c)); and (c) the secondary or complementary jurisdiction which should arise when a State in which the suspect is present does not extradite him/her to a State having the primary jurisdiction (art. 5,

para. 2). Under these circumstances, it is appropriate to interpret that "a State which has jurisdiction under the relevant treaty to try the suspect" should mean a State under whose jurisdiction, which was established by its domestic laws or other means in conformity with the treaty provisions, the crime concerned falls. It would be desirable that the ILC indicate a clear interpretation of the phrase such as the one referred to above.

#### *Article I', paragraph 2 (Art. 23)*

21. Japan supports the "opting in" system set out in alternative A of the article for the reason that this approach best reflects the consensual basis of the court's jurisdiction and best formulates the flexible approach which characterized the basic propositions accepted by the ILC in its forty-fourth session.

#### *Article 24, paragraph 2*

22. Paragraph 2 of article 24 should be deleted for the following reasons:

(a) Generally speaking, State practice shows that there is no need to ask for the consent of other States concerned (such as the State of nationality of the suspect or the State where the crime was committed, as the case may be) for a State to exercise its criminal jurisdiction. Taking into account this practice, and since the court's jurisdiction is the one ceded from a State which originally had such jurisdiction over a specified crime, it is inappropriate to put additional and heavier requirements for this court to exercise jurisdiction than for a State.

(b) The court's *raison d'être* would be seriously jeopardized, if the court could not acquire jurisdiction when these requirements would not be satisfied.

(c) The interest of a State to protect its own nationals cannot be a sufficient reason for preventing the court from acquiring jurisdiction (i.e. the first step as explained in para. 15 above), due to the reason described in (a) above. When the suspect is present in the State of his/her nationality which has not consented to the court's jurisdiction, the success or failure of the proceeding of the tribunal depends not on whether the court's jurisdiction could be claimed for the case (i.e. the first step) because jurisdiction should be claimed without the consent of the State of nationality, but on whether the transfer of the accused from his/her State of nationality to the court (i.e. the third step as explained in para. 15 above) can be successfully accomplished. (Japan might review its position on this paragraph if its comment on art. 45 (see paragraph 29 below) is not taken into account by the ILC.)

#### *Article X (Art. 25)*

23. This article is important because it enables the Security Council to make use of the tribunal instead of creating an ad hoc one. Japan is concerned that an expression within this article, "on the authority of the Security Council", is not very clear. Since the statute is based on the ceded jurisdiction principle, it would be natural to consider that this article prescribes a case in which the Security Council, based on the measures taken under

Chapter VII of the Charter of the United Nations, decides that jurisdiction of a specified State should be ceded to the court. If the ILC wishes to include in this article the possible acquisition of jurisdiction by the court through measures of the Security Council taken under Chapter VI of the Charter of the United Nations, Japan requests that the ILC will give prudent consideration to the appropriateness of the idea and to the possible relationship between the court's jurisdiction and that of domestic courts in such a case.

24. It is also necessary to consider who, in the case described in this article, can bring the complaint in accordance with article Y (art. 29); should it be limited to the Security Council or can it be extended to other qualified States?

#### *Article II (Art. 26, paragraph 2 (a))*

25. The definition of this category of crimes should be studied further. The principle of legality requires that the components of crimes and the relevant penalties should be defined clearly. The ILC is requested to work out a possible solution for this principle to be abided by for this category of crimes, for example by providing in the statute a list of crimes, if any, which fall into this category. In addition, these crimes can be punished only when committed after the statute is in force.

#### *Article 28*

26. In order that the principle of legality is strictly abided by, things such as components of crimes, relevant penalties, applicable defences, extenuating circumstances, statute of limitation and complicity should be defined clearly. If the ILC wished to dispense with including such definitions in the statute itself, it would be necessary to have recourse to national law for that purpose, since international criminal law is sometimes silent about them. National law, in that case, cannot be a mere subsidiary source, but should be one of the primary sources of applicable law.

27. Further study should be done by the ILC into which national law is applicable in a specified case or situation. One idea might be to apply the national law of the State which has ceded its jurisdiction to the Court. The applicability of the national law of the State where the crime has been committed might also be worth considering.

#### *Article 41*

28. As for the language within brackets in subparagraph (a), Japan is of the view that, even if a State party to a treaty does not enact a domestic law to give effect to the treaty's provisions, it is by no means contrary to the principle of legality for the court to punish a crime concerned on the basis of the treaty, when the treaty is promulgated after ratification or accession and the treaty provisions are clear enough to be applied in place of national law.

#### *Article 45*

29. An important character of the ceded jurisdiction principle is that even when the court acquires jurisdiction ceded to it by a certain State, it does not affect the jurisdiction that other States have over the same crime. From this point of view, paragraph 1 of article 45 is not appropriate because if, due to this provision, domestic courts of States which have not ceded their jurisdiction to the court were prevented from trying (exercising their jurisdiction over) the person who has already been tried under this statute, it would have the same effect as if they had ceded their jurisdiction to the court. Therefore, this paragraph should apply only to the domestic courts of States which have ceded jurisdiction to the court, and it would be appropriate that other courts are merely obliged to take into account the extent to which any sentence imposed by the court on the same person for the same act has been served. Japan believes that this approach is not contrary to paragraph 7 of article 14 of the International Covenant on Civil and Political Rights.

#### *Article 53*

30. As for the penalties to be imposed, it is very important that national law to be specified shall be applied by the court within the framework set out by the international standards (see also Japan's comment on article 28 in paragraph 25 above).

#### *Article 58*

31. Concrete references should be made, following the examples shown in articles 33 and 63, to the judicial assistance by States parties to the statute which have not accepted the Court's jurisdiction over a crime and by States not parties to the statute. Especially if such States have jurisdiction over the crime under the relevant treaty, it is possible for these States to conduct an investigation of the crime. It is important that efforts be made, as far as possible, to provide the tribunal with information and evidence so collected by these States. It is also desirable that the judicial assistance and the surrender of the accused from such States to the tribunal should be considered equal to, and should as far as possible have the same mechanism as, the ones being practised between States.

#### *Article 63*

32. As for paragraph 3 (c), it is important that States parties should endeavour to consider the request from the tribunal for surrender in accordance with the laws concerned of the requested States parties at least as if it were a request from a State. In this connection, it would be useful to mention in the statute that if a State party which makes extradition conditional on the existence of a treaty receives a request for extradition from the tribunal with which it has no extradition treaty, it may, if it decides to extradite, consider this statute as the legal basis for extradition in respect of crimes concerned.

**Kuwait**

[Original: Arabic]  
[3 August 1994]

## COMMENTS ON SPECIFIC ARTICLES

*Article 2 (Relation of the Tribunal to the United Nations)*

1. Two formulations are given for article 2. In the first, the tribunal would be an organ of the United Nations and in the second it would be linked with the United Nations as provided for in the statute. The first version would require amendment of the Charter of the United Nations to permit the tribunal to be regarded as a United Nations organ, while if the second were adopted it would suffice for a kind of link to be established with the Organization such as a treaty of cooperation along the lines of those between the United Nations and its specialized agencies, a separate treaty providing for the election of judges by the General Assembly. The tribunal, as a judicial organ of the United Nations, would thereby acquire the necessary authority and permanence. The second formulation should be accepted for the reasons given and because it would accelerate the adoption of the statute. The first version, on the other hand, might require amendment of the Charter and this would be difficult in practical terms.

*Article 9 (Independence of judges)*

2. Article 9 states that the judges shall be independent, that they shall not engage in any activity which interferes with their judicial functions or affects their independence and that in case of doubt the court shall decide. Obviously, what is meant is that the court shall decide the matter of whether these conditions are met with respect to those elected judges of the tribunal. The word "therein" should therefore be added to the end of the article in order to clarify its meaning. The question then remains of how the court will ascertain that the aforesaid conditions are met with respect to those elected for appointment to the tribunal at the time of their nomination and while the court has yet to be formed. The court will be formed of those self-same judges, and its formation will thus follow their appointment.

*Article 11 (Disqualification of judges)*

3. Paragraph 1 states that judges shall not participate in any case in which they have previously been involved in any capacity whatsoever, or in which their impartiality might be open to doubt on any ground, including an actual, apparent or potential conflict of interest. Clearly, the term "impartiality" is not intended or is simply a typographical error, since what is meant is the existence of a suspicion of partiality by the judges and not the opposite. The prefix "im-" should therefore be deleted in order to remove the confusion.

4. The disqualification of judges in any case in which they have previously been involved in any capacity whatsoever, or in which suspicion of partiality might arise on any ground, apparent or potential, as worded, extends of

course to all previous expressions of opinion on the case of whatever kind, e.g. acting as prosecutor or deputy prosecutor, participating in the investigation of the case in any way or in any capacity or appearing with the accused as defence lawyer in any pre-trial investigation.

5. Paragraphs 3 and 4 state that the accused may also request the disqualification of a judge under paragraph 1, that any question concerning the disqualification of a judge shall be settled by a decision of the absolute majority of the chamber concerned, that the chamber shall be supplemented for that purpose by the president and the two vice-presidents of the court and that the challenged judge shall not take part in the decision.

6. Since it is possible that the body so formed after the exclusion of the judge or judges challenged might consist of an equal number of judges, paragraph 4 of the article should be amended to stipulate that any question concerning the disqualification of a judge shall be settled by a decision of an absolute majority of the chamber concerned and that in the event of a tied vote the side on which the president has voted shall prevail. A paragraph 5 should be added to the article placing a limit on the number of judges whose disqualification the accused may request for any reason—with the exception of disqualification on grounds of previous participation in any capacity whatsoever in the case—so that abuse of the right of challenge by the accused does not create a situation where there is an insufficient number of judges qualified to decide on the charge against him and the trial is thus suspended.

*Article 13 (Composition, functions and powers of the Procuracy)*

7. Paragraph 1 states that the procuracy shall be composed of a prosecutor, who shall be head of the procuracy, a deputy prosecutor and such other qualified staff as may be required. This means that although other staff are included in the composition of the procuracy, the draft does not establish procedures for their appointment or specify what guarantees are accorded to them in the performance of their duties in assisting the prosecutor and deputy prosecutor. The draft does not specify their powers and contains no reference to how they are to be determined, and it does not state whether or not the same restriction applies to them as is placed on the prosecutor by article 13, paragraph 7, namely that he shall not act in relation to a complaint involving a person of the same nationality.

*Article 15 (Loss of office)*

8. Paragraph 2 states that where the prosecutor is found, in the opinion of two thirds of the court, guilty of proved misconduct or in serious breach of the statute, he shall be removed from office. The commentary on the article states that one member of the Working Group had found it strange that the prosecutor could be removed by an organ different from that which had elected him and thought that this might compromise his independence before the court. We agree with this view and consider that the prosecutor should be removed by the organ that

elected him and not by the court. According to article 16, paragraph 4 (Privileges and immunities), of the statute, the court may not, in order to ensure his independence, revoke the immunity of the prosecutor. How then can it be allowed to decide on his removal from office?

#### *Article 19 (Rules of the Tribunal)*

9. Article 19 states that the court may, by a majority of the judges and on the recommendation of the bureau, make rules for the conduct of pre-trial investigations, the procedure to be followed and the rules of evidence to be applied in any trial and any other matter necessary for the implementation of the statute. The formulation of rules for the conduct of pre-trial investigations, for the procedure to be followed and the rules of evidence to be applied in any trial and for any other matter necessary for the implementation of the statute is a purely legislative act supplementary to the statute, and it is therefore not part of the function of the judges of the tribunal. Such provisions should therefore be incorporated into the statute or annexed thereto so that the judges of the tribunal are obligated to apply them in the cases brought before them, which goes against the rules of the tribunal. The rules of procedure of the tribunal, however, may be determined by its court.

#### *Article 21 (Review of the Statute)*

10. The place of article 21 of the statute is inappropriate, and we consider that it should be part of the final clauses.

#### *Article 23 (Acceptance by States of jurisdiction over crimes listed in article 22)*

11. Article 23 sets forth three alternatives regarding the acceptance by States parties of the jurisdiction of the court over crimes referred to in article 22 (List of crimes defined by treaties). Kuwait supports the adoption of this proposal as being in keeping with the purpose of elaborating the statute of the proposed tribunal, namely the need to prosecute perpetrators of the crimes within its jurisdiction provided that a State party does not declare that it does not accept the jurisdiction of the court over one or more of the crimes referred to in article 22. Such a declaration, as specifically stated in article 23, paragraph 3, will not affect any proceedings already commenced under the statute. It will thus not prevent the completion of those proceedings, that is to say the completion of inquiries or trials that may have commenced regarding any charges or crimes referred to in article 22 and thus will not prevent their being brought to trial and the verdicts reached, as the case arises. That is, such a declaration will affect only events and charges subsequent thereto.

#### *Article 25 (Cases referred to the Court by the Security Council)*

12. Kuwait agrees with the provisions of article 25. This would enable the Security Council to make use of the proposed court as an alternative to establishing special tribunals. The United Nations General Assembly should also

have the power to refer cases to the court, particularly where the Security Council is unable to adopt a resolution because of the use of the veto by one of its five permanent members.

#### *Article 31 (Commencement of prosecution)*

13. Article 31 provides that a person may be arrested or detained under the statute for such period as may be determined by the court in each case, but it does not establish a maximum period for such detention. This is an exceptional measure on which there must be limits, and it may not be maintained for such a long time as to become a penalty.

#### *Article 33 (Notification of the indictment)*

14. It has already been stated that it would be preferable for the statute of the tribunal to have a binding character. All States that acceded to the statute would thus have accepted the jurisdiction of the court and would therefore be bound by its requests and decisions with regard to the provisions of articles 24, 26, 29 and article 33, paragraph 2.

#### *Article 37 (Establishment of Chambers)*

15. Kuwait agrees with the view, as set forth in the commentary to article 37, paragraph 4, that the membership of the chambers should be predetermined on an annual basis in order to avoid any suspicion of a particular judge being selected to consider a particular case.

#### *Article 38 (Challenges to jurisdiction)*

16. Our views on article 38 are as follows:

(a) Challenges to the jurisdiction of the court should be restricted to States that have a direct interest in the case, the criteria for interest in the case, rebuttals and challenges being those in use under national law;

(b) The question of jurisdiction is an essential matter concerning which the draft requires the tribunal to satisfy itself and to decide of its own accord that it has no jurisdiction if such should seem to it to be the case. Since the draft gives the accused the right to challenge the jurisdiction of the tribunal at any stage, the same right should, by analogy, be accorded to the State since the reasoning is the same and because of the grave consequences a charge may have for the accused or for a State party;

(c) It would be preferable to establish a chamber to consider pre-trial rebuttals and challenges relating to the sufficiency of the indictment or jurisdiction. Since the bureau of the court concerns itself with referral procedures as a chamber of indictment at this stage, it may consider the rebuttals submitted to it. The fact that it is the bureau that issues the indictment does not detract from this, because it is above all else a judicial body of which it is assumed that it does not refer a case to the tribunal unless it has sufficient evidence for the charge.

*Article 41 (Principle of legality (Nullum crimen sine lege))*

17. Kuwait does not approve of the words “and its provisions had been made applicable in respect of the accused” that appear in square brackets in article 41 (a) in the light of the principle of the equal criminal responsibility of different individuals irrespective of national law or of whether or not a State party has met its commitment to criminalize in internal law the acts enumerated in international treaties.

*Article 44 (Rights of the accused)*

18. Kuwait is in favour of trial *in absentia* if the accused has been notified but chooses not to appear before the court or if the accused has been arrested but escapes. Kuwait therefore agrees with the formulation of situation (c) as given in the commentary to the article for the worthy reasons given there and in order to give the *in absentia* verdict a deterrent value for the international community, promote the achievement of justice and reaffirm the international rule of law by the punishment of whoever is proved to have committed an international crime. We support the view that judgements *in absentia* should be vacated if the accused is later apprehended and that he should be allowed to defend himself in the interests of justice.

*Article 45 (Double jeopardy (non bis in idem))*

19. Our views on article 45 are as follows:

(a) It is assumed that States parties will have approved the jurisdiction of the court and that they will therefore undertake to desist from instituting trial proceedings if the court should commence inquiries, so that the accused will not be brought to trial before two judicial organs at the same time. In this connection, the draft should address a number of questions concerning what States parties should do with regard to bringing the accused to trial before their national courts in the situation where the court has commenced investigations, and whether their hands are tied or they can continue with their proceedings;

(b) Paragraph 2 states that a person who has been tried by another court for acts constituting crimes referred to in articles 22 or 26 may be subsequently tried under the statute only if the act in question were characterized as an ordinary crime. The principle is that a person may not be tried again for the same criminal act even if it were characterized differently. Hence, if an act is characterized as aggravated assault a person cannot be retried for the same act characterized as torture or inhuman treatment. This does not preclude the possibility of bringing an accused person to trial if he has committed acts that constitute an international crime other than those for which he has been tried.

20. In another respect, paragraph 2 (b) of the article is sufficient to address this question because, whenever the trial is a “sham” proceeding, it is possible to try the accused before the court on the crime either as characterized in the trial under national law or however else characterized.

21. If, however, the accused can be tried for the same act when characterized as an international crime, then it must be stipulated that the international tribunal should take account of whatever penalty has been imposed by the national tribunal.

*Article 50 (Quorum and majority for decisions)*

22. Article 37 states that each of the chambers of the court shall consist of five judges. In our view, all of these judges should attend all of the trial proceedings, including the hearings, the deliberations and the rendering of the judgement, so that the number of members of the chamber is not less than that stipulated in article 37 and is not five for one case and four for another, thereby violating the principle of equal rights for the accused. Article 50, therefore, in stating that the presence of only four judges is sufficient, is in violation of the foregoing principles.

*Article 53 (Applicable laws)*

23. The determination of penalties should be part of international penal law and not of a procedural code, and a penalty should be established for each individual crime in conformity with the law concerning crimes and penalties.

*Article 55 (Appeal)*

24. Our views on article 55 are as follows:

(a) The article does not lay down any precise deadline for appeal against the judgement. This has the effect of allowing a judgement to be challenged at any time, thereby undermining the finality of the judgements of the tribunal;

(b) The Appeals Chamber should have more members than the court of first instance, preferably seven;

(c) It should be stipulated that a judge who has participated in the rendering of the initial judgement should not sit in the appeal proceedings, given that this is a basic guarantee in judicial proceedings.

25. In our view, no separate chamber should be established to consider appeals, both for reasons of economy and because the number of appeals may not be large enough to require the establishment of a separate chamber. It should rather be formed as needed by judges other than those who took part in the judgement contested.

26. Although most constitutions stipulate that citizens or nationals may not be extradited, when States parties accept the jurisdiction of the court, the court shares jurisdiction with the national courts in considering these cases. This entails an obligation to surrender to it accused citizens or nationals in the event the court should so request.

## Malta

[Original: English]  
[29 June 1994]

## GENERAL COMMENTS

1. The Government of Malta takes note of and welcomes the report of the Working Group of the International Law Commission which contains a comprehensive and systematic set of draft articles on a draft statute for an international criminal court.

2. The Government of Malta supports the establishment of an international criminal court. This support has already been affirmed by Mr. Guido de Marco, Deputy Prime Minister and Minister for Foreign Affairs of Malta during the International Conference for Protection of War Victims held at Geneva from 30 August to 1 September 1993 and during the general debate of the forty-eighth session of the United Nations General Assembly. This position was reiterated during the Commonwealth Heads of Government meeting held in Cyprus in October 1993.

3. The Government of Malta believes that the relationship between the court and the United Nations is crucial both to the court's establishment and to its long-term viability. Therefore, Malta prefers that the court should be an organ of the United Nations. However, in the light of the practical and technical difficulties expounded during the debate on this subject, and in particular the controversy as to whether such an option would necessitate an amendment of the Charter of the United Nations, Malta could agree to the establishment of the court by a statute in the form of a treaty entered into by States. If this second option is adopted, it would be essential to create, through appropriate agreements, a close cooperative relationship between the court and the United Nations as this would greatly enhance the court's authority and effectiveness as well as its universal appeal.

## COMMENTS ON SPECIFIC ARTICLES

4. Article 4 (Status of the Tribunal) provides for a court which is not a full-time body but which would sit when required. While being aware that such an option is less costly and, therefore, more attractive to potential parties to the statute, the Government of Malta believes that the consequential weakening of the court caused by the lack of continuity and its diminished independence and authority might undermine its continued existence. The possibility that the president of the court might become full time if circumstances so required does little to redress the problem.

5. With regard to the rest of part 1, which covers articles 1 to 21, it presents few problems to Malta.

6. Malta shares the Working Group's adoption of the principles that judges should not be eligible for re-election. At the same time it is felt that the 12-year terms could be shortened.

7. Part 2 of the statute (Jurisdiction and applicable law) is a serious attempt to address a series of complex issues. The basic approach adopted by the Working Group to the court's jurisdiction *ratione materiae* is shared by Malta. The compilation of a list of crimes defined by treaties such as that found in article 22 can provide the core of this jurisdiction. In this context, the setting up of an international criminal court, vested with jurisdiction to try crimes against humanity, war crimes, international terrorism and global traffic in narcotics, will give an institutional concept in dealing with the international dimension of such offences.

8. Regarding article 23 (Acceptance by States of jurisdiction over crimes listed in article 22), Malta reiterates its position in favour of a flexible jurisdictional regime. This would encourage a larger number of States to become parties to the statute. The net result of both "opting-in" systems (alternatives B and C) achieves the aim of allowing States that so desire to become parties to the statute to decide over which crimes they would be prepared to accept the court's jurisdiction. The initial presumption in favour of the lack of jurisdiction of the court in alternative A would probably make this alternative appear less inhibiting to potential States parties.

9. Note is taken of the fact that the Working Group's draft statute separates the establishment of the court from the entry into force of the draft code of crimes against the peace and security of mankind. Any linkage between the court and the code could prove detrimental to the early establishment of the court and therefore such linkage should be avoided.

10. While understanding the logic explained in the Working Group's commentary to article 25 (Cases referred to the Court by the Security Council), Malta feels that the drafting of article 25 could be improved in the light of paragraph 2 of the commentary.

11. Malta feels that article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22), paragraph 2, which provides for the court's jurisdiction over crimes under general international law, may give rise to concerns over the proper application of the principle *nullum crimen sine lege*, since it is arguable whether such crimes are defined with a precision that is acceptable as a basis for criminal jurisdiction. This may cause difficulty for Malta in the light of section 39 (8) of the Constitution of Malta which states that:

8. No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is more severe in degree or description than the maximum penalty which might have been imposed for that offence at the time it was committed.

12. This is very similar to article 7 of the Convention on the Protection of Human Rights and Fundamental Freedoms, which speaks of the same principle in an almost verbatim manner, and article 11 of the Universal Declaration of Human Rights, which speaks out in favour of the principle. Furthermore, recognition of the jurisdiction of the international criminal court may mean constitutional changes, as well as extradition treaties with the States parties involved and the United Nations. All this necessarily

implies an enormous number of changes in the laws which will have to take place.

13. Malta is largely in agreement with part 3 to part 7 of the draft statute, which deal, *inter alia*, with several procedural issues of fundamental importance. It notes with approval that article 53 (Applicable punishment) does not empower the court to award capital punishment. On the other hand, the possibility, albeit restricted, of holding trials *in absentia*, provided for in article 44 (Rights of the accused), paragraph 1 (*h*), should not be included in a revised draft statute since there is little benefit in a purely declamatory justice that risks possible infringements of the rights of the accused.

#### CONCLUSIONS

14. Malta looks forward to the early submission by the International Law Commission of a revised version of the draft statute that has been prepared by the 1993 Working Group. Malta believes that the Commission's work on this subject matter will prove to be a determining factor in successfully meeting the increasing need being felt in the international community for the establishment of an international criminal court.

#### Mexico

[Original: Spanish]  
[15 February 1994]

#### GENERAL COMMENTS

1. [The Government of Mexico] is not attempting to comment exhaustively on the report of the International Law Commission's Working Group on a draft statute for an international criminal court, for its comments refer only to those points relating to the establishment of an international criminal court, which it thinks need further study.

2. Mexico expresses its thanks to the 1993 Working Group for its report. Its in-depth treatment of the relevant issues without a doubt significantly advances the development of the topic, yet it also brings out the variety of complex problems that have to be dealt with before proceeding to establish such a court.

3. The Working Group must therefore carefully analyse the comments made by the various States both in the Sixth Committee debates during the forty-eighth session of the General Assembly and subsequently.

#### SPECIFIC COMMENTS

4. The tribunal as proposed in its draft statute is expected to be a body that will meet only when a case is submitted for its consideration. The practicality of such a mechanism will no doubt attract the general support of the international community.

5. As to the manner in which the tribunal is to be set up, it became clear during the last session of the General

Assembly that most States endorsed the idea of a tribunal established by an international agreement. Mexico shares that view, and once the basic problems relating to the establishment of an international criminal court are resolved, the body to be instituted should be defined in an international treaty under which each State assumes the obligations it deems appropriate, and the observance of the principle *res inter alios acta* is fully guaranteed.

6. How the tribunal is to be linked to the United Nations is a question that has been approached in different ways. Although the majority recognize the need for a relationship with the United Nations system, the manner in which this is to be done is still being debated. Since the body in question is a jurisdictional one where impartiality and independence become essential, Mexico believes that the relationship to the United Nations must be limited to an agreement to cooperate. The tribunal must not be conceived as an organ of the United Nations, as proposed, within brackets for the moment, in article 2.

7. Articles 19 and 20 of the draft statute give the court the power to determine its own internal rules, rules of procedure, rules of evidence and in general all the rules necessary for the proper implementation of the draft statute. Mexico believes that power to be too broad. In the interests of legal certainty, it would be preferable if the rules governing the functioning of the court were established in the draft Statute itself as clearly as possible, leaving the court only the authority to determine administrative provisions.

8. The observance of the principle *nullum crimen sine lege, nulla poena sine lege* demands that special attention be given to the crimes over which the tribunal is to be given jurisdiction. Mexico believes that only exceptionally serious international crimes should fall within its purview. Consequently, the list of crimes in article 22 (List of crimes defined by treaties) must be studied with greater care, because the fact that a crime is covered under an international treaty is not of itself enough to confer jurisdiction on the court.

9. Furthermore, the provisions of articles 25 and 26, which would give the Security Council the authority to submit cases to the tribunal and give it jurisdiction over violations of peremptory norms of international law and over exceptionally serious crimes so identified in national legislation, in practice create serious legal difficulties that demand an in-depth study, in the light specifically of criminal law, of the scope of those articles.

10. In establishing an international court, another problem clearly arises in connection with the question of applicable substantive law. Article 28 determines that in settling cases submitted to it the court shall apply the statute, the applicable international treaties, the rules and principles of general international law and, as a subsidiary source, any applicable rule of national law. A provision of such scope, which leaves it to the court's discretion to decide which norm to apply, not only opens the door to legal uncertainty but runs counter to the principle of legality as it pertains to criminal law. Accordingly, progress must first be made in integrating the rules of international criminal law.



11. On the subject of international cooperation and judicial assistance, the machinery set up for bringing the accused before the court must always take account of the need at all times to respect the guarantees of due process which local laws generally afford individuals. If this concern is reflected and met in the draft statute, it will attract greater support from the international community. Trials *in absentia*, dissenting opinions, double jeopardy and appeals are still matters of considerable concern among the members of the international community. The establishment of an international criminal tribunal gives rise to quite a few problems. However, Mexico expects that the Working Group in charge of the topic will succeed in finding satisfactory solutions.

12. Only a tribunal whose goal is to guarantee genuine compliance with the law and in which effectiveness, respect for the law and impartiality combine and complement each other will secure the support of the international community.

### New Zealand

[Original: English]  
[23 February 1994]

1. In response to the invitation issued by the General Assembly in its resolution 48/31 of 9 December 1993, the New Zealand Government submits the following comments on the draft statute for the establishment of an international criminal court, prepared by the International Law Commission.

#### COMMENTS ON INDIVIDUAL ARTICLES

##### *Article 2 (Relationship of the Tribunal to the United Nations)*

2. New Zealand considers that an international criminal court should be established by a statute in the form of a treaty among States parties. New Zealand does not see the question of the form of the court's relationship to the United Nations as a central issue in the draft statute. The purpose of the court is the administration of criminal justice for the international community and this important role may need to be reflected by giving the court appropriate judicial status within the United Nations system, as in the case of the International Court of Justice. While we would be happy accordingly to see the court established as a judicial organ of the United Nations, further consideration does need to be given to the feasibility and ease of proceeding in this way within the terms of the Charter of the United Nations.

##### *Article 7 (Election of judges)*

3. New Zealand is aware that the statute of the International Tribunal for the Former Yugoslavia provides a precedent for the procedure for nomination of candidates contained in article 7, paragraph 2. The court, on the other hand, will be a permanent rather than an ad hoc body. A nomination process comparable to that in Article 4 of the

Statute of the International Court of Justice, whereby candidates are nominated by an independent body rather than by States parties, could enhance the quality of membership of the court.

4. Draft article 7 departs from the model provided by the Statute of the International Court of Justice in a number of respects. In New Zealand's view, the term of office should be reduced to nine years instead of 12, to bring the tenure of office in line with that of judges to the ICJ (Article 13 of the Statute of the ICJ).

5. Furthermore, New Zealand is not persuaded by the reasons given for the non-re-election principle. In both the Statute of the ICJ and the statute of the International Tribunal for the Former Yugoslavia, provision is made for the re-election of judges. We would favour reconsideration of this issue, with a view to providing for a shorter term coupled with the possibility of re-election.

##### *Article 19 (Rules of the Tribunal)*

##### *Article 20 (Internal rules of the Court)*

6. A useful distinction has been made between the rules of the tribunal (art. 19) and the internal rules of the court (art. 20). In New Zealand's view, it is appropriate to have a general rule-making power and for the procedural rules and rules of evidence to be published. Article 20 as it stands simply provides for the court to regulate its own internal procedure.

##### *Article 21 (Review of the Statute)*

7. New Zealand supports the five-year review provision contained in article 21. We should also favour the addition of a provision whereby a review conference shall be held every five years. The review option is important in relation to the jurisdictional provisions in part II of the statute. New Zealand can agree that this article may be more appropriately located in the final clauses of the statute.

##### *Article 22 (List of crimes defined by treaties)*

8. New Zealand supports article 22 in its current form. It is important for the credibility of the international criminal court that it have a strong consensual base from the outset. It follows therefore that the court's broadest jurisdictional responsibilities should relate to agreed international crimes in respect of which jurisdiction should be readily accepted by a large number of States. New Zealand supports the list of treaty-based international crimes compiled by the ILC. Consideration should also be given to the addition of other especially serious and important international crimes, in particular aggression and war crimes which do not constitute "grave breaches" in terms of article 22 (b).

9. New Zealand agrees with the distinction between the treaties creating "international crimes" and other treaties where the crimes are more a matter of national than of international law. New Zealand believes that this distinction should be maintained when consideration is given to adding new crimes to the list in article 22 in future.



10. New Zealand notes that some support has been expressed for including certain drug-related crimes, including the illicit trafficking of drugs across national frontiers, the laundering of drug money and the activities of narco-terrorists which threaten international peace and security, in article 22. While fully acknowledging the grave nature of these crimes, New Zealand considers that jurisdiction of the court over such crimes should be considered only under article 26 as a matter of special consent on the part of States.

11. New Zealand notes the difficulty involved in deciding whether torture (as contemplated in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) also qualifies for inclusion in the list of crimes under article 22. New Zealand agrees that a line must be drawn between the two strands of jurisdiction (as underlined in the commentary on article 22), but further consideration should be given to the placement of the crime of torture.

*Article 23 (Acceptance by States of jurisdiction over crimes listed in article 22)*

12. Ideally, the court would have compulsory jurisdiction with States bound simply by virtue of becoming a party to its statute. New Zealand recognizes, however, that this would be unlikely in practice to achieve the widest possible support from the international community for the international criminal court.

13. On article 23, New Zealand considers that the flexibility offered by alternative A may detract from the effective operation of the court. Alternative B is preferred as a better mechanism for achieving a solid and certain jurisdictional base for the court for the article 22 crimes. If alternative B is adopted, New Zealand suggests that paragraph 4 of alternative A (whereby States not parties to the statute may accept jurisdiction over some or all of the categories of crimes in article 22) might also be included.

*Article 24 (Jurisdiction of the Court in relation to article 22)*

14. It is not clear whether paragraph 2 of article 24 applies in the case of a referral by the Security Council under article 25. In the absence of compelling reasons to the contrary, New Zealand believes paragraph 2 should apply to an article 25 referral. If it is right that the State concerned should consent to jurisdiction in the circumstances described in article 24, paragraph 2, it seems right that it should also consent where jurisdiction is invoked by a Security Council referral rather than a complainant State with jurisdiction to try the case itself (art. 24, para. 1). However, this would clearly not be the case if the Security Council, in referring a case, was acting pursuant to its powers under Chapter VII of the Charter of the United Nations.

*Article 25 (Cases referred to the Court by the Security Council)*

15. The question of the relationship between the international criminal court and the Security Council is of fundamental importance. In the light of the primary responsibility of the Security Council for the maintenance of international peace and security under the Charter of the United Nations, New Zealand agrees that there is a case in principle for providing that the Security Council may refer cases to the court. A Security Council referral power may be all the more necessary if investigations are otherwise only to be commenced upon complaint by States.

16. It appears to be envisaged that the Security Council would not normally be expected to refer a "case" in the sense of a complaint against named individuals, but would more usually refer to the court a situation of aggression, leaving it to the court's own prosecutor to investigate and indict named individuals. In New Zealand's view, it should be made clear that article 25, in setting out a right for the Security Council to refer cases to the court, is subject to and does not impinge in any way upon the scope of the powers granted to the Security Council under the Charter of the United Nations.

17. New Zealand doubts whether it will be possible to extend this power of referral to the General Assembly, given the different role and powers accorded to the General Assembly under the Charter of the United Nations.

*Article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22)*

18. It is clear that the subject-matter jurisdiction of the court should be limited to crimes of an international character. Such crimes can be identified by reference to treaties in force. In addition, however, we recognize that the application of customary law in this respect has also to be considered.

19. New Zealand recognizes that, in principle, the court should be given jurisdiction in respect of crimes under customary international law. It is however also necessary in principle for acts constituting international crimes and subject to the jurisdiction of an international criminal court to be specified with as great a degree of clarity and precision as possible. New Zealand would support further elaboration of article 26, paragraph 2 (a) accordingly.

*Article 29 (Complaint)*

20. New Zealand considers that the prosecutor should be authorized to initiate an investigation in the absence of a complaint in the case of a crime apparently within the jurisdiction of the court but in respect of which the prosecutor has determined that there is no State which is willing and able to prosecute. New Zealand notes that broadly corresponding powers have been given to the Secretary-General under Article 99 of the Charter of the United Nations, whereby the Secretary-General may refer matters to the Security Council. It is also noted that means for preventing the abuse of the extension of the prosecutor's powers are contained in article 32 (Commencement of

prosecution), paragraph 2, and article 38 (Dispute as to jurisdiction).

*Article 30 (Investigation and preparation of the indictment)*

21. With regard to paragraph 1 of article 30, New Zealand doubts that the bureau should have power to direct the prosecutor to commence an investigation where the prosecutor decides not to proceed. The exercise of such power is likely to be seen by an aggrieved suspect or State as an indication of predisposition or bias and to impinge upon the prosecutor's independent exercise of the functions of the position.

22. New Zealand supports the fact that paragraph 4 makes provision for guaranteeing the rights of a person during the investigation phase before the person has actually been charged with a crime.

*Article 38 (Disputes as to jurisdiction)*

23. New Zealand agrees with the approach taken in article 38 that, consistent with the court's existence as the collective authority of the States parties, any State party should be able to challenge the court's jurisdiction, not only those States having a direct interest in the case.

*Article 41 (Principle of legality (Nullum crimen sine lege))*

24. New Zealand suggests that, rather than retaining the text contained in square brackets in subparagraph (a), what the statute needs to make clear here is whether the provision is concerned with treaties in force generally, or with respect to the State exercising jurisdiction over the individual concerned. New Zealand assumes the intention is to cover the latter; this should be clarified.

*Article 44 (Rights of the accused)*

25. New Zealand suggests that paragraph 1 (b) should guarantee directly the right of the accused to conduct a defence or to have the assistance of counsel, and not simply guarantee that the accused is entitled to be informed of such matters.

26. On the substance of the rights in paragraph 1 (b), it would be preferable for "means" to be qualified as "sufficient means" so that there is no suggestion that an accused has to exhaust all his or her means before becoming entitled to legal assistance. It should also be made clear that such legal assistance is both "adequate" and "free".

27. New Zealand is opposed to trials *in absentia*, and disagrees with paragraph 1 (h). The right to be present at one's trial is a fundamental principle which, as the ILC itself notes, is enshrined in article 14 of the International Covenant on Civil and Political Rights. New Zealand fully concurs with the views of the Secretary-General, as expressed in his report on the establishment of the International Tribunal for the Former Yugoslavia submitted pursuant to paragraph 2 of Security Council resolution 808 (1993):

It is axiomatic that the international Tribunal must fully respect internationally recognized standards regarding the rights of the accused

at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.<sup>1</sup>

It is noteworthy that Article 21 of that Statute does not permit trials *in absentia*.

28. Notwithstanding the difficulties involved in bringing the alleged offender before the court in certain cases in the absence of international enforcement mechanisms, New Zealand is not convinced by the arguments put forward in favour of derogating from the principle that there should not be trials *in absentia*. It is one of the incidents of criminal proceedings wherever they occur that an accused person may attempt to defeat the course of justice. It does not follow that an exception should be made to the principle because the court is dealing with the most serious international crimes. It may equally be argued that the more serious the crime, the more important it is that fundamental rights and guarantees are maintained.

29. New Zealand does not consider that a conviction *in absentia* would constitute any sort of "moral judgement" or sanction. It is more likely that such judgements could be regarded as placing the international court above the law, and undermining the credibility of the court to act impartially and within established human rights norms. New Zealand also does not consider that the principle can be respected by circumscribing the situations in which exceptions may be entertained. In New Zealand's view, the principle must be adhered to, consistent with existing international human rights law.

*Article 45 (Double jeopardy (non bis in idem))*

30. New Zealand is in principle opposed to any derogation from the principle of *non bis in idem*. We note that article 45 has been drafted carefully such that the court's role can be regarded as serving more in the nature of an appellate or review function *vis-à-vis* national courts. It is also noted that article 45 is modelled closely on article 10 of the Statute of the International Tribunal for the Former Yugoslavia, and that the circumstances in which it applies are exceptional. Whether, however, paragraph 2 (a) of article 45 is appropriate in this context, given that the jurisdictional base of the court will be much broader than the International Tribunal for the Former Yugoslavia, is a matter for further consideration.

*Article 51 (Judgement)*

31. With reference to paragraph 2, New Zealand supports provision for a dissenting judgement at first instance. It would be wrong in principle to prevent judges from expressing their views. It would also put the court on a different and inferior basis to both the ICJ and the International Tribunal for the Former Yugoslavia in this respect. Dissenting or separate opinions would also be very important to the jurisprudence of the court and to both the defendants who chose to appeal convictions and to appeals chambers when considering whether to overturn convictions.

<sup>1</sup> S/25704, para. 106.

*Article 58 (International cooperation and judicial assistance)*

32. This article is based substantially on article 29 of the statute establishing the International Tribunal for the Former Yugoslavia. New Zealand notes that a number of points will need to be addressed by States parties when enacting their requisite domestic legislation pursuant to this article. Consideration might therefore be given to other matters which are important to countries in terms of their domestic law. Such matters include whether it is envisaged that there could be grounds on which a request for assistance could be refused, who bears the cost when substantial assistance is given, and the exercise of compulsory powers within the limits available to domestic law-enforcement authorities.

*Article 61 (Communications and contents of documentation)*

33. Consideration should also be given to making provision in paragraph 3 of this article for requests to include the following elements:

(a) Details about the form in which documentary assistance (evidence) is to be supplied. It may need to be in a particular form to be admissible later in the court;

(b) A statement about the court's wishes concerning confidentiality and the reasons for confidentiality where it is required;

(c) The desired time-frame for compliance.

*Article 63 (Surrender of an accused person to the Tribunal)*

34. Further to paragraph 6, New Zealand considers that the power of delay in paragraph 3 should be extended to include persons who are mentally disordered (insane) or too ill to travel and face proceedings.

#### CONCLUSION

35. Several provisions in the draft statute touch on the interrelationship between national courts and national processes on the one hand and the international criminal court on the other in respect of the crimes at issue. Consideration should be given to making a suitable reference, perhaps in the preamble to the statute, to this relationship and to the respective roles and complementarity of the national and international processes.

#### Nordic countries

[Original: English]  
[15 February 1994]

#### GENERAL COMMENTS

1. As expressed in the Nordic statement on this item in the debate of the Sixth Committee during the forty-eighth

session of the General Assembly,<sup>1</sup> the International Law Commission should be commended for its preparatory work on this draft statute for an international criminal tribunal. The establishment of an international criminal tribunal is a project of the utmost importance to the international community. The task is difficult and sensitive, but certainly achievable. The spirit of cooperation in which States have discussed the issue recently is encouraging.

2. In the following, the Nordic countries present their comments on the draft articles, as well as on specific questions referred to in the commentaries. As a general preliminary observation, it should be pointed out that the procedural aspects of the statute should not be left to general principles, but should be as specific as possible.

#### COMMENTS ON THE RESPECTIVE ARTICLES

##### PART 1: ESTABLISHMENT AND COMPOSITION OF THE TRIBUNAL

##### *Article 2 (Relationship of the Tribunal to the United Nations)*

3. The two draft alternatives found in this article have no bearing on the tribunal's independence. The Nordic countries do have a clear preference for the tribunal as a judicial organ of the United Nations. The tribunal must be empowered with a clear United Nations mandate, in order to maintain its permanence and legitimacy. In addition, this would give the tribunal more widespread acceptance, and no separate bureaucracy with, for example, a standing committee would be needed. Among possible models that might be considered in this connection are arrangements similar to those made for the establishment of the United Nations Administrative Tribunal.

4. Should, however, the tribunal not become an organ of the United Nations, it is nevertheless necessary to ensure a formal linkage to the organization. One possibility might be to consider paragraph 9 of General Assembly resolution 47/111 of 16 December 1992. In that resolution, the General Assembly provided for arrangements concerning the bodies established under the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

##### *Article 5 (Organs of the Tribunal)*

5. The Nordic countries wish to stress the significance of ensuring that the prosecutor be given an independent role in relation to the tribunal.

##### *Article 8 (Judicial vacancies)*

6. According to this article, judges who have been elected to fill a vacancy may sit consecutively for a longer period of time (16 years) than judges who have been

<sup>1</sup> See *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee, 26th meeting.*

elected through the ordinary process. This may be considered inadvisable, and the wisdom of such a permitted service ought to be reviewed.

*Article 10 (Election and functions of President and Vice-Presidents)*

7. The bureau should be primarily assigned administrative duties. Should other duties be conferred, the risk of disqualification arises. Such a system might lead to a vague distribution of power within the tribunal. It must furthermore be noted that all steps in the decision-making process of a case should be the responsibility of the pertinent chamber and never of the bureau.

*Article 11 (Disqualification of judges)*

8. It is vital that the tribunal exemplifies a non-partisan stance in all cases, something which causes this article to be important for the totality of the rules pertaining to the tribunal. The possibility of clarifying what types of situations merit disqualification should be considered. One may here note that article 37 (Establishment of Chambers), paragraph 4, deals with precisely this issue in regard to individuals of the same nationality.

9. There is a potential problem where the president or a vice-president faces disqualification. As a result, the requirement that such individuals take part should not be seen as necessary. The text should require only the members of the chamber, with the addition of one member from the bureau.

10. In principle it is inadvisable to limit the right of the accused to request a competency review of a judge. It follows therefore that there ought not to be a limit on the number of judges whose removal can be requested on competency grounds. This is important in order to maintain a non-partisan appearance, which is essential for ensuring a continued and unassailable legitimacy for the tribunal.

*Article 13 (Composition, functions and powers of the procuracy)*

11. Legal safeguards require that there must also be rules of disqualification for the procuracy. In addition, a rule should be included requiring different nationalities for both the prosecutor and deputy prosecutor.

*Article 16 (Privileges and immunities)*

12. It should be determined whether income received for service by those listed under this article should not be subject to tax. As most of these positions are part-time duties, it might be argued that such immunity is not called for.

13. In paragraph 4, it is important that the deputy prosecutor be considered equal to the prosecutor in regard to privileges and immunities. This section of the article could therefore end with "other than the acting Prosecu-

tor". As a result, the judges should not have the opportunity to revoke an acting prosecutor's immunity.

*Article 17 (Allowances and expenses)*

14. A determination should be made as to whether judges' receiving a salary derived from other non-tribunal duties might provide a problem for their independence.

*Article 19 (Rules of the Tribunal)*

15. A framework for rules of evidence and procedure should be found within this statute, i.e. basic rules of evidence and procedure. Such a framework would thus be complied with in the more detailed rules which the tribunal will adopt after its establishment.

16. The suggestion that the various chambers should have the possibility of developing rules of procedure is acceptable, provided such rules have not been otherwise adopted by the tribunal/chambers. One must stress here that requisite uniformity of rules amongst the chambers should be maintained.

PART 2: JURISDICTION AND APPLICABLE LAW

17. Reliance on State consent during the various stages of procedure does not create unnecessary obstacles for bringing to justice persons who have committed crimes covered by the statute. The Nordic countries have some hesitation about the rather complicated system of strands of jurisdiction and various categories of crimes set forth in articles 23 to 26. This type of system has the potential to lead to procedural difficulties. Furthermore, it is vital that the statute avoid any possibility of jurisdiction shopping by States.

18. Of the two proposed "strands" of jurisdiction, the Nordic countries are critical of the second strand (arts. 26-27), which they suggest should be deleted. Article 26 is particularly vague. In addition, it is suggested that a clarified presentation of the complex rules should be found in the first strand (arts. 22-24).

19. Should the above suggestion be adopted, it might be advisable prior to article 22 to add the following as an article 21 *bis*:

"The Court has jurisdiction under this Statute in respect of crimes referred to in article 22, provided that its jurisdiction has been accepted in accordance with the provisions in articles 23-24."

As a result, article 24 might need to be slightly amended.

*Article 22 (List of crimes defined by treaties)*

20. Giving priority to treaty rules which are as far as possible part of international customary law serves the purpose of predictability and assessing individual responsibility for serious crimes, thereby preventing ambiguity. The Nordic countries are therefore gratified to see the enumeration of the serious crimes in this article, as these

States continue to maintain the view that the tribunal should be limited to serious crimes against mankind.

21. It may be advisable that certain rules be drafted more specifically, and that jurisdiction is limited to acts of particular gravity. Hence, the jurisdiction drafted in this article may be unnecessarily broad. Not all of the crimes referred to have the degree of seriousness which should be deemed mandatory. In addition, it should be determined whether the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should also be listed.

22. The statute of the International Tribunal for the Former Yugoslavia appears to be more adequately formulated, with reference to its articles 2 through 5.

*Article 23 (Acceptance by States of jurisdiction over crimes listed in article 22)*

23. Alternative B is preferred by the Nordic countries. This alternative provides for a presumption of jurisdiction, with the possibility of an opting-out declaration by a party which might wish to exclude the tribunal's jurisdiction in some respects. The other alternatives might lead the tribunal to end up with a very narrow scope of jurisdiction, based upon individual declarations of the parties, thereby weakening the statute's general aim.

24. A State that intends to become a party to the statute under article 23 should be required to accept some minimum basis of jurisdiction, e.g. jurisdiction under article 22 (a) and (b).

*Article 24 (Jurisdiction of the Court in relation to article 22)*

25. Paragraph 2 of this article requires that the State in which the accused is present also accepts the jurisdiction of the tribunal; however the related article for the International Tribunal for the Former Yugoslavia<sup>2</sup> appears to be more adequately drafted. Further consensual requirements to those already in the article should not be appended.

26. Paragraph 1 (b) is formulated in an unnecessarily complex way. An interpretation of this section might be that the tribunal has jurisdiction in regard to genocide once a State party to the Genocide Convention has consented. It is important that this paragraph correlates with the drafting comments.

27. The limitation in paragraph 2 may not be necessary. It might be sufficient that the territorial State is party to the statute.

<sup>2</sup> See the report on the establishment of an international tribunal for the former Yugoslavia submitted by the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704), annex, arts. 1, 8 and 9.

*Article 25 (Cases referred to the Court by the Security Council)*

28. Although articles 25 and 27 provide a rather large and undefined political discretion when the Security Council intends to bring cases before the court, the Nordic countries support the role which might be played by the Security Council according to these articles, with the proviso that the Council should not refer to the tribunal specific complaints against named individuals. One must ensure that the discretion given to the Security Council does not raise questions about the court's credibility when the Council intends to bring cases before the court. The principle of legality (*nullum crimen sine lege*) would seem to require that the modalities and criteria through which the Security Council exercises its proposed functions under the statute be more carefully elaborated. It is however entirely appropriate that the Council be given a prerogative to refer to the tribunal particular situations and leave it to the latter to decide whether prosecution should be instigated.

*Article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22)*

29. Should this section not be deleted, the Nordic countries have the following comments and suggestions:

(a) Both of the crimes presented in article 26 are vaguely formulated;

(b) Paragraph 2 (a) provides for the tribunal to judge in accordance with international legal principles not promulgated. This in itself is contrary to principles of legality, which for criminal prosecution requires written law (*nullum crimen sine lege*). In summation, this section is too broad from the perspective of the principle of legality in criminal law, and should therefore be deleted.

30. The Nordic countries are sceptical with regard to the regulation of narcotics crimes through this statute, despite full concurrence with the general conviction that action against international narcotics-related crimes requires international cooperation on the basis of agreements. It is difficult to perceive this tribunal as constituting the appropriate forum for cases of this nature. It must further be noted that the mere fact that a crime occurs over international boundaries cannot be considered sufficient basis for making this tribunal the appropriate legal forum.

*Article 28 (Applicable law)*

31. In order to maintain consistency it should be expressly stated that previous decisions of the tribunal are also considered a source of law. In subparagraph (c), national legislation may also be needed as a primary source, not merely as a secondary source. This may be necessary, as the relevant treaties do not all provide applicable punishment. For instance, article 26, paragraph 2 (b), is already based on national legislation.

### PART 3: INVESTIGATION AND COMMENCEMENT OF PROSECUTION

#### *Article 29 (Complaint)*

32. The provision of free access to deposit a complaint would arguably be functionally counter-productive. However, in addition to States being given the right to file complaints, the prosecutor should be given the right to commence investigation prior to the filing of complaints. A determination should also be made as to whether proceedings might also be instituted on the basis of information provided by internationally recognized humanitarian organizations.

#### *Article 30 (Investigation and preparation of the indictment)*

33. As stated previously, the bureau should have primarily administrative duties. Providing the bureau with the power to review a prosecutorial decision is difficult to accept, as it may be problematic in maintaining the impression of non-partisanship. Such a construction is not compatible with the independence of the prosecutor, nor with the principle of maintaining the separation of the roles of the tribunal and the prosecutor.

34. Review may be done differently, perhaps by review of one of the tribunal's chambers. It must be noted that the chamber in question would thereafter not be deciding the case.

#### *Article 31 (Commencement of prosecution)*

35. After certain periods of time a review should be made determining as to whether continued custody is required. The practice of the European Court of Human Rights might provide useful guidance in this connection.

#### *Article 32 (The indictment)*

36. It is once again important to stress that the bureau should primarily have administrative duties. First, it is unacceptable that the tribunal's three leading judges should decide the validity of the indictment yet also try the case; and secondly, it is unacceptable that the bureau has anything to do with the issuance of orders and warrants. In summation, the bureau should not be any type of "indictment chamber".

37. The Nordic countries strongly suggest that article 32 be deleted. Should however this article be retained, it must be clarified as to what occurs when a *prima facie* case is not found. Is the suspect thereby found not guilty, is the case dismissed, or are further investigations automatically commenced?

#### *Article 35 (Pre-trial detention or release on bail)*

38. The use of the concept of bail is unacceptable for the Nordic countries. It is furthermore against the legal traditions of many other countries, and should therefore not be

included. Such procuring of the release of a charged individual is a procedure which most likely would not be realistic for this tribunal, considering the magnitude of the crimes in question.

### PART 4: THE TRIAL

#### *Article 37 (Establishment of Chambers)*

39. The tribunal's chambers should be established prior to the adoption of rules of procedure, as was indeed done by the International Tribunal for the Former Yugoslavia. There should be a structured rotation system for the judges, rather than having the bureau determine which cases should be decided by the various judges. Reference can here be made to the process applied in connection with the establishment of the International Tribunal for the Former Yugoslavia. Finally, it is self-evident that a random distribution of cases must be ensured.

40. Should the above suggestion be pursued, it would be natural that paragraph 4 be transferred to article 11, as that article concerns disqualification.

#### *Article 38 (Disputes as to jurisdiction)*

41. All member countries should have some control over the tribunal's competence, not solely countries with a legal interest in the case concerned. This should also be possible prior to the main hearing. In addition, any further determination of sufficiency of indictment should not be necessary.

#### *Article 40 (Fair trial)*

42. It is essential that trials be held in public. Use of closed sessions must be better defined and more clearly regulated. Reference may here be made to the International Covenant on Civil and Political Rights, article 14, paragraph 1.

#### *Article 41 (Principle of legality (nullum crimen sine lege))*

43. The fact that a treaty has entered into force is considered sufficient in maintaining legality. This view is based on the following two factors: first, the various countries will have fulfilled their obligations relating to a treaty at different times; and secondly, a requirement of incorporation or transformation would debilitate the tribunal's legal basis. The various conventions should serve the purpose of providing a description of the offence. A "written law" or catalogue of prohibited actions will thus be found within the conventions.

44. Should article 26 be deleted, it is logical that this should also occur with article 41, subparagraphs (b) and (c).

*Article 42 (Equality before the Tribunal)**Article 43 (Presumption of innocence)*

45. Although these articles present the two important principles of equality before the law and innocence of the defendant before proved guilty, one should here determine as to whether it ought to be expressly stated that the defendant has the benefit of the doubt.

*Article 44 (Rights of the accused)*

46. Considering the matter of legal safeguards, the Nordic countries have some hesitation regarding the provision of trial *in absentia*. Such trials could give rise to political as well as legal difficulties which ought to be avoided, thereby precluding any judgement in such a situation.

47. Should it nevertheless be determined that trial *in absentia* is essential, it must be noted that such trials should only occur in a very limited manner, on condition that they be regulated more clearly than is currently worded in the draft statute.

48. In regard to paragraph 4 of the commentary to the draft article, one may question the rationale of having a trial whatsoever, should a person convicted *in absentia* in fact be given merely a temporary judgement.

*Article 46 (Protection of the accused, victims and witnesses)*

49. Within this article should be included rules regarding the protection and assistance of victims of the crimes, in accordance with certain basic principles set forth in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>3</sup>

*Article 48 (Evidence)*

50. There should be more specific evidentiary rules. Such principles as best evidence and free assessment of evidence should be mentioned at the beginning of this article.

51. There should not be access to appeal decisions regarding evidence from the main hearing. This would cause a division of the proceedings and could also be utilized by the parties as a postponing tactic. If the parties are dissatisfied with a decision of the tribunal in this regard, they may refer to article 55, paragraph (1) (a).

*Article 51 (Judgement)*

52. Dissents are an expressive outlet for legal views in many legal systems, and should therefore be permitted. Such views would not have any negative effect on the tribunal's standing or authority. One may here refer to the European Court of Human Rights, which permits dissents.

*Article 53 (Applicable penalties)*

53. The tribunal should be exclusively a criminal tribunal. Consequently, the application of civil law-related penalties should be reconsidered, as it is highly doubtful as to whether such rules should be included. To illustrate, a potential case resulting in a judgement for damages presents a difficult choice of law issues. In addition, there is the question of how such a judgement is to be executed, something which is unclear.

54. It might be advisable to delete the possibility of judgement of fines. Considering the magnitude of the crimes in question, it is difficult to imagine how fines would be applicable. Furthermore, it should be noted here that the penalty of confiscation/seizure is a punishment for criminal activity which should be included in the statute, as it is in fact related to criminal punishment. This should be possible in order to provide a compensating remedy for victims of certain crimes, such as victims of stolen property.

55. The Nordic countries are pleased that the provisions regarding punishment do not include the death penalty.

*Article 54 (Aggravating or mitigating factors)*

56. The possibility that such issues as necessity, self-defence, intent, etc., be added to this article ought to be considered, and a determination should be made as to whether or not such inclusion in this statute would present a basis for antithetical conclusions. One must determine whether material rules should be coupled with procedural rules in such a statute or whether the former should be found in a "Code of Crimes".

## PART 5: APPEAL AND REVISION

*Article 55 (Appeal against judgement or sentence)*

57. The decisions of the tribunal should also be appealable by the prosecution. Reference should here be made to article 31.

*Article 56 (Proceedings on appeal)*

58. It is important that the tribunal's chambers be established from the outset, and that the composition of the chambers be not chosen by the bureau. A rotation plan determining which judges should decide appeals is advisable. Considering the limited number of cases the tribunal is likely to review, the necessity of a separate appeals tribunal ought to be looked into.

59. The wording of the statute can possibly be interpreted as implying that with six judges and a split-vote determination of 3-3, the court of the first instance's decision would stand. Majority vote ought to be required for any decision against the defendant. A split vote would thus negate the guilt of the defendant, thereby observing the principle that all doubt shall be to the benefit of the defendant.

<sup>3</sup> General Assembly resolution 40/34 of 29 November 1985.

*Article 57 (Revision)*

60. To have the possibility of requesting a re-examination or careful review for correction or improvement of a judgement is important in most legal systems. The prosecutor should also have the possibility of applying for revision of the tribunal's judgement.

PART 6: INTERNATIONAL COOPERATION AND  
JUDICIAL ASSISTANCE

*Article 61 (Communications and contents of documentation)*

61. It is possible that use of the word "normally" in paragraph 1 might not be necessary, and a determination should be made on that issue. It is also important to clarify that in paragraph 2, the word "communications" must mean written documentation.

*Article 63 (Surrender of an accused person to the Tribunal)*

62. An indictment should be sought only from a constituted chamber. Thus, reference to the bureau should be deleted.

*Article 66 (Enforcement of sentences)*

63. The possibility of serving time in the country where the violation was perpetrated merits further careful consideration.

64. Should fines be maintained as a penalty in the final draft, it is important that the statute contain rules regarding the execution of such a judgement, and where such funds should be distributed. In addition, it is necessary to have rules for confiscation/seizure and claims of vindication.

**Norway**

[See *Nordic countries*]

**Panama**

[Original: Spanish]  
[8 March 1994]

1. The Government of Panama agrees to the elimination of international trafficking in narcotic drugs and massive violations of human rights from the list of crimes contained in the draft Code of Crimes against the Peace and Security of Mankind, as these topics are amply covered by international treaties, and as specialized bodies have already assigned working groups to them; this is true of the inter-American system for the protection of human rights established by the Organization of American States, as well as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

2. With regard to the establishment of the international criminal tribunal, the Government of Panama believes that the draft articles do not fully meet the aspirations of Member States of the United Nations for the establishment of such a tribunal, because they do not offer guarantees of a supranational tribunal, they restrict access in terms of working languages (see article 18), and they do not clearly resolve cases in which the acceptance by States of the court's competence to prosecute crimes against the peace and security of mankind involves only the consent of the affected State and not of the aggressor State, so that simple non-ratification by the State which does not accept the court's competence can render the implementation of sanctions ineffective.

3. The foregoing notwithstanding, in view of the work accomplished by the Commission up to now, the Panamanian Government trusts that legal mechanisms of understanding and consensus will be found so that the current difficulties and obstacles can be overcome.

4. The Government of Panama is of the view that the elaboration of such rules requires the broadest range of scientific and political opinions which can harmonize the views of Member States to the greatest possible extent.

**Romania**

[Original: French]  
[25 February 1994]

## COMMENTS CONCERNING SPECIFIC ARTICLES

*Article 1*

1. Calling the body a "Tribunal" is preferable to the initial name of "Court".

*Article 2*

2. As for the link between the tribunal and the United Nations, Romania favours the wording that "the Tribunal shall be a judicial organ of the United Nations".

*Article 4*

3. We consider the best formulation to be that in article 4, paragraph 1.

*Article 5*

4. Romania also favours the option of making the "Court", the "Registry" and the "Procuracy" the component parts of the tribunal, thereby constituting an international judicial system.

*Article 7*

5. Romania considers it somewhat excessive for judges to hold office for a term of 12 years. Setting a term of six



years, with possible re-election for a single further term, seems more in keeping with the requirements, for the following reasons:

(a) A 12-year term is not to be found in the statutes of other international courts, the maximum being terms of nine years (in both the International Court of Justice and the European Court of Human Rights);

(b) A six-year term, with a possible one-time renewal, would we believe be closer to the spirit of the draft statute under consideration, which makes registrars (art. 12) and prosecutors (art. 13) eligible for re-election;

(c) If it is decided to establish a six-year term, the term of the registrar would have to be reduced from seven to five years (five years being also the term of the prosecutor).

#### Article 22

6. Romania supports the proposed inclusion in the list of crimes defined by treaties of actions considered crimes by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

#### Article 23

7. Of the three variants of article 23, we opt for alternative A.

#### Article 25

8. We consider it appropriate to broaden the category of subject matters that may be brought before the court under article 25, and to confer the authority to do so upon the General Assembly as well, thus avoiding impasses, particularly in cases where a member of the Security Council uses its right of veto.

#### Article 26

9. With regard to the discussions concerning special acceptance by States of the court's jurisdiction as foreseen in paragraph 2 (a) over crimes not defined as such in international treaties, such as aggression, or genocide in the case of States not parties to the Convention on the Prevention and Punishment of the Crime of Genocide, we find the proposal to deal with this problem also in article 25 to be justified. In that case, the Security Council and the General Assembly (as proposed earlier) would have the authority to submit to the court a crime under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals. Such a submission would naturally entail fulfilment of the condition laid down in article 27, requiring that it must first be determined that the State concerned has committed the act of aggression which is the subject of the charge.

### Slovenia

[Original: English]  
[28 February 1994]

1. The Republic of Slovenia supports the establishment of an international criminal court on the basis of the statute as its constituent document. That would not necessarily require an amendment to the Charter of the United Nations. We favour the idea that the court be linked to the United Nations, but it would not need to be its organ. Consequently, the Republic of Slovenia supports the composition of the tribunal, as envisaged in the draft statute, including the establishment of the procuracy as a separate organ of the court.

2. Concerning the rules of the tribunal stipulated in article 19 of the draft statute, the Republic of Slovenia favours the idea that the basic procedures concerning the rules of evidence to be applied in the trial be the subject matter of the statute rather than of the rules of the tribunal itself, a position also expressed by some members of the Working Group. In order to guarantee the complete independence of the procuracy in relation to the court, the procuracy should be governed by its own internal rules.

3. The Republic of Slovenia expresses the opinion that part 2 on jurisdiction and applicable law is the core issue of the present draft statute. In principle, the Republic of Slovenia supports the treaty-enumeration approach to crimes defined by these treaties, as the basis of the jurisdiction *ratione materiae* of the court, as laid down in article 22. Thus can the application of the principle *nullum crimen sine lege* be most properly preserved.

4. Besides, the Republic of Slovenia notes with satisfaction that the grave breaches of Protocol I additional to the Geneva Conventions of 1949 and relating to the protection of victims of international armed conflicts of 8 June 1977, have been listed among the crimes covered by article 22. It is true that the two Additional Protocols of 1977 to the Geneva Conventions of 1949 have not been as universally accepted as the Conventions themselves. Nevertheless they have been by now ratified by two thirds of all States and may soon, if not yet, be tested as the customary source of international humanitarian law. Therefore, the position expressed in the commentary of the Working Group, that Protocol II of 1977 to the Geneva Conventions of 1949 and relating to the armed conflicts of non-international character was left outside the scope of article 22 for the reason that it contained no provision concerning grave breaches, is not convincing. Protocol II contains under its part II very clear provisions as to which acts are and shall remain prohibited at any time and in any place whatsoever and may *prima facie* be characterized as serious violations of humanitarian law. Drafters of the draft statute of an international criminal court should bear in mind that the most brutal and massive violations of humanitarian law and human rights are one of the most evident features of armed conflicts which are not of an international character.

5. The Working Group decided to put in the first strand of the court's jurisdiction *ratione materiae* the anti-terrorist conventions of a universal character that qualify

specific terrorist acts as grave crimes and oblige their State Parties to act according to the rule *aut iudicare aut dedere*.

6. Here the Republic of Slovenia suggests that the Working Group reconsider whether terrorist international crimes can be put on the same footing as war crimes and crimes against humanity in respect of the gravity of their criminality. Certain legal distinctions between the two groups of crimes in question can already be drawn. We must bear in mind that the most serious war crimes and crimes against humanity are not the subject of the statutory limitation, as stipulated in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal<sup>1</sup> and put down in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Secondly, terrorist crimes are to be treated in the domestic legislation as classical non-political crimes in order to fit into already existing bilateral extradition agreements. On the other hand, war crimes and crimes against humanity are to be prosecuted by domestic courts on the basis of the principle of universality.

7. The list of anti-terrorist conventions could be supplemented with the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which extends the scope of this Convention to terrorist acts committed at international civil airports.

8. The Republic of Slovenia in principle agrees that drug-related crimes fall within the subject-matter of the jurisdiction of an international criminal court but the Working Group should re-examine whether drug-related crimes should fall within the group of crimes which require a special acceptance of jurisdiction according to article 26. As a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Republic of Slovenia supports the position that this Convention too is included among the treaties that fall within the jurisdiction of an international criminal court. Bearing in mind the acceptance by States of the jurisdiction over crimes listed in article 22, the Republic of Slovenia favours the "opting in" system, by which the jurisdiction is not conferred automatically for the States Parties of the statute, but requires the additional acceptance of a special declaration.

9. As many other Member States of the United Nations, the Republic of Slovenia must express a reservation against the territorial scope of the jurisdiction of the court in relation to its own nationals, who by our Constitution cannot be surrendered for trial outside the country.

10. As we come to the second strand of the jurisdiction *ratione materiae* of an international criminal court as laid down in article 26, for which a special acceptance of the jurisdiction is required, the delegation of the Republic of Slovenia cannot accept the position of the Working Group that war crimes and crimes against humanity that are not listed in the Convention on the Prevention and Punishment of the Crime of Genocide, nor in the Geneva Conventions of 1949 and Protocol I, should be separated from the crimes envisaged in the said Conventions and put

under the special acceptance of a jurisdiction clause. The Working Group obviously had in mind international crimes which had their basis in the customary international law, such as the Hague Convention respecting the Laws and Customs of War on Land, and the Regulations annexed thereto, the Charter of the Nürnberg International Military Tribunal, annexed to the London Agreement,<sup>2</sup> and the common article 3 of the 1949 Geneva Conventions, and applying to internal armed conflicts. Here, the ILC should follow the approach of the Statute of the International Tribunal for the Former Yugoslavia, which unconditionally covers the said crimes under its subject matter jurisdiction.

11. Predetermination of the act of aggression by the Security Council as envisaged in article 27 of the present draft statute is, in the opinion of the Republic of Slovenia, in contradiction with the principle of independence of the judiciary and should be reconsidered most carefully by the Working Group.

12. The provision on the applicable law in article 28 in our view does not suffice to follow the principle *nullum crimen sine lege* and should be reconsidered accordingly.

13. In respect of the jurisdiction *ratione personae* the future court will have its jurisdiction over natural persons on the basis of individual criminal responsibility. Here, in the opinion of the Republic of Slovenia, the draft statute needs further elaboration with regard to the responsibility of governmental officials, crimes committed on an order of a superior and other related questions.

14. The Republic of Slovenia believes that one of the fundamental questions concerning an efficient international judicial system is the question of how to bring the suspected or the accused perpetrator of an alleged crime to the court. In this respect, it must be noted that the Constitution of the Republic of Slovenia does not permit a trial *in absentia*.

15. Pending the trial, the procedural standards as laid down in article 14 of the International Covenant on Civil and Political Rights must be respected. The Republic of Slovenia suggests that more care should be devoted to victims and witnesses at the court.

16. As regards the applicable penalties, the Republic of Slovenia notes with satisfaction that there is no capital punishment envisaged since in Slovenia it is prohibited by the Constitution. The legal system of the Republic of Slovenia does not envisage life imprisonment either and it should be, in the view of the Republic of Slovenia, replaced by a maximum term of imprisonment.

17. The age of the perpetrator of an international crime cannot be taken into account as a sole aggravating or mitigating factor. The Working Group should decide whether juvenile perpetrators, i.e. under the age of 18 according to the well-established international standards, will take a stand at an international criminal court.

18. The Republic of Slovenia does not oppose the possibility that the prosecutor, too, may submit an appeal

<sup>1</sup> See *Official Records of the General Assembly, 5th Session, Supplement No. 12 (A/1316)*, pp. 12 et seq., text reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 12, para. 45.

<sup>2</sup> London Agreement of 8 August 1945 for the Prosecution and Punishment of Major War Criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279; see particularly p. 289.)

against or apply for the revision of the judgement of an international criminal court. However, if these rights are granted to the prosecutor, it must be carefully foreseen by the statute of the court, in which case the sentence may be altered, and whether a more severe judgement may ever be promulgated, should the circumstances of a case so require.

19. Finally, the Republic of Slovenia suggests that the International Law Commission continue its work on the draft statute of an international criminal court as a matter of urgency.

## Spain

[Original: Spanish]  
[25 January 1994]

### GENERAL COMMENTS

1. The Government of Spain firmly supports the establishment of an international criminal tribunal with general competence to punish international crimes. The existence of such a tribunal is an increasingly felt ethical and political need in the international community.

### COMMENTS ON SPECIFIC ARTICLES

2. There is no doubt that a close link between the tribunal and the United Nations is necessary for both practical reasons and reasons of moral authority. It would therefore be best for the statute to be adopted by an international conference convened under the auspices of the United Nations. Moreover, in order properly to establish the relationship between the tribunal and the United Nations system, appropriate references must be made to the latter system in the preambular and operative parts of the statute of the court. All of this should be without prejudice to the possible adoption of a treaty of cooperation formalizing and even reinforcing the link.

3. Another question closely related to the previous one concerns the number of ratifications of or accessions to the proposed treaty for the establishment of the tribunal which would be necessary for the statute to enter into force. The Government of Spain is of the view that this number should be neither too low, since this would deprive the tribunal of its necessary representativeness, nor too high, so as not unduly to delay the start of its functioning.

4. Articles 22, 23 and 24 of the draft submitted by the 1993 Working Group provide that the *court's jurisdiction* shall be voluntary and not binding. Binding jurisdiction would no doubt be ideal; however, until such time as this becomes feasible, the Government of Spain considers the system contemplated in the draft articles to be perfectly acceptable.

5. Given the importance of this question, the Government of Spain considers that, in the absence of an international code of crimes, article 22 (List of crimes defined by

treaties) appears to be acceptable, especially when viewed against article 21 (Review of the Statute), which provides for the revision of the list of crimes.

6. Of the three alternatives presented in article 23 (Acceptance by States of jurisdiction over crimes listed in article 22), Spain is in favour of alternative B, which provides for the voluntary nature of the court's jurisdiction without emphasizing it too strongly.

7. Article 25 (Cases referred to the Court by the Security Council) is acceptable on the understanding that it would be directed more towards the denunciation of general situations than against individuals, and would perhaps provide a good alternative to the establishment of ad hoc tribunals.

8. On the other hand, article 27 (Charges of aggression) needs to be examined more fully, since its current wording not only contradicts in some measure the circumscription of the tribunal's jurisdiction *ratione materiae* to natural persons, but also causes some degree of confusion with regard to the crime of aggression.

9. The Government of Spain considers that as far as trials *in absentia* are concerned, article 44 (Rights of the accused) adopts in paragraph 1 (*h*) a balanced approach to the arguments for and against the inclusion of a provision on such trials, by excluding in principle such a possibility while allowing it, on an exceptional basis, in cases in which the court, after hearing the submissions and considering the necessary evidence, determines that the absence of the accused was deliberate. In such a case, and in order to guarantee the full protection of the rights of the accused, provision should be made for a new trial if the accused appears before the court at a later stage.

10. The Government of Spain has certain misgivings with regard to paragraph 2 of article 53 (Applicable penalties), concerning applicable penalties, since the provision does not seem fully to respect the principle of the legality of penalties (*nulla poena sine proevia lege*). In order to comply with the provisions of article 15, paragraph 1, of the International Covenant on Civil and Political Rights ("Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed"), provision must be made for the court to have, when deciding upon the length of a term of imprisonment or the amount of a fine, the duty—and not merely the ability—to take into account the penalties provided for in the national law of the States referred to in paragraphs 2 (*a*), (*b*) and (*c*) of article 53.

11. With respect to recourses, the Government of Spain holds the view that provision should be made for recourse by appeal and revision.

12. In addition to the convicted person, the prosecutor should also be empowered to appeal against a decision or to apply for revision of a judgement. It will therefore be necessary to remove the square brackets in articles 55 and 57.

## Sri Lanka

[Original: English]  
[15 March 1994]

## GENERAL COMMENTS

1. The Government of Sri Lanka is of the view that an international criminal court, in order to command the widest possible international confidence and acceptance, which it must necessarily enjoy in order to discharge the onerous responsibilities to be entrusted to it, must be established as an impartial judicial institution committed to upholding the rule of law and administering justice free from any taint of political considerations. The court would often be called upon to adjudicate on complex legal issues which might also involve a substantial element of political sensitivity. It is essential that, in the performance of its functions, the court pay due regard to the principles of sovereignty, territorial integrity and political independence of States as enshrined in the Charter of the United Nations.

2. The Government of Sri Lanka wishes to commend the International Law Commission and members of the Working Group on a draft statute for an international criminal court on the pragmatic and flexible approach adopted in the formulation of the draft articles. However, there are several matters of substantial political, legal and practical difficulty which need to be addressed and satisfactorily resolved before wide acceptance of the statute can be assured.

## COMMENTS ON SPECIFIC ARTICLES

## I. SUBSTANTIVE ISSUES

*Article 2 (Relationship of the Tribunal to the United Nations)*

3. The Government of Sri Lanka is of the view that the establishment of an international criminal court, as either a principal or a subsidiary organ of the United Nations, would be impractical. It is of the view that there does not at the present stage appear to be sufficient support within the international community for an international criminal court to be established with the status of a principal or subsidiary organ of the United Nations and requiring for such purpose such a major undertaking as an amendment of the Charter of the United Nations. However, the Government of Sri Lanka recognizes the importance of a formal link with the United Nations in order to ensure that the institution is vested with the requisite authority for the exercise of international criminal jurisdiction and to generate the confidence of the international community. This could be achieved through the conclusion of a multilateral treaty under the auspices of the United Nations. This would enable the court to have a close cooperative relationship with the United Nations, while maintaining a separate status.

*Article 5 (Organs of the Tribunal)*

4. It is noted that the term "Tribunal" is used in the draft statute to include the court, the registry and the procuracy. While appreciating the reasoning of the Working Group that for conceptual, logistical and other reasons the three organs had to be considered in the draft statute as constituting an international judicial system as a whole, the Government of Sri Lanka wishes to stress the importance of ensuring the independence which must necessarily exist between the judicial and prosecutorial branches of an international judicial system.

5. In terms of the statute, the procuracy will be in charge of the investigations, the institution of proceedings and the conduct of the prosecution. In relation to these functions the procuracy should have independent authority. No doubt the tribunal will have the power to examine and rule on the exercise of such authority at relevant stages. However, the exercise of the functions stated should not be under the direction of the tribunal.

*Part 2 (arts. 22 to 28) (Jurisdiction and applicable law)*

6. The Government of Sri Lanka is of the view that the provisions in part 2 of the draft statute relating to jurisdiction and applicable law, which constitute the core provisions of the statute, raise a number of legal issues which require further examination by the Commission.

7. The question arises whether there are adequate reasons for the separation presently made in the crimes referred to in article 22 (List of crimes defined by treaty) and those referred to in article 26 (2) (b), i.e. the distinction made between primary and secondary strands of jurisdiction. The Government of Sri Lanka is of the view that the jurisdiction of the proposed court must, at least initially, be confined to crimes established under multilateral treaties enjoying a wide degree of international acceptance. It is noted in this context that the list of agreements in article 22 covers such international treaties, and these define specific acts which are required to be considered as serious crimes and create an "extradite or prosecute" regime in respect of such crimes.

8. With regard to the crimes defined under the Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation, (art. 22 (d)), consideration should be given to the extension of these provisions to include unlawful acts against airports and civil aviation facilities (as distinct from unlawful acts against aircraft) covered under the 1988 Protocol to the 1971 Montreal Convention.

9. The Government of Sri Lanka is also of the view that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances should be dealt with in article 22. The growing link between narcotic trafficking, acts of terrorist groups and the illicit arms trade poses an ever-increasing threat to peace and security within and among nations in many parts of the world. This phenomenon demands that the international community treat these activities as grave crimes under international law.

10. Furthermore, the provisions of the above-mentioned Convention, as in the case of those conventions listed under article 22, create an “extradite or prosecute” regime in relation to drug-related offences and provides for the exercise of extraterritorial jurisdiction in respect of such offences, where extradition is not granted. These factors would justify the Convention’s being treated on a par with other multilateral treaties under article 22.

11. With regard to the category of crimes referred to as “crimes under general international law” under article 26, paragraph 2 (a), the Government of Sri Lanka is of the view that these provisions lack the standard of exactitude and specificity which must be present before vesting the court with jurisdiction. The Government of Sri Lanka therefore wishes to reiterate that the jurisdiction of the proposed court must at least initially be confined to crimes under multilateral treaties.

12. On the question of the court’s jurisdiction, it is noted that the draft statute as presently formulated is concurrent and not exclusive, preserving the inherent right of a State party either to try an accused before its national courts or to refer the accused to the international criminal court. The Government of Sri Lanka is in agreement with this approach which is a logical extension of the “extradite or prosecute” regime incorporated in the treaties listed in article 22. Such a regime could help to fill a jurisdictional vacuum which could well arise where a requested State refuses to extradite its own nationals and the requesting State clearly has no trust or confidence in the judicial system of the requested State.

13. Moreover, the concurrent jurisdiction of the court is made subject to the consent of States, i.e. the State in which the crime has been committed and the State of which the perpetrator of the crime is presumed to be a national.

14. The draft statute provides in article 23 for specific acceptance of the “subject matter” jurisdiction of the court by each State party to the statute. Of the two alternatives suggested, the Government of Sri Lanka would support the “opting-in” procedure in alternative A, which is in consonance with the consensual basis of the court’s jurisdiction.

15. Article 25 of the draft statute, which provides that cases pertaining to crimes referred to in article 22 or article 26, paragraph 2 (a), may be submitted to the court “on the authority of the Security Council”, requires further examination.

16. It is unclear under the present provisions whether the “authority” purported to be vested in the Security Council would be subject to the same conditions regarding consent as would apply to the submission of cases to the court by a State. The vesting of such authority in the Security Council alone without it’s also being vested in the General Assembly would prejudice the general acceptability of the statute and make any agreement on this issue elusive.

17. The Government of Sri Lanka is of the view that it would be prudent to restrict, at least in its initial phase, the right to refer cases to court only to States parties. In any event, it seems reasonable to assume that if the court is to

be established as a viable institution for the exercise of international criminal jurisdiction, the statute would require the widest possible adherence of States. Thus a case could be submitted to the court by one or more States pursuant to a decision taken by the Security Council.

18. The provisions of articles 24 and 26, requiring that before a case is submitted to the tribunal, a State otherwise having domestic jurisdiction over a case or over an accused in the case present in its territory should agree to the submission of the case to the court, seem directed to the objective of ensuring that there is consistency between, on the one hand, the proposed obligations of States under the statute and, on the other, requirements under their national laws and treaties. The validity of such an objective is unquestionable.

19. However, the present somewhat involved provisions of the draft statute raise several issues of substantial complexity, which require further examination. Particular mention must be made in this context of the provisions of article 63 on the surrender of an accused person to the tribunal.

20. Article 63 requires a State party which has accepted the jurisdiction of the court with respect to a particular crime to take immediate steps to arrest and surrender an accused to the court. A State party which is also a party to the treaty in question which defines the particular crime but has not accepted the court’s jurisdiction is required either to surrender or to prosecute the accused. The article also requires that a State party should, as far as possible, give priority to a request from the court for the surrender of an accused, over a request for extradition from other States.

21. The question of pre-existing treaty obligations to extradite devolving on a State party to the statute, *vis-à-vis* a State which is not a party to the statute, in a situation where there is a competing request from the court, requires further examination.

22. The multilateral treaties defining the crimes set out in article 22 create an “extradite or prosecute” regime between the States parties to these treaties. Considerable difficulties, legal as well as political, could well arise where a State party to one of these multilateral treaties which is not a State party to the statute of the court makes a request for extradition from a State which is a party both to the statute and to the multilateral treaty. It must also be noted that, except for the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid, the multilateral treaties referred to in articles 22 and 26 did not provide for the submission of a case to an international criminal court. Article 63 attempts to extend the “extradite or prosecute” regime by analogy to cover the case of the surrender of an accused to court.

23. This is a question which requires further examination, paying due regard to the relevant provisions of the Vienna Convention on the Law of Treaties (1969) on modification of treaties. Particular care should also be taken to ensure that provisions of the statute do not prejudice the legal regime created through bilateral extradition treaties.

## II. PROCEDURAL ISSUES

*Article 30 (Investigation and preparation of the indictment)*

24. This draft article refers to the receipt of the complaint by the prosecutor. It is recommended that the complaint be received by the procuracy division, where a decision will be made as to whether an investigation should be carried out or not. This is comparable to a situation when information is received in respect of the commission of a crime which is cognizable by the court.

25. The discretion granted to the prosecutor to decide whether an investigation shall be launched or not is in line with the performance of his duties. However in the matter of the review of his initial decision, the direction to the prosecutor on finding that there is sufficient basis should be to commence investigations, and not to commence a prosecution.

26. At the conclusion of such investigation as directed by the bureau, it will be the duty of the prosecutor to decide whether an indictment should be framed against the suspect. A decision of the prosecutor not to prosecute may be reviewed at the instance of the complainant party. However, it will be advisable for the bureau to have a preliminary inquiry without the participation of the parties concerned, subject to a hearing in exceptional situations. In the absence of exceptional circumstances, the decision of the prosecutor not to indict should not be made subject to review. This observation is made having regard to practical reasons. No doubt the prosecutor should in the exercise of his power not to indict act with great caution. The system will not be satisfactorily operative in the event of a direction to indict when the prosecutor is not willing to do so.

*Article 32 (The indictment)*

27. This article provides for a review of the indictment. This provision appears to undermine the position of the prosecutor. It also appears to provide for an inquiry within an inquiry. It also does not appear to coincide with the earlier provisions which provide for a direction issued by the bureau to the prosecutor to indict.

28. The institution of the prosecutor must be organized in such a way as to ensure that indictments are forwarded only in fit and proper cases.

*Article 38 (Disputes as to jurisdiction)*

29. It may be provided that objection to the jurisdiction of the court be taken prior to the commencement of the trial and not after the accused has pleaded to the indictment. Challenges to jurisdiction at any other stage result in loss of time and energy for no purpose. Only those with a direct interest in the case should have the right to challenge the court's jurisdiction.

30. The question of jurisdiction, since it goes to the root of the matter, should be decided at a pre-trial stage by a chamber set up to hear the case.

*Article 48 (Evidence)*

31. Matters of relevancy, admissibility and value of evidence should be left to be decided by the court. There are basic principles applicable in respect of admissibility of evidence. Illegal means adopted to obtain evidence should be taken into account in considering whether such evidence should be admitted or not. In certain situations some evidence may be admitted but the court may decide not to attach value to such evidence. It should be left to the court's discretion to decide for good reason whether or not to admit any given item of evidence.

*Article 49 (Hearings)*

32. The matter of objection to jurisdiction is dealt with in this article. It appears that the objection is to be taken at a stage prior to the accused's pleading to the indictment. This is in accordance with the observations made above. The court will rule on the objection prior to proceeding any further with the trial.

*Article 51 (Judgement)*

33. It is submitted that dissenting opinions serve a purpose and should not be shut out. A majority decision of the court will be the decision of the court. Judges must have the freedom to differ.

*Article 55 (Appeal against judgement or sentence)*

34. A time limit should be provided within which an appeal should be lodged.

35. It is accepted that there should be a right of appeal against decisions of the court. In the exercise of this right, however, it may be provided that there shall not be a right of appeal where the accused has pleaded guilty to the indictment.

36. It may also be considered whether the right of appeal granted to the prosecutor could be structured in the following manner:

(a) On a question of law;

(b) On a question of fact alone or on a question of mixed law and fact with the leave of the court;

(c) On the ground of inadequacy or illegality of the sentence imposed.

*Article 56 (Proceedings on appeal)*

37. The procedure in the hearing of appeals has not been provided for. Perhaps the rules of the court may make necessary provisions. It is suggested that provision be made to enable the court to receive additional evidence if it thinks necessary at the stage of the appeal.

38. As and when required, an appeals chamber could be constituted from the same court to hear the appeals. Judges of eminence who are appointed to the court will be competent to act in the dual capacity.

## III. OTHER ISSUES

39. The statute may not provide for all situations relating to investigations, institution of proceedings, indictments, trials, sentences and appeals and revisions. Therefore it is suggested that a provision be included for cases not provided for. Such procedures as the justice of the case may require, and not inconsistent with the statute, may be adopted in such situations.

40. Another matter for which provision may be made is for trial *in absentia* of an accused person. Having accepted an indictment, if a person wilfully evades appearing in court or wilfully does not appear in court to receive indictment, or having appeared wilfully obstructs the proceedings of the court or is unable due to ill-health or other disability to present himself in court, and so on, a procedure may be stated for trial *in absentia*.

41. Since the law of evidence will figure prominently in the proceedings before the court, it may be advisable to have at least a compendium of the rules of evidence applicable in the court.

42. Provision may also be made to enable the court to discharge an accused person at any stage of the case for the prosecution on the ground that further proceedings in the case will not result in the conviction of the accused. The court shall record the reasons for doing so.

43. It will also be appropriate to have a provision to enable the court to terminate proceedings at the close of the case for the prosecution, on the ground that the evidence produced fails to establish the commission of the offence charged against the accused in the indictment. If the court considers that there are grounds for proceeding with the trial, the court shall call upon the accused for his defence.

## IV. FINANCIAL AND OTHER RESOURCES

44. As the provisions of the statute are developed, it would be important for consideration to be given to the funds and other resources that would be required for the establishment and operations of an institution such as the tribunal.

45. An early identification should, of course, be made of possible cost-components, e.g. such international institutional and other administrative requirements that would have to be permanently in place; and other facilities that would have to be available for use whenever necessary (especially, investigatory, prosecutorial, judicial and incarceration).

46. If the tribunal were to be established as a principal or subsidiary organ of the United Nations, the manner of funding (regular budget or voluntary) would, of course, be carefully examined in the budgetary committees of the General Assembly.

47. If the tribunal were to be established by treaty, the provisions on funding would be some of the most important issues that would need to be satisfactorily resolved. However, whether such a tribunal be established as a principal or subsidiary United Nations organ or as a treaty

body, it would be essential (having in view the importance of securing the objectivity and integrity of the tribunal, and of the public perception thereof) that it should have independent financial viability, and, accordingly, that its funding should be self-sustaining and not dependent on government contribution.

## Sweden

[See *Nordic countries*]

## Tunisia

[Original: French]  
[25 February 1994]

## I. RELATIONSHIP OF THE TRIBUNAL TO THE UNITED NATIONS

1. Tunisia supports the option under which the tribunal would be a United Nations body. This formula would give this jurisdiction the requisite authority and permanence and would ensure international recognition of its competence.

## II. APPLICABLE LAW

2. Tunisia agrees that the list of international agreements and conventions set out in draft article 22 should constitute the basis of the law to be applied by the court. Nevertheless, it believes that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should be added to this list.

3. Moreover, only a few of the treaties mentioned in article 22 define with precision the acts which they prohibit. Customary international law, which supplements these treaties, is equally powerless to define these offences accurately. This situation could be a source of difficulty in terms of specifying, at the international level, the elements constituting an international offence so as to comply with the principle of legality, which is recognized by all criminal justice systems in the world. Accordingly, it would be advisable to expedite the work on the draft Code of Crimes against the Peace and Security of Mankind.

## III. COMPETENCE

4. Tunisia is of the view that the competence of the court should be limited to individuals and, accordingly, should not be extended to States and international organizations, as that would be contrary to the principles of sovereignty and jurisdictional immunity of States, which are the subject of a draft convention prepared by the International Law Commission.<sup>1</sup>

<sup>1</sup> For the text of the draft articles on jurisdictional immunities of States and their property, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 12-62.



5. Furthermore, pending the completion of the draft Code of Crimes against the Peace and Security of Mankind, the subject-matter competence (competence *ratione materiae*) of the court could be defined by special agreements between States parties to the statute or by individual acceptance. In this way, the offences in respect of which one or more States recognized the competence of the court would be determined with the greatest possible precision. Such agreements or individual declarations could be made at any time.

6. Moreover, the court could be competent to try any individual, provided that the State of which he is a national and the State in whose territory the crime is committed accept its jurisdiction (this solution is similar to that proposed by the Special Rapporteur).

7. Lastly, the rights of the State against whose property criminal acts are committed, where such property is situated in territory other than its own, should also be taken into account (Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the Protocol thereto).

#### IV. NOMINATION OF JUDGES

8. Tunisia suggests that each State party to the statute should nominate a judge who possesses the requisite moral qualifications and competence. Subsequently, judges would be elected to the court by the General Assembly. This formula is designed to ensure the independence and impartiality of the judges, while strengthening the relationship between the United Nations and the court.

#### V. STRUCTURE OF THE COURT

9. Tunisia supports the Special Rapporteur's proposal regarding the component parts of the court, namely:

- (a) The "Court" or judicial organ;
- (b) The "Registry" or administrative organ; and
- (c) The "Procuracy" or prosecutorial organ.

#### VI. REFERRAL OF CASES TO THE COURT

10. Contrary to the Special Rapporteur's proposal that cases should be referred to the court solely in response to complaints by States, whether or not they are parties to the statute, Tunisia is of the view that the right to refer cases to the court should also be extended to international organizations. This solution would ensure better protection of human rights.

#### VII. INDICTMENT

11. The indictment should be upheld by a procuracy, rather than by the complainant State, as in the second formula proposed by the Special Rapporteur, in order to guarantee the neutrality and impartiality of the court.

#### VIII. INVESTIGATION

12. The investigation should be carried out by the court itself at a hearing. If the case is too complicated, the court could establish a special investigation commission. This choice is necessary in order to guarantee the rights of the accused and the objectivity of the investigation.

#### IX. FAIR TRIAL

13. With regard to draft article 40, a general principle should be formulated relating to the enjoyment by the accused of the basic rights established by international treaty and customary law and recognized by the general principles of law.

#### X. PRINCIPLE OF LEGALITY

14. Two comments seem to be called for in this connection:

(a) The principle of legality, as set out in article 41, does not clearly mention one of its most important corollaries, namely, the non-retroactivity of international criminal law. Yet such a reference would appear to be essential, thus implying application of the only factor mitigating that principle, namely, the invoking of those provisions of international criminal law which are most favourable to the accused, notwithstanding the seriousness of the crimes punished;

(b) With regard to the question of international and national double jeopardy, it is quite clear that an international criminal court would be ineffectual if it could prosecute an individual guilty of a crime against the peace and security of mankind only if such acts were condemned by the law of the country of which he was a national. What would happen if countries did not include certain criminal acts in their domestic legislation? It might therefore be possible to omit a reference to the principle of double jeopardy provided that such crimes were contemplated in international treaty or customary law.

#### XI. APPLICABLE PENALTIES

15. Tunisia supports the Special Rapporteur's proposal to leave to the court, in the absence of an international criminal code prescribing penalties, the option of referring to the law of the State of which the perpetrator of the crime is a national, the law of the complainant (victim) State, or the law of the State in whose territory the crime is committed.

16. However, the possibility of a crime in whose commission several persons of various nationalities participate has not been envisaged. If the court insists on referring to the law of the State of which each of the accused is a national, this could result in varying judgements and penalties, which would constitute discrimination in the treatment of the accused. In order to remedy this situation, a single system of law should be applied, preferably that of the victim State; this would ensure a measure of homogeneity in judgements and would strengthen the feeling of the victim State that justice has been fully rendered.



## XII. REMEDY OF REVIEW

17. The accused should be entitled to the remedy of review if a new fact comes to light which was unknown at the time of trial or appeal and which could have had a decisive impact on the judgement of the court.

## XIII. WORKING LANGUAGES

18. Draft article 18 provides that the working languages of the court shall be English and French. This provision is restrictive. The official languages of the court should be those of the United Nations.

**United Kingdom of Great Britain and  
Northern Ireland**

[Original: English]  
[23 February 1994]

## GENERAL COMMENTS

1. The Government of the United Kingdom of Great Britain and Northern Ireland has made clear its support for the project which is being undertaken by the International Law Commission to prepare a statute for an international criminal court. While it is very conscious of the serious problems—jurisdictional, procedural, institutional, financial and others—which must be solved before an international criminal court is created, it is convinced that the attempt to resolve the difficulties is a worthwhile undertaking.

2. The draft statute which was before the Sixth Committee of the General Assembly last year, and which is the subject of the present comments, is an admirable beginning for this difficult task. Because of the expertise and working methods which the Commission has at its disposal, the Government regards it as important that the Commission should ensure that it has addressed and fully dealt with all of the problems of a legal nature connected with the setting up of a criminal jurisdiction before any draft statute is dealt with in the more political arena of an intergovernmental conference. The Government considers in particular that rules of evidence are of such significance to the proper operation of the prosecution and of the court itself—an importance which goes beyond mere procedure—that the rules should be included in the draft statute and should initially be drafted by the Commission.

3. The Government of the United Kingdom of Great Britain and Northern Ireland considers that any international criminal tribunal which is established must be of the highest authority and the highest legal and moral quality. The Government regards it as necessary that States should enter into a solemn treaty commitment in relation to it, and that it should have the widest possible acceptance. The tribunal should be given a close institutional link with the United Nations, to give it a universal authority.

4. As a final point, the United Kingdom Government considers it important that the international community

learn from the experience of the other international court which has recently been established: the International Tribunal for the Former Yugoslavia.

## COMMENTS REGARDING SPECIFIC ARTICLES

*Article 2 (Relationship of the Tribunal to the United Nations)*

5. Leaving aside the question whether it would fall within the competence of the General Assembly or the Security Council to establish the tribunal as an organ subsidiary to them under Article 22 or 29 of the Charter of the United Nations, it is clearly inappropriate that the court should be subordinate to either of those two bodies. Further, the statute will impose obligations upon States and it will be necessary for this to be done in some legally valid way. Since the new tribunal will not, unlike the International Tribunal for the Former Yugoslavia, come within the responsibilities of the Security Council for the maintenance of international peace and security, it will not be possible to impose the necessary obligations upon States by means of a Security Council resolution, as in the case of the International Tribunal for the Former Yugoslavia. It will therefore be necessary to establish these obligations by treaty. It is suggested that the statute be adopted by international treaty, and it may be useful for the Commission to draft the necessary treaty provisions. The treaty could be negotiated and adopted under the aegis of the United Nations. It is also suggested that an institutional link of some kind with the United Nations be created, not amounting to the establishment of an organ subordinate to one of the principal organs.

*Article 4 (Status of the Tribunal)*

6. The Government welcomes the provision that the tribunal should sit only when required to consider a case submitted to it.

7. The provision in paragraph 2 will need more thought, in relation to status, legal capacity and the persons authorized to negotiate on behalf of the tribunal, once a decision has been taken as to the relationship between the tribunal and the United Nations.

*Article 5 (Organs of the Tribunal)*

8. Whatever the prosecutor's office is called in other languages, "Procuracy" is inappropriate in English.

*Article 6 (Qualifications of judges)*

9. The court is a criminal tribunal. In the Government's view, it is inappropriate that judges should be appointed who have had no judicial experience in criminal cases. In addition to the qualifications set out in the first sentence of the article, the United Kingdom suggests it should be made a condition of appointment that a judge should have had judicial experience in criminal trials.

*Article 7 (Election of judges)**Article 8 (Judicial vacancies)*

10. Consideration should be given to making express provision for what is already implicit in article 8 that vacancies may arise because of the death or resignation of a judge.

*Article 11 (Disqualification of judges)*

11. Paragraph 3 provides that the accused may request the disqualification of a judge. It will be necessary to make provision for grounds to be put forward by him to justify disqualification for one of the reasons set out in paragraph 1.

*Article 13 (Composition, functions and powers of the Procuracy)*

12. In the Government's view, careful consideration should be given to the qualifications required of the prosecutor and the deputy prosecutor, particularly in relation to the following points:

(a) If the prosecutor is to be disqualified from acting in relation to a complaint involving a person of the same nationality, there should be a requirement that the deputy is of a different nationality;

(b) The requirement that the prosecutor and the deputy have the highest level of competence and experience in the conduct of both investigations and prosecutions would give difficulty to many common-law countries where those functions are in separate hands. The qualifications should be in the alternative. It should be a requirement that either the prosecutor or the deputy be a lawyer of several years' seniority.

13. The Commission might consider whether paragraph 3 is sufficiently clearly worded.

14. As regards paragraph 4 of the commentary, the Government is of the view that consultation of the bureau on the prosecutor's staff appointments would not compromise the prosecutor's independence, and such a provision might appropriately be included.

*Article 19 (Rules of the Tribunal)*

15. Rules of evidence include matters of considerable importance which affect the rights of the accused. It is noted that one or two basic provisions of the rules of evidence are included in article 48 and elsewhere in the statute. The Government considers however that the Commission should give further consideration to this important subject and should provide draft provisions for the rules as a whole, to be included in the draft statute.

*Article 21 (Review of the Statute)*

16. The Government shares the view that this article is better placed in the final clauses of a treaty adopting the statute. The Government doubts whether it is appropriate to refer to the code of crimes against the peace and security of mankind in the way in which the draft article does. While a generally accepted code will of course have relevance to any international criminal jurisdiction which is created, it is difficult to frame a satisfactory reference to an instrument which has not yet been adopted, and it may be preferable not to refer to it at all.

*Article 22 (Lists of crimes defined by treaties)*

17. As the Working Group notes, part II of the draft statute is the central core of the draft. Articles 22 to 26 lay down two strands of jurisdiction, based on a distinction drawn between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. As regards article 22, the Government of the United Kingdom understands and shares the reservations expressed by some delegations in the Sixth Committee with regard to conferring jurisdiction upon an international court over crimes which were defined with insufficient precision in the relevant treaties, in respect of which the treaties were drawn up without any idea of bringing the crimes before an international criminal court, and for which the treaties did not specify any penalties. Nevertheless, the Government of the United Kingdom considers that, if an international court is to be established under present conditions, a list of crimes along the lines of those set out in article 22 should form the major part of its jurisdiction. The Government does however consider that the list of crimes in article 22 should be examined again to ensure that only those treaties which have received a very substantial acceptance by the international community should be included; the criterion of entry into force is not, in the United Kingdom's view, sufficient to qualify a treaty for inclusion in the list. Subject to this proviso, however, the Government would not oppose the inclusion of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

*Article 23 (Acceptance by States of jurisdiction over crimes listed in article 22)*

18. The United Kingdom Government shares the view expressed in paragraph 2 of the commentary that the approach set out in alternative A (the "opting-in" approach) best reflects the consensual basis of the court's jurisdiction. Conferring jurisdiction on an international court represents a certain ceding of jurisdiction by individual States; this ceding is best established by the two-stage process of acceptance of the statute and the separate acceptance of the jurisdiction of the court over specific crimes in accordance with alternative A.

*Article 24 (Jurisdiction of the Court in relation to article 22)*

19. In the Government's view, the Commission should also give consideration to requiring the acceptance of its jurisdiction by the State in whose territory the offender is located. That consent will not always be required under the existing provisions of paragraph 1 (a).

20. The Commission is requested to consider whether the drafting of paragraph 1 (a) and (b) is adequate. It is unclear whether all States parties having jurisdiction under a treaty to try the suspect before their own courts are required to accept the court's jurisdiction, or whether the consent of any one of the States parties to the relevant treaty is sufficient. The Government assumes that the latter is intended but does not regard this as acceptable, at least with regard to paragraph 1 (a). The Commission is asked to consider whether, in relation to paragraph 1 (a), the consent of all such States should be required.

*Article 25 (Cases referred to the Court by the Security Council)*

21. It is not clear from this article whether the Security Council may refer cases to the court where the consents required under article 24 or 26 have not been obtained, or whether it is intended that the court will only have jurisdiction in respect of a complaint referred to it by the Security Council if the relevant States have accepted the court's jurisdiction. If the substance of the article is to remain, the Government would prefer the latter view to prevail.

22. The Government is not, however, convinced that the understanding of the Working Group expressed in the second sentence of paragraph 2 of the commentary is adequately reflected in the provision. The Commission is asked to consider changes to articles 25 and 29 to ensure that the Security Council does not have the powers to refer complaints against named individuals, but only to request the prosecutor to investigate particular situations.

23. The Commission is asked to consider the inclusion of a provision in this part of the statute requiring that where the Security Council is seized of a dispute or a situation, a case falling within that dispute or situation may not be referred to the tribunal except with the leave of the Council.

*Article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22)*

24. The United Kingdom has grave doubts about the desirability of all the provisions of this article. As regards paragraph 2 (a), it is not satisfactory that a criminal court has jurisdiction over unspecified offences in respect of which there cannot but be uncertainty and controversy. It is not satisfactory to argue that it will be for the court itself to determine whether there is the necessary international consensus for the existence of a particular crime: an accused is entitled, even during the prosecution process, to more certainty about what he is accused of than this article provides; even if the court eventually decides that

the crime is not one "accepted and recognized by the international community of States as a whole", he will have been subject to the prosecution process even though not convicted.

25. The Commission is invited to consider whether there are indeed any crimes under general international law of the kind referred to in paragraph 2 (a), and if so, to identify them expressly in the article.

26. As regards paragraph 2 (b), the United Kingdom is not in favour of including in the statute crimes under national law which have not been defined with precision in an international treaty, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Furthermore, the attempt to restrict jurisdiction to "exceptionally serious crimes" is unlikely to be workable: no definition of "exceptionally serious" is attempted and it is unlikely to be possible to produce one that would be generally agreed.

*Article 28 (Applicable law)*

27. The Commission is requested to look again at the description of national law as a "subsidiary source". Even if, as the United Kingdom would wish, a decision is taken to delete article 26, paragraph 2 (b), national law will often have to be resorted to by the court. The components of an offence (with the exception of genocide), the applicable defences and the relevant penalties (subject to the provisions of the statute) will all be matters for national law. This being so, it is important that the court be directed to the appropriate national law: the Government presumes that it will be the law of the State (or the jurisdiction within that State) where the crime was committed.

*Article 29 (Complaint)*

28. The Commission is requested to consider whether it would not be advisable to elaborate upon what supporting documentation is required as a minimum to accompany a complaint.

*Article 30 (Investigation and preparation of the indictment)*

29. The provision does not specify, in paragraph 1, what constitutes a "sufficient basis" for the prosecutor to proceed with the prosecution of a case. Paragraph 5 of the commentary, and the provisions of article 32, make it clear that the test is the existence of a *prima facie* case. The government doubts whether the establishment of a *prima facie* case is a sufficient basis for instituting a prosecution. The Commission is invited to consider the practice of States with regard to the institution of prosecutions in national courts: the Government doubts whether the standard for a prosecution in an international court should be lower than that required for a national court. In the United Kingdom, for example, a prosecution is not instituted unless it is considered that there is at least a realistic prospect of conviction.

30. Paragraph 1 provides that the bureau may direct the prosecutor to commence a prosecution. The Commission

is requested to consider whether a defendant prosecuted at the behest of the court contrary to the inclination of the prosecutor following a thorough investigation would believe that he was receiving an impartial and fair hearing.

31. Paragraph 4 (a) provides for a person under investigation to be informed that his silence in response to questions will not be a consideration in the determination of his guilt or innocence. The Government fully shares the view that there ought to be no question of a person being convicted on the basis of silence alone, without other evidence. The Government does not, however, regard it as an indispensable element of a fair trial that no consideration at all should be given to whether or not an accused person has remained silent. In the United Kingdom, the Criminal Law Revision Committee recommended in 1972 that it should be possible in certain carefully defined circumstances for inferences to be drawn, in support of other evidence, from the refusal of a defendant to answer relevant questions; the British Parliament is currently considering legislation based on its proposals.

32. The Commission is requested to reconsider the wording of paragraphs 2 and 3, which may be read as suggesting that the prosecutor may summon suspects, victims and witnesses, collect evidence and conduct on-site investigations directly on the territory of States parties and others, without seeking the cooperation of the State concerned. Such powers are, in the view of the Government of the United Kingdom, only necessary and appropriate in situations where a State fails in its cooperation obligations or where its criminal justice system has broken down. Previous recommendations by the Commission clearly envisaged that evidence should be collected through cooperation mechanisms based on international mutual legal assistance arrangements (but with fewer grounds for refusal and, of course, no mutuality). The draft statute might be augmented so as to place legal assistance obligations on States parties whose cooperation is requested by the prosecutor or the court, and to differentiate between different degrees of acceptance, rather as article 63 does for surrender of suspects.

33. It is therefore suggested that article 30, paragraphs 2 and 3, be modified so as to provide that the prosecutor shall have power to request: (a) the presence of suspects, victims and witnesses for questioning; (b) the disclosure and production of evidence, including any documents or exhibits relating to the complaint; and (c) on-site investigations.

#### *Article 31 (Commencement of prosecution)*

34. The relationship between articles 31 and 62 (a) on the one hand, and article 33 on the other, may need further thought. Article 31 indicates that a person may be arrested or detained under the statute while the indictment is still in preparation, on the basis of the issuance of a warrant or other order of arrest or detention by the court (a provisional arrest warrant) and article 62 (a) provides that in cases of urgency the court may request provisional arrest. Article 33 implies, however, that States parties' obligations to arrest and detain the subjects of such warrants arise only after the indictment has been personally noti-

fied to the accused. There are no provisions designed to secure cooperation in pre-indictment arrest or detention. The Commission may wish to cover this. If it does, however, for human rights reasons it would not be right to allow too long a period to elapse between execution of the provisional arrest warrant and the notification of the indictment to the accused: the European Convention on Extradition, for example, imposes a 40-day limit.

#### *Article 32 (The indictment)*

35. The Government is of the view that it is not sufficient to leave to rules of court matters such as details of the requirements for the "necessary supporting documentation" which must be considered by the bureau before the indictment is affirmed. It is presumed that the phrase is intended to refer either to the evidence, in written form itself, or to a summary. The provision should specify the extent of evidence required and the manner in which it is to be placed before the chamber. It is presumed that the indictment itself will not contain a summary of the evidence.

#### *Article 37 (Establishment of Chambers)*

36. The Government of the United Kingdom considers that five is a good number for the judicial strength of a trial chamber. The Government is of the view that the constitution of chambers should be dealt with by the bureau in whatever manner it thinks fit. This is preferable to leaving the matter to be regulated by inflexible rules.

#### *Article 38 (Disputes as to jurisdiction)*

37. The Government of the United Kingdom considers that the view expressed in paragraph 5 of the commentary, that it would be imperative for the accused to be allowed to challenge the jurisdiction of the court before trial, should be acted upon and that the merely institutional obstacles thought to exist should not stand in the way of a solution's being found. The chamber to deal with the case should rule on the question, or if the challenge is made before the indictment is confirmed (possibly after the person's arrest), a chamber should be made available for the purpose.

#### *Article 44 (Rights of the accused)*

38. The Commission is invited to look again at the possibility of distinguishing different situations for the purpose of determining whether a trial should be held in the absence of the accused; the Government is of the view that the question should not be left to decision by the court, as provided in paragraph 1 (h). In the Government's view a trial should not be held in the absence of the accused unless (a) he has been duly notified and chooses to appear not in person but by means of a legal representative, and (b) the accused has been arrested but escapes after the trial has begun but before it has been completed.

39. Paragraph 3 deals with the information which is to be made available to the defence. This is another case in

which the Commission is invited to consider the inclusion in the statute of further details governing the role of the prosecutor and the court. In particular, the explanations given in paragraph 8 of the commentary might usefully be included.

*Article 45 (Double jeopardy (non bis in idem))*

40. The Commission is requested to look again at paragraph 2 (a), which has a reference to an “ordinary crime”. The concept is a very difficult one to define and it may be that the best course is simply to delete this.

*Article 47 (Powers of the Court)*

41. Paragraph 1 (a) and (b) refers to the court’s having the power to require the attendance and testimony of witnesses, and to require the production of documentary and other evidentiary materials. In view of the comments on article 30 above, to the effect that in practice the most acceptable and indeed most efficient way of obtaining both persons and evidence is by requesting cooperation from the States parties which will have certain obligations to assist, it is suggested that it would be preferable to refer to the court’s power to issue orders for the attendance and testimony of witnesses, and for the production of documents, etc. The word “orders” is in fact used in the commentary. The same point arises on article 48, paragraph 1.

*Article 48 (Evidence)*

42. The Government draws attention to its comments on article 19 above, relating to the desirability of the statute’s providing further rules of evidence. One matter that should be addressed is whether a witness is to have a privilege against self-incrimination before the tribunal. The question arises whether a witness is, in particular, obliged to answer questions which may place him in breach of his national law.

43. As regards the point made in paragraph 4 of the commentary, it is considered that in view of the evidentiary difficulties for national courts in prosecuting perjury before the tribunal, it would be preferable to address in the statute the question of giving false testimony before the court.

*Article 53 (Applicable penalties)*

44. Paragraph 2 departs from the previous recommendations made by the Commission to the effect that penalties should be based on the applicable national law, subject to residual provision for the court to lay down penalties where none is specified or where the penalty specified falls outside international norms. The Government considers that the Commission should revert to the previous recommendations. The penalties imposed by the State in whose territory the crime was committed should be the first point of reference and should be followed, subject to the reservations made above. Such an approach would accord with the generally accepted principle that a

person committing a crime should know what punishment he might expect.

45. As regards paragraph 4, the Commission is invited to consider whether the court should be directed to the order in which fines or confiscated property should be paid out. As regards subparagraph (c), it is questionable whether the provisions referred to in paragraph 4 of the commentary are likely to be used in practice. It is doubtful whether a trust fund is needed at all, and it may be that the tribunal should itself have the power to pay sums of money directly to the victims or to the State of their nationality expressly for their benefit.

*Article 55 (Appeal against judgement or sentence)*

*Article 56 (Proceedings on appeal)*

*Article 57 (Revision)*

46. The Government is in favour of providing a right of appeal for the accused. It is of the view, however, that seven is too small a number for the Appeals Chamber, having regard to the fact that the judges in the Appeals Chamber will be of the same rank as the trial judges. It is suggested that an Appeals Chamber of at least nine judges would be more appropriate.

47. As regards the possibility of the prosecution’s being given a right of appeal, it is considered that any such right should be limited to specified grounds of appeal, namely on a point of law or on the sentence given by the trial court. The prosecutor should not have a general right of appeal.

*Article 58 (International cooperation and judicial assistance)*

48. The Commission is requested to consider what “interim measures” might be required.

*Article 62 (Provisional measures)*

49. Attention is drawn to earlier comments on provisional arrest. In relation to any provisional measures the request from the court would need to be a formal request if it is to be acted upon by States. States will be able to respond only in so far as their national laws permit which may not, for instance, include preventing the escape of a suspect unless a provisional arrest or arrest warrant has been issued. National laws may also impose special conditions for search and seizure of evidence; this is recognized in most international mutual legal assistance agreements.

*Article 63 (Surrender of an accused person to the Tribunal)*

50. The Government notes that, under paragraph 3 (a), a State party which has accepted the jurisdiction of the court with respect to the crime in question is obliged to take immediate steps to arrest and surrender the accused

person to the court. Having regard to the provisions of article 9 (4) of the International Covenant on Civil and Political Rights, the Government's view is that the accused person must have a right to challenge arrest and detention in the requested State, though the grounds on which challenge is possible should be kept to a minimum. The view is taken, therefore, that a State which had taken immediate steps to arrest the suspect would have fulfilled its obligations even if the suspect successfully exercised his right to challenge his arrest and detention.

51. Paragraph 3 (b) refers to a State party which is also a party to the treaty establishing the crime in question but which has not accepted the court's jurisdiction over that crime. The Government queries the obligation to arrest. Arrest may be premature if the national authorities are not ready to lay a charge immediately or find, on reviewing the case, that a charge would not be likely to succeed.

52. Paragraph 5 requires States parties, as far as possible, to give priority to court requests over requests for extradition from other countries. This departs from the Commission's previous recommendation that States parties should be free to choose in the case of multiple requests, but could be offered non-binding guidelines on choosing, for example suggesting that requests from the court are given special consideration. The paragraph 5 requirement, moreover, relates to any request under paragraph 2: the requested State might not even have accepted the court's jurisdiction over that crime or that category of crimes. The Commission is invited to consider deleting paragraph 5. Non-binding guidelines, as originally proposed, could however be helpful.

53. Paragraph 6 is, in the Government's view, helpful, as is the recognition of the speciality rule in article 64.

54. Attention was drawn earlier in these comments to the desirability of an additional article on legal assistance, which would, *inter alia*, spell out the obligations of States parties to comply with requests. It is for consideration whether obligations, or the same degree of obligation, should be imposed on States parties that have not accepted the court's jurisdiction in relation to the crime, or the category of crime, in question. It would also seem desirable for the statute to indicate, even if the list is non-exclusive, the types of legal assistance that may be sought from States parties—as, for instance, in the United Nations Model Treaty on Mutual Assistance, article 1, paragraph 2.

#### *Articles 66 (Enforcement of sentences)*

#### *Article 67 (Pardon, parole and commutation of sentences)*

55. The Commission is asked to consider whether the statute should cover the procedures to be followed if a prisoner convicted and sentenced by the tribunal escapes from custody.

## United States of America

[Original: English]  
[2 June 1994]

### GENERAL COMMENTS

1. The United States of America wishes to express its appreciation to the 1993 Working Group of the ILC for its impressive efforts. As a result, Governments have before them a document which provides a useful focal point for examining the complexities of this topic.

2. These comments are by necessity preliminary, and the United States Government may wish to provide further views in the future. Failure to comment on an aspect of the draft statute, however, does not mean that the United States either supports or does not support the ILC's specific formulation.

3. Although the Working Group's report addresses many of the concerns shared by the United States and other nations regarding the establishment of an international criminal court, a number of significant problems remain. We believe that unless these problems are corrected, the court will not make the kind of contribution to world order the ILC envisions. It is therefore important that the ILC take into account the views of States as it continues its effort to create a statute that builds upon, not displaces, effective national judicial and international processes.

4. As the ILC continues its deliberations, the Government of the United States of America urges the Commission to reflect on the following considerations:

(a) An international criminal court should be viewed as a supplementary facility—one that does not compete with existing functioning law enforcement relationships. In other words, it should exist expressly for those cases where interested States perceive a need for this type of forum, presumably because no other forum will serve;

(b) The statute must reflect a consensus among States. If there is no such consensus, the treaty will fail to gain a meaningful acceptance among States, and this important effort will fail;

(c) In keeping with the need for consensus, it is necessary to avoid any linkage between the proposal to create an international criminal court and the development of the Draft Code of Crimes Against the Peace and Security of Mankind. The Code of Crimes is, so far, a highly controversial and imperfect document. As long as it remains this way, it cannot form the basis for an international court's jurisdiction;

(d) The budgetary and administrative requirements of the tribunal must be handled with great care. The tribunal could be an extraordinarily expensive undertaking, especially if it is used at any one time for extensive investigations or more than a limited number of cases.

5. The rules of evidence and procedure of the tribunal should be agreed to by States parties and formulated in conjunction with the statute, and not left to the discretion of the court. In many instances, the content of the rules can be as important as that of the statute. One reason for

this is that such rules have an important impact on the rights of defendants, and thus must be in keeping with relevant human rights and due process norms.

#### COMMENTS ON SPECIFIC ARTICLES

##### PART 1: ESTABLISHMENT OF THE TRIBUNAL

###### *Article 1 (Establishment of the Tribunal)*

6. The United States supports the approach taken by the 1993 Working Group in establishing the proposed tribunal through a multilateral treaty, binding those States which choose to become parties to the instrument.

###### *Article 2 (Relationship of the Tribunal to the United Nations)*

7. The United States believes that the proposed tribunal should not be established as an organ of the United Nations, which would involve the complicated task of amending the Charter of the United Nations, but the tribunal should none the less have a clear relationship to the United Nations. An agreement between the United Nations and the tribunal is desirable because it would facilitate cooperation. This is especially important given, as noted by the commentary, that a part of the tribunal's jurisdiction might depend upon decisions by the Security Council. One appropriate way of establishing such a relationship would be for the United Nations and the proposed court to enter into an agreement along the lines of agreements between the United Nations and specialized agencies, pursuant to Articles 57 and 63 of the Charter of the United Nations.

8. The United States believes that the statute should include an appropriate mechanism for "ratification" by States parties of major decisions by the tribunal that may have financial or operational repercussions. This might be accomplished by including an article in the statute providing for specified matters to be put before States parties.

###### *Article 3 (Seat of the Tribunal)*

9. This issue could be resolved in the convention establishing the proposed court. Alternatively, the resolution of the issue should be subject to approval by the majority of States parties.

###### *Article 4 (Status of the Tribunal)*

10. The United States agrees that, for budgetary reasons, the tribunal should sit only when it needs to conduct business. This result does not mean that the tribunal will lack the requisite degree of permanence or authority for it to accomplish its mission. At this point, States are not in a position to predict how active the tribunal might be. Requiring that the proposed court be in permanent session would deprive the institution of necessary flexibility, and subject States parties to unnecessary costs.

###### *Article 6 (Qualification of judges)*

11. The United States believes that the statute should make a distinction between the qualifications for trial and appellate judges. Trial judges should be required to have experience in trying criminal cases. While it would be desirable for appellate judges to have a background in hearing appeals of criminal cases, given the international law character of this tribunal, it may not be necessary to require such experience in cases where an individual has had other relevant experience.

###### *Article 7 (Election of judges)*

12. The United States believes strongly that the appellate function should be independent from the trial function in order to ensure full and fair appellate review. Consequently, judges should be elected separately for these two functions. Candidates for judicial positions will be likely to have more experience in one or the other capacity, and thus separate voting will assure States parties that relative expertise will be channelled appropriately.

13. The United States reserves judgement as to whether 18 judges is the proper number. Much depends on how many cases States parties predict the tribunal will have, and the overall budgetary requirements of the tribunal.

14. The judges should be elected by States parties.

###### *Article 9 (Independence of judges)*

15. The rules of the tribunal will need to include specific guidelines for judicial service, and will need to strike a proper balance between allowing part-time judges to earn a living and the necessity of ensuring that the integrity of the judges and the tribunal in appearance and fact is protected. For example, judges should be permitted to teach or practise law (although they may not take cases that relate to matters before the tribunal or that otherwise are inconsistent with the tribunal's conflict of interest standard). They should not participate as members of executive or legislative branches of Governments. Whether they could act as judges in domestic courts is an issue which should be explored.

16. One important reason to have the rules of service specified in advance is that candidates for judgeships may not put themselves forward if they cannot predict how their outside activities and incomes will be affected.

###### *Article 10 (Election and functions of president and vice-presidents)*

17. It would be appropriate for States parties to elect the president and vice-presidents, rather than leaving the matter to the judges.

###### *Article 11 (Disqualification of judges)*

18. The United States does not believe that there is any reason to limit the number of judges whose disqualification an accused can request. There should be no difficulty



in handling such challenges in the ordinary course. The prosecutor should also have the right to request the disqualification of a judge. Other judges, too, should have this right. Rather than have the chamber, or the chamber supplemented by the bureau, render a decision on this question, it would be preferable for the court as a whole to do so. The final decision should be reached on the basis of a majority vote, with a majority consisting of more than half the eligible judges present and voting.

19. In certain circumstances, States parties may have information bearing upon whether a judge should be disqualified. In such circumstances, there should be a procedure to permit such States parties to file a motion with the court requesting a review by the chamber concerned.

#### *Article 12 (Election and functions of Registrar)*

20. The statute should provide that the registrar can be removed for cause by a vote of a majority of the court. A seven-year term appears somewhat long for this type of office, and we suggest that five years may be a more appropriate period particularly in view of the permissibility of re-election.

21. The tribunal, as a supplementary facility, should have a small professional staff, which States parties could agree to expand as needed. This basic principle should apply to both the registry and the procuracy.

22. The number of employees of the registry and its budget should be subject to approval by States parties. As drafted, the bureau could authorize unlimited numbers of additional staff, presumably to be paid for by assessments from States parties. Instead, on a yearly or shorter basis, the registry should submit to the president of the court a detailed accounting of its activities, along with a proposal for changes in expenditures for the next period. The president would submit a proposal to States parties, based on the registrar's proposal.

#### *Article 13 (Composition, functions and powers of the Procuracy)*

23. The United States Government agrees with the Working Group's proposal that the prosecutor and deputy prosecutor be elected by States parties. That election should require a super majority vote, for example an affirmative vote of two thirds of the States parties.

24. Without affecting its basic independence, States parties must none the less have oversight with respect to the budget of the procuracy. Thus, as with the registry, the procuracy should draw up periodic budgetary proposals for approval by States parties.

#### *Article 15 (Loss of office)*

25. The statute should provide, here or elsewhere, that judges, the prosecutor or deputy prosecutor, and the registrar may be removed from office, or suspended, by reason of inability to perform their functions because of long-term illness or disability.

26. Given the importance placed in the independent status of the prosecutor, we question whether the court should have the authority to remove the prosecutor or deputy prosecutor from office. Thus, we suggest that the statute limit the authority of the court to barring participation of any prosecutor for cause, but leave removal from office of the prosecutor or the deputy prosecutor to a super majority decision of States parties. The ILC will need to develop mechanisms for expeditious consideration of issues by States parties and voting procedures.

#### *Article 16 (Privileges and immunities)*

27. This provision should be revised so that it states clearly, and without reference to the standards used by other institutions, the privileges and immunities of specific persons or categories of persons. Thus, judges and the prosecutor (and perhaps the deputy prosecutor) should enjoy full diplomatic immunity while present in the territory of any State party where they are performing official functions related to the work of the tribunal. Full privileges and immunities would be provided to the prosecutor because he or she will be likely to make the kind of controversial decisions that would require such protections. All other categories of persons listed should enjoy the privileges and immunities provided to administrative and technical staff under the Vienna Convention on Diplomatic Relations while present in the territory of any State party where they are performing official functions related to the work of the tribunal.

28. Further consideration should be given to who should be able to waive immunities (we prefer the term "waive" to "revoke"). The person with authority to waive immunity should normally be someone with direct authority over the person whose immunity is affected. Thus, it would be appropriate for the prosecutor to be able to waive the immunity of other prosecutors or members of the procuracy, the president (perhaps in consultation with the rest of the court) for the staff of the court, the registrar and his staff, and counsel, experts and witnesses.

#### *Article 17 (Allowances and expenses)*

29. If judges reach the point where they are working full time, there should be a transition mechanism, so that per diem payments do not exceed what would normally be paid as a full-time salary for the same period.

#### *Article 19 (Rules of the Tribunal)*

30. As noted above (para. 5), the United States believes that the tribunal's rules should be formulated in conjunction with the statute and agreed to by States parties prior to establishment of the international criminal court. The conduct of pre-trial investigations, rules of procedure and evidence and other matters "necessary" to the implementation of the statute can have a fundamental impact on the ability of the tribunal to have fair and acceptable proceedings. Rules that affect the operation of the tribunal to this degree will require painstaking effort to draft; States parties should not be asked to give their approval to the court



unless that effort has been made and the results have met with general approval.

*Article 20 (Internal rules of the Court)*

31. As a general proposition, we agree that the court should have leeway in determining its own internal rules. Nevertheless, care needs to be taken to ensure that these rules do not adversely affect the rights of the accused. If the court's internal rules are not subject to prior approval of States parties, then the statute should provide that the rules of procedure and evidence (which would be subject to such approval) take precedence over the rules of the court in case of conflict.

*Article 21 (Review of the Statute)*

32. While we agree that providing for a review conference is desirable, this article should not refer to the Code of Crimes. As noted above (para. 4 (c)), the Code is a controversial document which at this time cannot form the basis for the jurisdiction of an international criminal court, and which will not be able to form such a basis in the near future.

PART 2: JURISDICTION AND APPLICABLE LAW

*Article 22 (List of crimes defined by treaties)*

33. The United States Government has reviewed the draft articles on jurisdiction with great attention. This is undeniably the heart of the international criminal court proposal, and must be crafted with great care. In making a number of recommendations on structuring the jurisdiction of a court, we have borne in mind the need to attain a very wide degree of support for an ambitious project of this nature.

(a) *War crimes, crimes against humanity, genocide*

34. Recent events have shown that there is an important need to ensure that war crimes, crimes against humanity and genocide do not go unpunished. While international prosecution is not an effective substitute for systems of military justice and discipline in most cases, there are circumstances in which domestic efforts will not suffice. For that reason, such crimes are appropriate subjects for the jurisdiction of an international criminal court. These crimes are of fundamental concern to all States. Beyond the fact that such crimes may be so serious that they shock the conscience of the civilized world, in large measure the significance of such cases to all States derives from the fact that the commission of such crimes may create instabilities which threaten international peace and security, or because such crimes are committed in connection with international conflicts. Because of this connection to issues of peace and security, the United States concludes that such crimes should be subject to the tribunal's jurisdiction only where such cases are referred to the tribunal by the Security Council.

35. At the same time, we believe that these types of cases should not be initiated in the tribunal by individual

States. The Council is well-placed to make judgements about when particular situations are of so great a concern to the international community that an international (rather than a national) prosecution is required. In addition, we are concerned that there would be a temptation for States to invoke the jurisdiction of the tribunal for political purposes.

36. The United States believes that it is appropriate for the international criminal court to have jurisdiction over offences under the laws of war that are well-established. Because aspects of Protocol I additional to the Geneva Conventions of 12 August 1949 have yet to attain a sufficient level of recognition and acceptance, we conclude that Protocol I should not form part of the tribunal's jurisdiction. Furthermore, in armed conflicts, applicable laws of war derive from the treaties to which all belligerents are parties. The ILC draft would allow one of the belligerents to a future conflict to initiate court prosecution of members of another belligerent's armed forces for violations of laws of war under an instrument to which the latter is not a party, and for crimes which have not been sufficiently well accepted as crimes. Such a result should be avoided. (In addition, as discussed below (para. 45), we believe that the tribunal should not have jurisdiction over cases otherwise subject to an existing status-of-forces agreement.)

37. In these circumstances, the United States Government supports establishment of an international criminal court which permits referral of cases for investigation and prosecution only by the Security Council for crimes set forth in the instruments listed in sections 22 (a) and (b) (i)-(iv). In addition to grave breaches under the Geneva Conventions, we would also include violations of equivalent gravity of the 1907 Hague Conventions. With respect to crimes against humanity, in the absence of an appropriate instrument defining the crime, the ILC should consider developing a definition for inclusion in the statute, perhaps modelled along the lines of article 5 of the statute of the International Tribunal for the Former Yugoslavia. In the context of an international criminal court, we would suggest that the ILC make clear that there is no requirement that crimes against humanity be limited to those cases arising out of or even during an armed conflict.

(b) *Crimes under the "terrorism" Conventions*

38. The United States Government also recognizes that it might, in principle, be desirable in some cases to have a forum available for prosecution of persons committing crimes defined in the conventions listed in sections 22 (c), (d), (f), (g) and (h) where national forums are unavailable or will not suffice. At the same time, however, the possibility of international criminal court jurisdiction should under no circumstances impede or undermine the effective prosecution of terrorists in domestic courts. Unfortunately, under the present proposal this latter risk is presented.

39. Many difficulties may arise in bringing such cases to an international criminal court. Such difficulties include whether a tribunal of this nature would be able to conduct investigations of complex terrorist cases as competently as national governments. Such investigations often take many years and considerable resources,

resources which the international criminal court prosecutor may not possess. In addition, a court might end up competing with or pre-empting legitimate national investigations, or causing national authorities to leave to the tribunal elements of investigations which in fact could be more efficiently performed by those authorities.

40. In addition, the United States continues to have a number of reservations about creating jurisdiction on the basis of treaties which in many respects do not provide precise definitions of crimes, but instead impose obligations in aid of the exercise of national jurisdiction. As a general rule, important elements of crimes and defences are left to national jurisdictions. The statute, and the rules of evidence and procedure, will need to provide an adequate guide to the court on the question of elements of crimes and defences if the court is to meet the requirements of *nullem crimen sine lege*.

41. The ILC and Member States will need to give careful consideration to whether these difficulties can be overcome so as to justify inclusion of terrorism within the ambit of the international criminal court. The United States Government reserves judgement on whether this is possible, but hopes that the ILC will be able to make progress in presenting an analysis of issues which can assist in further discussions among United Nations Member States.

(c) *Protection of peacekeepers*

42. The United States notes with satisfaction that progress is being made at the United Nations in elaborating a convention concerning responsibility for attacks on United Nations peacekeepers and associated personnel. Should such a convention come into force, consideration should be given to including crimes under that convention within the jurisdiction of the court. The ILC should consider now mechanisms for bringing these crimes within the jurisdiction of the court expeditiously once the treaty comes into force and States parties determine that they wish to add it to the statute.

(d) *The International Convention on the Suppression and Punishment of the Crime of Apartheid*

43. The United States believes that article 22 should not include the International Convention on the Suppression and Punishment of the Crime of Apartheid. This convention was addressed primarily to a particular situation, that of the system of apartheid in South Africa, which has now been dismantled. This convention was controversial at its adoption and has not gained wide support, in part because it is not sufficiently precise in defining the crimes which are its subject.

*Article 23 (Acceptance by States of jurisdiction over crimes listed in article 22)*

44. With respect to the three options provided in the draft statute, we prefer alternative A because it best reflects, as pointed out in the commentary, the consensual basis of the tribunal's jurisdiction.

*Article 24 (Jurisdiction of the Court in relation to article 22)*

45. It is essential that the tribunal should not substitute for or undermine existing and functioning law enforcement relationships. Thus, States should not be permitted to avoid their obligations under existing extradition treaties by referring a case to the international criminal court. Moreover, military personnel who would otherwise be subject to the jurisdiction of their national courts by reason of a status of forces or similar agreement should not be tried by the tribunal. The most compelling reason for establishing a court is that persons who commit the most serious crimes will otherwise go unpunished; where persons would be tried and punished in a national forum but for the intervention of the court, it becomes a competing rather than a supplementary mechanism.

46. National prosecutions are usually preferable for criminal prosecutions. There are many reasons for this: the applicable law in a national prosecution will usually be clear; the prosecution will be less complicated, based on familiar precedents and rules; the prosecution and defence is likely to be less expensive; evidence and witnesses will normally be more readily available; language problems are minimized; the local courts will apply established means for compelling production of evidence and testimony, including application of rules related to perjury. International criminal proceedings will almost always be more complicated and expensive than national proceedings, and will not necessarily produce a more just result.

47. In these circumstances, it is necessary to provide appropriate mechanisms to ensure that, with respect to State-initiated cases, where States are willing and able to bring national proceedings, those proceedings will be preferred over international criminal court ones. This preference was recognized in the eighth report of the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind,<sup>1</sup> which provided for broader consent requirements than does the 1993 Working Group's draft.

48. The Government of the United States proposes that article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) be revised so that the very limited consent regime currently reflected in the statute is expanded to include States with a critical interest in the prosecution. Specifically, for each case under sections 22 (c), (d), (f), (g) and (h) the statute should require the consent of the State where the crime occurred or the State of nationality of the victim (or in cases where there are victims of many nationalities, the State or States with the most significant interest). The State where the crime occurred will in almost all cases have jurisdiction over the crime, and a very strong interest in the prosecution of any person who committed it. The State of nationality of the victim will often be, in terrorist cases, the State against which the attack was directed; as a result, that State has a particular interest in trying persons accused of the crime.

<sup>1</sup> See *Yearbook . . . 1990*, vol. II (Part One), p. 27, document A/CN.4/430 and Add.1, especially p. 36, para. 84.

49. The United States is not opposed to including a requirement that the State with custody have a right of prior consent. However, among States with an "interest" in a prosecution, the State with custody does not necessarily have the strongest interest. Indeed, the presence of the fugitive in that State may be no more than fortuitous. Traditional extradition practice has given particular weight to the role of the State with custody, but that emphasis may not be appropriate where the objective is to identify those States which have such a strong reason to prosecute themselves that their preferences should prevent an international criminal court prosecution.

50. If a State with custody under any circumstances exercises a right either to refuse to surrender the accused to the international criminal court, or a right to withhold consent for an international criminal court prosecution, that State (if it has jurisdiction over the crime) must be required to submit the case to its appropriate authorities for prosecution or surrender to another State that is ready to prosecute.

51. In addition, any State which has an applicable extradition agreement with the State with custody, or any State which could make a request for extradition under the provisions of the latter State's domestic extradition law, should be given the opportunity to seek extradition prior to the international criminal court's taking a case. If the State with custody is not obliged and does not intend to extradite to the requesting State (or is not obliged to prosecute under the terms of an extradition treaty), or the State having received the fugitive via extradition for any reason does not proceed with the prosecution within a reasonable period of time, the Court could take jurisdiction over the case.

#### *Article 25 (Cases referred by the Security Council)*

52. As noted above (paras. 34 and 37), the United States believes that only the Security Council should have authority to refer war crimes, crimes against humanity and genocide cases to the court. In addition, articles 29 and 30 should be revised to make clear that no investigation may commence nor complaint be filed with respect to those types of cases prior to such Security Council action.

53. The Government of the United States noted with interest the view contained in the commentary that the Security Council would not normally be expected to refer a "case" in the sense of a complaint against individuals, but would more usually refer to the tribunal's situation. The Council would normally refer situations, which would then be the subject of investigation by the procuracy. However, we see no reason why the Council, in appropriate circumstances, should be prevented from referring specific cases for the consideration of the international criminal court. In such instances, the Council would not require that a prosecution be brought, but would refer a case that would then be taken up by the prosecutor. If the prosecutor did not find that the case involved criminal conduct, he or she would be under no obligation to seek an indictment.

#### *Article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22)*

54. The Government of the United States does not support inclusion within the jurisdiction of the international criminal court of crimes under general international law or crimes under national law which give effect to provisions of a multilateral treaty. The concept of "crimes under general international law" is not sufficiently defined, and inviting States to initiate prosecutions on such a basis would be potentially counterproductive and ill-advised. As discussed in paragraph 37 above with respect to article 22, we are prepared to include within the tribunal's jurisdiction crimes against humanity—a category of crimes which is sufficiently well-defined under customary international law. The United States would also be willing to consider proposals for the inclusion of other particularly well-defined categories of crimes, if any, under customary international law when referred by the Security Council.

55. The United States Government does not support including drug-related crimes which give effect to the provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It shares the concerns expressed by many States in the Sixth Committee debate that this Convention does not provide the level of specificity needed to form the basis of criminal charges in an international criminal court. Moreover, even if this defect could be rectified, we are not convinced that a way could be found to ensure among other things that the tribunal would hear only the most significant drug cases; instead, the court would be likely to be overwhelmed with cases, with all the resource implications this implies. The tribunal could become a drug court with little time for other cases of critical importance to the world community.

#### *Article 27 (Charges of aggression)*

56. The Government of the United States would not support prosecutions on charges of aggression, even if the Security Council had first determined that the State concerned had committed the act of aggression which is the subject of the charge. Although the Council is the international political body charged with determining the difference between unlawful aggression and lawful self-defence, the offence of aggression is not yet sufficiently well-defined as a matter of international criminal law to form the basis of international criminal court jurisdiction. In addition, charges of aggression are essentially charges of State and not individual responsibility. Recent difficulties in determining whether particular armed conflicts are international armed conflicts are examples of definitional problems also encountered in defining aggression.

#### *Article 28 (Applicable law)*

57. The United States is concerned about the reference to "the rules and principles of general international law" as well as references to "applicable national law". Neither the statute nor the commentary make clear the purposes for which the court may have reference to these sources of law. Application of some elements of national law to fill

out the elements of crimes specified in the treaties (or the rules of procedure and evidence) is inevitable unless there is a more developed international law to which the court can refer. The crimes in the listed treaties, for example, would normally be interpreted by national courts in conjunction with domestic legal principles, often pursuant to domestic legislation defining elements of the crimes, related defences, and other matters. This lack of more detailed international law, however, poses serious questions and concerns. Our preference is to develop supplementary legal principles for the court in conjunction with the statute.

58. If reliance on national laws is necessary, which law is to be applied, the law of the State where the crime was committed, that of the State of nationality of the defendant, or of where the defendant is located? Is the court to survey the laws of all States on the matter and come up with general principles as recognized under article 38, paragraph (c), of the Statute of the ICJ? These are matters that need to be further analysed by the ILC.

59. Finally, unless addressed in the statute, an overlap will exist between the International Court of Justice and the international criminal court regarding jurisdiction to determine questions relating to the interpretation and application of the provisions of as many of the treaties as would be covered by the statute. Consequently, it is possible that the two courts will opine on the same or similar issues. Of course, the States parties to the statute can agree among themselves to bring such questions only to the court, but this would not preclude other States from bringing the same or similar questions to the ICJ.

### PART 3: INVESTIGATION AND COMMENCEMENT OF PROSECUTION

#### *Article 29 (Complaint)*

60. States should not be allowed to pick and choose when they will subject themselves to the general obligations of the statute. It would be particularly inappropriate if a non-party could bring a case to the international criminal court, but would be under no treaty obligation to cooperate with the tribunal in legal assistance matters. Moreover, the United States opposes giving a right to non-States parties to bring cases before the tribunal. Only States paying for the court's operations should be able to act as complainants.

61. As noted above (paras. 34 and 37), the United States Government concludes that only the Security Council should be permitted to refer cases involving war crimes, crimes against humanity and genocide to the international criminal court. Thus, no complaint regarding crimes under instruments listed in sections 22 (a) and (b) (i)-(iv) should be accepted by the court unless referred by the Security Council.

62. The statute should provide that there be some threshold showing, if not determination of, jurisdiction before the investigation begins—rather than waiting for the issue to be raised on the eve of trial under article 38 (Disputes as to jurisdiction). As a minimum, the complaining State should be required to make a showing on

the issue of jurisdiction and the prosecutor or tribunal would be able to decline or defer the case if there appeared to be a serious jurisdictional defect. In order to avoid a waste of investigatory resources, all interested States which have a right under the statute to withhold consent (and thereby curtail a prosecution) should be required to make an election (either irrevocable or provisional) at a specified early point, without prejudice to the right of the defendant to challenge the jurisdiction of the tribunal. In addition, States must be given a reasonable amount of time in which to make a decision concerning consent.

63. Further consideration needs to be given to the role and function of the bureau, especially to the extent to which it will perform judicial functions that would otherwise be referred to a chamber of the court. One member of the Working Group suggested the possibility of establishing an "Indictment Chamber". (See article 29, comment 6.) Article 30 (Investigation and preparation of the indictment), paragraph 1, stipulates that the bureau can direct the prosecutor to commence a prosecution which he or she has declined, and article 32 (The indictment), paragraph 2, states that the bureau determines the sufficiency of an indictment. Giving authority to the court under article 30, paragraph 1, to direct that a prosecution be brought might constitute an infringement on the independence of the prosecutor and thus we should prefer to limit the authority of the court in this respect to requiring reconsideration of the matter.

#### *Article 30 (Investigation and preparation of the indictment)*

64. To avoid potential abuse of the tribunal's investigative powers and waste of financial and personnel resources, the standard for declining an investigation (para. 1 stipulates that "unless the Prosecutor determines that no possible basis exists for action by the Court") should be made less demanding. In addition, provision should be made for retention of information or evidence, for possible future use, in the event the prosecutor declines prosecution.

65. Paragraph 2 provides that the prosecutor shall have the power to request the presence of certain persons and the production of information. The obligations of States to cooperate with the tribunal, e.g. with respect to subpoenas seeking disclosure and production of documentation or exhibits, should be spelled out more clearly with respect to both this article and article 58.

66. Although this may be presumed in paragraph 4, it would be preferable for the right of a person to be informed, at the time of the questioning, that he or she is a suspect, to be included explicitly in the list of the suspect's rights.

67. Because war crimes, crimes against humanity and genocide cases should be referred only by the Security Council (see discussion above with respect to article 22), this article should be redrafted to take the distinction between State-initiated and Council-referred cases into account.

*Article 31 (Commencement of a prosecution)*

68. We propose that the prosecutor be authorized to proceed with preparation of an indictment if he determines there is a *prima facie* case, not, as provided in the statute, if he determines “there is a sufficient basis to proceed”. This is in line with article 32 which requires there to be a *prima facie* case for affirmation of the indictment. The prosecutor should proceed to indictment only if he or she believes in good faith that the indictment will be upheld by the court.

69. In addition to information specified in paragraph 1, the indictment should specify the alleged facts establishing the elements of the offence. It could also include a statement of the basis of jurisdiction. The standard for pre-indictment arrest (“sufficient grounds to believe”) should be clarified. This sounds like the equivalent of probable cause (the standard used in the United States), but it is hard to determine whether this is the case.

70. The statute leaves the period of pre-indictment detention to the discretion of the court. Many judicial systems, provisional arrest articles in extradition treaties, and international human rights standards (for example, art. 9, para. 3 of the International Covenant on Civil and Political Rights) allow detention for a stated period of time, or for a “reasonable” period. If the prosecutor cannot seek a timely indictment, e.g. cannot establish a *prima facie* case, the appropriateness of a lengthy detention is open to question. Thus, article 31 might be revised to permit pre-indictment detention for a “reasonable” period.

*Article 32 (The indictment)*

71. We question whether the judges who affirm an indictment should hear the resulting case or appeal. The statute or rules should provide for the amendment of an indictment after it has been affirmed and for the sealing of indictments. Presumably determination of whether there is a *prima facie* case would be based on a review of the evidence submitted as part of the “supporting documentation”. It is unclear from the language of the statute what facts must be established preliminarily, and how “*prima facie*” would be defined.

72. So that the court will have control over the tribunal’s docket, we believe that the court should have discretion to decline to hear State-initiated cases which otherwise meet the requirements of the statute, based on appropriate criteria to be developed by the ILC. Such criteria might include the fact that a case would be better handled at the national level, or is not of sufficient gravity to warrant the attention of the international criminal court.

*Article 33 (Notification of the indictment)*

73. This article should be read together with article 58 (International cooperation and judicial assistance) and article 63 (Surrender of an accused person). The statute made a distinction between States parties which have accepted jurisdiction of the tribunal with respect to the crime(s) in question, which are ordered to make the necessary notification and/or arrest, and those which have

not accepted jurisdiction of the tribunal for those crimes, which are merely “requested” to cooperate in this regard. We agree that, with respect to a State which does not accept the jurisdiction of the tribunal for the crime in question, the tribunal should be able to do no more than make a request for cooperation with respect to service of the indictment and detaining the accused. Similar limitations on States’ obligations should be reflected in article 58.

*Article 34 (Designation of persons to assist in prosecution)*

74. In particular because the tribunal will function on an *ad hoc* basis, the prosecutor will have limited staff, and thus will need the ability to designate persons to assist in prosecutions. This is also desirable because the prosecutor will be likely to need assistance with issues related to local law. It is not clear from the text whether this article applies to pre-indictment investigations (which it should).

*Article 35 (Pre-trial detention or release on bail)*

75. The statute or rules need to address issues related to the standards for determination of whether a person should be detained or released on bail prior to trial, duration of detention and right to review. Given the nature of the offences the court may hear, consideration of both the risk of flight and of danger would seem appropriate and would frequently result in a decision not to grant release. The statute or rules should also specify that these provisions will apply to pre-indictment proceedings. It is not clear that the place of detention should be limited to the host State; if the tribunal were to handle many cases at the same time, this limitation could create difficulties.

## PART 4: THE TRIAL

*Article 37 (Establishment of Chambers)*

76. As noted with respect to article 7, the statute should be revised so that there is a clear distinction between trial and appellate judges. As for the question of composition of the chambers, we prefer the option of rotation on an annual or other periodic basis among the specially-selected trial judges (consistent with the need to preserve the composition of the panel of judges hearing a particular case). There should be no rotation between the trial and appellate benches.

77. Regarding paragraph 4, we recognize that disqualification of judges who are nationals of the complainant State or who are from a State of which an accused is a national is a difficult question. Although the removal of any taint of partiality is a valid objective, this prohibition can remove from the proceedings an expert on what is potentially relevant local law. Thus, we would delete paragraph 4.

*Article 38 (Disputes as to jurisdiction)*

78. An allegation of jurisdiction and the basis thereof should be included in the indictment. Pre-trial challenges to jurisdiction upon arrest or indictment should also be authorized.

79. Allowing any State party to challenge jurisdiction is not necessary and would only complicate the proceedings. However, we believe that any interested State should be able to make such a challenge at the beginning of the proceedings. Such States could be any State that asserts a right to consent under the statute, the State of nationality of the accused, the State of nationality of the victims, the State (or States) where the crime occurred and the State where the accused is present.

*Article 39 (Duty of the Chamber)*

80. The statute appropriately authorizes disclosure of evidence to the accused and exchange of information between the defence and prosecution before trial. This fosters a more efficient trial and improves the accused's ability to prepare a defence. However, the court should also be given the authority to issue protective orders and to take other measures to address legitimate concerns that may arise about the scope or nature of discovery. In addition, there will need to be procedures to protect disclosure of sensitive information provided by governments (see comments below with respect to articles 47 and 48).

81. The details concerning handling of exculpatory evidence, prior convictions, witness lists, defences, and related matters should be provided for in the rules of procedure and evidence.

82. Paragraph 2 should be read in conjunction with article 44 (Rights of the accused). This paragraph states that the chamber "may" order disclosure of evidence to the defence "having regard" to article 44, paragraph 3. This presumably means the court will in fact (i.e. is authorized to) ensure that exculpatory information is disclosed, not that it might do so.

*Article 40 (Fair trial)*

83. The reference to an "expeditious" trial is an important one, and might be emphasized in the statute or rules by including not only an explicit "speedy trial" requirement (which we find in article 44's provision for trial "without undue delay", based on article 14, paragraph 3 (c) of the International Covenant on Civil and Political Rights), but standards for the amount of time in which a trial should normally take place after the accused has been placed in custody.

84. This article permits closed sessions only in order to protect a witness, but broader issues are involved, such as the need to protect sensitive information provided by governments (see discussion below with respect to articles 47 and 48).

*Article 41 (Principle of legality (Nullum crimen sine lege))*

85. The principle of *nullum crimen sine lege* is a critical one. The problem posed is in the difficulty of its application. Meeting this standard produces particular problems for crimes under "general international law" which in many cases will lack precise definitions, and will thus pose a risk to fair and effective prosecutions. We should not want the tribunal to make ad hoc determinations of criminality based on controversial notions of what constitutes general or customary international law.

*Article 43 (Presumption of innocence)*

86. The statute fails to establish a standard of proof for a finding of guilt. The commentary suggests that beyond a reasonable doubt will not necessarily be the standard. Rather than leave the matter uncertain, the statute should provide a standard. The United States suggests that that standard be a stringent one such as "beyond a reasonable doubt" (however expressed).

*Article 44 (Rights of the accused)*

87. The United States delegation listened with interest to the debate within the Sixth Committee on the question of whether *in absentia* trials should be permitted under the statute. By "*in absentia*" we mean that the accused never appears before the Court. Although such *in absentia* trials are not permitted under the United States system, trials are permitted in some circumstances where the defendant appears initially but later absents himself voluntarily.

88. We appreciate that a number of legal systems permit *in absentia* trials of some sort, and that such trials may serve in some circumstances to vindicate the rights of victims. Nevertheless, on balance we conclude that *in absentia* trials are too controversial and should not be part of the proceedings. The most effective and fair prosecutions will usually be those where an effective defence is presented, and this will not normally be the case in an *in absentia* trial. It is important that the court be not tempted to seek the easier route of hearing cases *in absentia* when the custody of accused persons becomes difficult to obtain. Rather, every effort should be made to ensure that States comply with obligations to surrender fugitives.

89. Paragraph 1 (h) is problematic given that the absence of the accused will often be wilful, and thus deliberate. Thus, trials *in absentia* would be permitted in any case where the accused does not voluntarily offer himself to the tribunal. Given our reasons for opposing *in absentia* trials, we cannot support this provision.

90. The United States notes that the statute of the International Tribunal for the Former Yugoslavia incorporates the right of the accused to be tried in his or her presence, based on article 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights. The statute or the rules of procedure should cover post-indictment "voluntary" absence, and waiver of the defendant's right to be present after a warning by the Court that his or her disruptive behaviour justifies exclusion from the proceedings.

91. Other than the question of *in absentia* trials, we support this article, which reflects the International Covenant on Civil and Political Rights. Article 44, paragraph (g), requires that an accused should not be compelled to testify or to confess guilt. Consideration should be given also to ensuring that the defendant's silence cannot be considered evidence of guilt.

92. The United States notes that the commentary to article 39, paragraph 2, speaks of a "right" to simultaneous interpretation. While simultaneous interpretation is always preferable, this should not be viewed as a right of absolute dimension, as there may be times when this is not possible.

#### *Article 45 (Double jeopardy (Non bis in idem))*

93. A number of questions need to be addressed with respect to this article, including whether lesser/greater offences implicate double jeopardy. What if the conduct in question has subjected the person to prior prosecution, but not for the particular crimes that are now charged? Should there be a requirement that the prior trial has resulted in a determination on the merits?

94. The United States Government agrees that a "sham" prior prosecution should not deprive the tribunal of jurisdiction. We note that the ILC 1993 Working Group employed in this context the formulation used in the statute of the International Tribunal for the Former Yugoslavia. The experience of the Yugoslavia Tribunal will be relevant to determining whether this formulation is a good one in practice.

#### *Article 46 (Protection of the accused, victims and witnesses)*

95. We believe that the rules will need to provide details of the "measures" that might be taken by the court. In particular, while it is important to protect victims, a countervailing consideration is that the accused must have a meaningful opportunity to have witnesses against him examined.

#### *Article 47 (Powers of the Court)*

#### *Article 48 (Evidence)*

96. The relationship of articles 47 and 48 to article 58 (International cooperation and judicial assistance) needs to be clarified. While States parties will be obligated to cooperate in carrying out the court's orders to provide witnesses and evidence, it is not clear to what degree national legal systems will be able to comply. A series of questions concerning the relationship of the international criminal court to States parties and their domestic courts will often arise because the tribunal, lacking personal jurisdiction of persons having requisite evidence, must rely on States parties to enforce the tribunal's orders. The tribunal in every case will be operating in the realm of international judicial assistance. Its statute and rules must reflect the flexibility essential for effective prosecutions in this area.

97. The reference to "complete record of the trial" (art. 47, para. 2) should be construed to mean either a verbatim transcript or a video/audiotape record, together with copies of documents, and not merely the judge's or clerk's notes of the proceedings.

98. In order to make the oath requirement (art. 48, para. 2) meaningful, the tribunal must have the authority to prosecute witnesses for perjury. Asking States to punish persons who commit perjury before the international criminal court appears to us likely to be an impractical solution.

99. Article 48, paragraph 5 establishes a rather low threshold for exclusion of evidence ("obtained directly or indirectly by illegal means which constitute a serious violation of human rights"). Paragraph 6 of the commentary, proposed by some ILC members, suggests rejecting evidence obtained through violations of international law as well. We believe that the focus must be on whether the evidence to be placed before the court is reliable. Persons may differ on what constitutes serious violations of human rights or international law; we believe the ILC should indicate in detail what situations will be likely to result in exclusion of evidence under these standards. Using that information, States will be able to determine whether they can support either reference.

100. The ILC should give further consideration to the question of how national security information will be handled or disclosed. In particular, it will be necessary to permit a State to decline at its discretion to produce information related to its security despite a request from the tribunal. Furthermore, procedures should be developed to ensure that a State may disclose sensitive information to the prosecutor without fear that such information will be disclosed to defendants and defence counsel without that State's consent. If such rules are sound, it will greatly assist in widening the scope for cooperation between States parties and the tribunal. If there is uncertainty about how sensitive information may be used or disclosed, governments may be reluctant to provide certain types of valuable information to the tribunal.

101. The ILC will no doubt wish to consider national security implications as they affect a number of other articles related to rights of and measures to protect the accused (e.g. arts. 44 and 46), court orders on disclosure of evidence (art. 39), and the requirement of a fair trial (art. 40), as well as the rights and protection of the accused (e.g. arts. 44 and 46).

#### *Article 49 (Hearings)*

102. A host of issues, such as an opportunity for the court to rule on the sufficiency of the evidence presented by the prosecution at the close of its case, and handling of cross-examination and re-direct, are not dealt with here. Paragraph 2 of the commentary states that the rules will contain additional procedures. Consideration will need to be given by the ILC as to whether some of these issues should be reflected in the statute; if not they would unquestionably have to be reflected in the rules.



*Article 50 (Quorum and majority for decisions)*

103. Although making decisions by majority vote is sensible, in principle we would want the full bench of five judges to be present during the entire trial, particularly considering that the judges are finders of fact as well as of law. We propose that this provision be revised accordingly.

*Article 51 (Judgement)*

104. The statute should permit the judges of the court (both the trial and appellate benches) to issue dissenting and concurring opinions. The ability of the dissenters to challenge the majority's reasoning will help ensure that majority decisions are well grounded and publicly justified.

*Article 52 (Sentencing)**Articles 52 (Penalties)*

105. The United States of America believes that the rules of procedure will need to provide further details on issues related to sentencing. We also urge consideration of the adoption of uniform penalty provisions, so that the court will not need to search for and justify references to national law. Such provisions will assist the court in ensuring that persons committing similar crimes receive similar sentences.

106. Article 53, as drafted, appears to permit the tribunal to exercise jurisdiction over and attach individual and even government property located within States. This is likely to require subsequent enforcement actions in national courts. Such litigation can be complex. While we strongly support remedies of forfeiture and restoration of property to victims, this has proved one of the more difficult areas in international assistance. Thus, the statute may need to be revised to reflect the fact that court orders involving execution in States with respect to property may be subject to review by national courts under national law.

## PART 5: APPEAL AND REVIEW

*Article 55 (Appeal against judgement or sentence)*

107. While the possibility for a prosecutor's appealing an acquittal is limited under United States law, we recognize that it is permitted in other countries. At the very least, we do not believe it is appropriate for the prosecution to be able to seek a reversal based solely on new evidence at the appellate stage.

*Article 56 (Proceedings on appeal)*

108. As noted above (para. 76), we propose that the court include separate trial and appellate chambers. (See also comments above on dissenting and concurring opinions with respect to article 51.)

109. There needs to be more specificity concerning the appeal process: can the court hear newly discovered evidence? Will the appeal be done primarily on the briefing or will there be oral argument? Can the court solicit views of States parties? Under what circumstances might the appellate chamber remand the case for further proceedings?

*Article 57 (Revision)*

110. The statute leaves open whether the prosecutor can seek revision. The United States has serious reservations about allowing the prosecutor open-ended authority to seek reversal of an acquittal particularly when the appellate phase has concluded. The ILC should clarify under what circumstances it would be appropriate for the prosecutor to seek revision.

111. It is assumed that the reference to "judgement of the Court" pertains to the finding of guilt or innocence. It would be generally inappropriate to utilize this remedy to seek additional review of a sentence. It is unclear whether discovery of a new fact clearly indicating that the court lacked jurisdiction would be encompassed in this provision—the United States thinks it should be.

## PART 6: INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

*Article 58 (International cooperation and judicial assistance)*

112. Paragraph 2 requires "States parties which have accepted the jurisdiction of the Court with respect to a particular crime to respond to international criminal court 'orders' or 'requests' for assistance". This obligation to cooperate extends to producing evidence and to arrest, detention and surrender of accused persons. However, there is no limitation on that obligation reflecting issues such as ongoing criminal proceedings, domestic constitutional requirements, jeopardy to the safety of victims or witnesses, and adequate articulation of the need for evidence. As a practical as well as a legal matter, it is not possible for States to cooperate with the tribunal smoothly (and in some respects at all) unless these types of matters are clarified. If they are not, States will take it upon themselves to determine the extent of their obligation to cooperate, leading to what will be likely to be inconsistent results.

113. As a general matter, States must not be required to cooperate in legal assistance matters if they do not accept the court's jurisdiction over the offence giving rise to the need for cooperation. Although States parties would expect to cooperate in most cases, establishing a legal obligation is inconsistent with the consensual nature of the court proposal.

*Article 60 (Consultation)*

114. The obligation to consult under this article is ambiguous. It is not clear who is to consult and for what purposes. It is not clear why formal consultations



generally among States parties would be necessary or useful prior to the review conference.

*Article 61 (Communications and contents of documentation)*

115. This article should provide that States parties will determine whom the competent national authority would be for purposes of communications, and would notify the registry.

*Article 62 (Provisional measures)*

116. Given the considerable legal complications of arresting individuals and seizing property, this provision must be expanded to cover at the very least issues addressed in standard extradition treaties. For example, the provision needs to spell out the form and content of requests. It should provide that the provisional arrest is for the purpose of awaiting the submission to the State with custody of a complete request for surrender (with accompanying documentation), and that if such complete request is not received in either a set period of time or a "reasonable" time, the individual will be released.

117. One difficulty with the statute is that the various articles dealing with arrest do not clearly interrelate. Article 31 provides for "pre-indictment" arrest, although this provision discusses the arrest as part of the procedural requirements necessary for commencing a case, rather than as a stand-alone element of an "extradition" process; article 62 is ambiguous in its relation to article 31 and requires further detail, and article 63 concerns the obligation to surrender rather than the functional steps needed to bring this about.

*Article 63 (Surrender of an accused person to the Tribunal)*

118. The precise interplay between article 63 and article 33 on notification of the indictment needs to be clarified. Moreover, this article should specify the documents that would be provided with the request for surrender. The lack of a provision for transmission of evidence or a summary statement of the evidence, combined with the need for the custodial State to take "immediate steps" suggests that the 1993 Working Group did not contemplate the need for judicial proceedings in the requested State. The United States and, we suspect, other countries as well, cannot surrender persons to another government or entity without judicial proceedings. Such proceedings have a constitutional dimension under United States law, and thus we could only participate in a criminal court structure that took this need into account.

119. As noted above with respect to article 22, deference should be given to national prosecutions, including adherence to existing extradition obligations in aid of national prosecutions. Thus, the obligation to surrender as set forth in article 63 should be revised to reflect that basic approach.

120. Although the statute permits delayed surrender while an accused is being prosecuted or serving a sen-

tence, it might also include a clause permitting temporary surrender. It is sometimes useful, because of availability and freshness of evidence and recollections of witnesses, and where the accused is serving a long sentence, to surrender the accused temporarily to the tribunal for trial. The United States often includes such a clause in its bilateral extradition treaties.

121. Overall, the statute's approach to surrender obligations and their interplay with existing extradition treaties requires further review and analysis.

*Article 64 (Rule of speciality)*

122. Paragraph 2 provides that evidence tendered shall not be used as evidence for any purpose other than that for which it was tendered. Rather than make this an absolute requirement, with the burden on the court to request a waiver from the affected State, it is preferable for the State providing the information to request this treatment with respect to evidence it believes warrants special procedures.

123. Also, this paragraph could be interpreted to mean that the Prosecutor could not reveal even exculpatory evidence relevant to the defence in one case, if the relevant information had been received in connection with another case. Such a limitation on use of evidence could seriously affect the rights of an accused.

## PART 7: ENFORCEMENT OF SENTENCES

*Article 65 (Recognition of judgements)*

124. The United States assumes that the purpose of this provision is primarily to provide for giving effect to judgements imposing fines or ordering return or forfeiture of property. Given the jurisdictional scheme envisioned for the court, the United States believes that obligatory recognition of court judgements should be limited to States which accept jurisdiction over the offence in question. This is because it would not be appropriate for a State to be forced to execute under its domestic law an order based on an offence which is not recognized by that State.

*Article 66 (Enforcement of sentences)*

125. The rules should set guidelines for the "supervision" envisioned under paragraph 4. As a general matter, once the court is satisfied that a particular State's correctional system is satisfactory, the details of the incarceration should normally be left to that State. The court would be expected to monitor whether basic norms for incarceration under relevant standards of international law are met.

*Article 67 (Pardon, parole and commutation of sentences)*

126. There appears to be some confusion in this article as to whether the court should rely on national law to decide issues related to pardon, parole and commutation.

There is a potential inequity in allowing the national law of the State of incarceration to be decisive on these questions, as persons who have committed the same grave crime may be subject to very different terms of actual imprisonment regardless of the fact that each received the same sentence. At the same time, it is convenient to use the national law of the State of imprisonment as a guide.

127. The rules of procedure provide basic guidelines on these issues, and such rules along with the law of the State of imprisonment should be considered by the court. Paragraph 4, which allows too much discretion to the State of imprisonment, should be deleted.

### Yugoslavia

[Original: English]  
[10 March 1994]

#### GENERAL OBSERVATIONS

1. The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) wishes to make some general observations on the very question of the need for establishing such a court and to draw the attention of the Secretary-General to the position it has already taken on this matter.

2. In his letter of 19 May 1993 (A/48/170-S/25801), the Minister of Foreign Affairs for the Federal Republic of Yugoslavia recognized the need for establishing a permanent international criminal court, while, at the same time, he expressed his disagreement with the establishment of an *ad hoc* international tribunal to prosecute only persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia. The Federal Republic of Yugoslavia considers that it is in the interest of all members of the international community to enlarge the existing system of international legislation by such a court, which would, on the one hand, contribute to the settlement of disputes and, on the other, enable the international community to use successfully all measures of prevention and suppression of any threatening act.

#### OBSERVATIONS REGARDING SPECIFIC ARTICLES

##### *Articles 1 to 4*

3. Out of three possible ways to establish the court—by the revision of the Charter of the United Nations in the sense of establishing a new organ, by a General Assembly resolution or by a multilateral convention—the best solution seems to be that the court be established as an organ of the United Nations by an amendment to the Charter. In doing so, use should be made of the possible revision of the Charter to allow the expected extension of the Security Council by the admission of new permanent members; an international criminal court could also be established by an amendment.

4. The principal disadvantage of having the court established by a General Assembly resolution is in that,

according to Article 22 of the Charter, it would be only a subsidiary organ of the United Nations and subordinated to the General Assembly, contrary to the principle of the independence of the judiciary which it would be highly inappropriate to violate in the case of such an important court.

5. Apparently, the only possible solution at this moment seems to be to establish the court by a multilateral convention whereby all countries would be enabled to accede to its statute and recognize its competence for certain criminal acts, regardless of whether they were United Nations Member States or not. However, even in the case of the court's being established in this way, it should be linked with the United Nations as much as possible either through a cooperation agreement or a provision that the General Assembly should nominate its judges and the prosecutor.

6. As to the proposal in article 4 that the court "shall sit when required to consider a case submitted to it", the Yugoslav Government would like to point out that this court should be a permanent organ whose permanence should not necessarily be reflected in holding permanent sessions. It would suffice to establish the court, with elected judges, strictly determined competence and organized judicial administration.

##### *Articles 5 to 11*

7. As to the structure of the court, there is no doubt that it has to have the proposed structure; however, the judicial and prosecutorial organs have to be strictly separated. As to the procuracy, the position of the Yugoslav Government will be presented in its comments on article 13.

8. The election of judges should be left to the States parties to the convention on the establishment of the court and, in the case where the court is established by the Charter of the United Nations, the General Assembly of the United Nations should elect the judges. Either solution would heighten the independence and impartiality of judges and provide a firm link between the court and the States which have established it, i.e. the United Nations.

9. The court should also have well organized administrative organs since it will not be in permanent session but only when a case is submitted to it. The status and organization of the administrative organs should be regulated by the rules of procedure of the court.

10. The principle of the disqualification of judges is of great importance. Therefore, the reason for disqualification should be presented both by the disqualified judge and the accused. The number of judges whose disqualification is requested should not be limited, and, under paragraphs 1 and 2 of Article 11, decisions should be made in the same manner and by the same quorum.

##### *Article 13*

11. The functions of the procuracy should be separated from those of the court. Since the prosecutor has to bear the principal burden in the conduct of investigations and prosecutions, his status must be clearly determined and

separated from the status of other parties which might appear before the court and the court itself. Accordingly, the election and the functions of the procuracy should be regulated in greater detail.

12. The prosecutor could also be elected by the General Assembly from among candidates from various countries who would apply under the same conditions as judges.

13. Furthermore, in addition to the request of a State concerned, the prosecutor could institute proceedings himself or at the initiative of the Security Council if there is a well-founded suspicion that a war crime has been committed.

#### Articles 15 to 18

14. The loss of office should be regulated in the same manner as the Statute of the International Court of Justice. The Yugoslav Government considers it unacceptable that the loss of office is decided by the court, i.e. two thirds of the judges. It is of the opinion that this brings into question the independence the procuracy must have.

#### Article 19

15. The Yugoslav Government considers that this article (or a number of articles) of the draft statute should provide for the fundamental rules and general principles relating to the procedure and evidence.

#### Articles 22 to 26

16. The Yugoslav Government is in favour of the court's having *ratione personae* jurisdiction to prosecute only individuals.

17. The jurisdiction of the court *ratione materiae* in the cases under article 22 of the draft statute should be obligatory for all States parties to the statute, without providing for the possibility that the matter of the court's jurisdiction be left to the will of States and possible reservations.

18. If the proposal contained in article 23 is accepted, the purpose and functions of the international criminal court will be challenged. The Yugoslav Government considers that, in order to function effectively, the international criminal court should be vested with the authority to establish criminal responsibility and enforce sanctions in a generally accepted minimum of cases, always bearing in mind the sovereignty of States. The list of crimes in article 22 and possible supplements (e.g. as proposed in the case of mercenaries) is the optimum, in view of the structure and gravity of crimes and their consequences for which consensus of States should be obtained with respect to the obligatory jurisdiction of this court.

19. In this context, the court's jurisdiction for the crimes under Article 22 should not be made contingent on the consent of the State of the accused or the State in which the crime was committed, if these States are signatory to the statute.

20. As to the cases under article 26 of the draft, the Yugoslav Government is of the opinion that in that case the court could have a subsidiary jurisdiction, i.e. that its jurisdiction should depend on the consent of the States concerned.

21. As to the possibility that the Security Council may, on the basis of its authority, submit a case to the court, the Yugoslav Government considers that the Security Council could not, in such cases, act as a prosecutor, i.e. identify certain persons as the accused. Within its competences to maintain international peace and security, the Security Council should be enabled to draw the attention of the court/the prosecutor to the cases of aggression, while the prosecutor will conduct an investigation and prosecution.

#### Article 29

22. Since the role of the Security Council in the commencement of prosecution before the court must differ from the role of the prosecutor, a difference should be made between the requests submitted by States and the initial act of the Security Council. While States' requests should contain evident facts necessary for conducting criminal proceedings (i.e. identification of the accused, valid evidence, description of crimes, etc.), the initial act of the Security Council should not be corroborated in such a manner but should point to an aggression, i.e. provide an indication for the prosecutor to conduct investigations when crimes under article 22 of the draft are in question for which, in the opinion of the Yugoslav Government, the court should have the obligatory jurisdiction.

#### Articles 30 to 32

23. The Yugoslav Government considers that revision of a case should be provided for if the prosecutor decides not to proceed, i.e. that this rule should not be transferred to the bureau of the court.

24. Arrest and the issuance of a warrant prior to an indictment should be ordered only by court chambers, not by the bureau. It would also be justified to determine the length of detention.

25. The indictment prepared by the prosecutor could be submitted for discussion only to a court chamber which should determine whether or not a *prima facie* case exists.

26. All this indicates that, prior to an indictment by the court, there should exist a court chamber with the jurisdiction for all these acts.

#### Articles 37 and 38

27. Chambers of the court should be established on the basis of the rules of procedure to be adopted by the court, not only on the basis of the members of the bureau.

28. Challenges to the jurisdiction in every concrete case can be made only by the States concerned in a dispute, not by any State party to the statute, proceeding from the principle of efficient proceedings. The accused should also be enabled to challenge the court's jurisdiction prior to the indictment by the court or the trial itself which should be

the subject of the decision made by the court or a court chamber.

#### Article 44

29. The Yugoslav Government considers that paragraph 1, article 44, is contrary to paragraph 3 (d), article 14, of the International Covenant on Civil and Political Rights providing for the right of the accused to be present at the trial, which is one of the guarantees of the right to a fair trial. The possibility for the international criminal court to try *in absentia*, contrary to one of the basic international law conventions, would question the authority of the court, while the impossibility of enforcing the penalty would question its efficiency. The General Assembly and the Security Council are already in the position to establish a kind of moral sanction on the basis of their powers, so that there is no need for a court to do this.

#### Article 45

30. The Yugoslav Government considers unacceptable the possibility that the court may review a decision of the national court under article 45, paragraph 2 (b). If there are grounds for suspicion regarding the impartiality of the national court, the second-instance proceedings could be conducted before the international criminal court which would then act as an appellate court.

#### Article 47

31. Evidence collected in contravention of the relevant provisions of international law should not be taken into account nor should the court assess their validity.

#### Articles 55 to 57

32. The right to appeal against a decision of the court chamber should be provided both to the convicted and to the prosecutor. This right should be time-limited for both parties. However, this right of the prosecutor could be limited (but not completely excluded) in the case of acquittal.

33. The Yugoslav Government considers that the bureau, when discussing articles 30 to 32 of the draft, should not constitute the Appeals Chamber. This matter should be regulated in advance.

34. The most acceptable solution would be that the appeal is decided on by all the judges in the plenary, except those who made the first-instance decision.

35. In view of the provision of article 14, paragraph 7, of the International Covenant on Civil and Political Rights, the prosecutor should not be allowed to request the revision of judgement to the detriment of the convicted, i.e. in the case of acquittal (as provided in article 57).

#### Article 63

36. An order for the arrest and surrender of the accused can be issued only by the court chamber.

37. Extradition of persons accused of the crimes under article 22 of the draft, provided the jurisdiction of the court is compulsory in this case also, should be obligatory as well.

38. In other cases, extradition should depend on whether a State concerned accepted the jurisdiction of the court. In that case, the solution in article 63, paragraph 3 (b) is acceptable.

## II. Observations received from a non-member State

### Switzerland

[Original: French]  
[8 February 1994]

#### GENERAL COMMENTS

1. The International Law Commission, its Special Rapporteur, Mr. Doudou Thiam, and the Working Group are to be congratulated for having adapted so rapidly to the constantly changing requirements of the international situation and preparing, in such a short period of time, the draft statute for an international criminal court, on which we wish to offer the following comments. It is true that the task of the Working Group and of the Commission has been facilitated to some extent by the excellent report of

the Secretary-General of the United Nations concerning the establishment of an ad hoc international tribunal for the prosecution of persons alleged to be responsible for serious violations of human rights in the territory of the Former Yugoslavia since 1991,<sup>1</sup> (referred to below as the International Tribunal for the Former Yugoslavia).

2. It is clear, none the less, that the establishment of a permanent international criminal jurisdiction poses problems that are even more difficult than the creation of a tribunal whose jurisdiction is limited to crimes committed in the former Yugoslavia. In the latter case, the statute of the tribunal became immediately applicable to all States Members of the United Nations on the basis of Article 25

<sup>1</sup> Report drawn up pursuant to paragraph 2 of Security Council resolution 808 (1993) and submitted on 3 May 1993 (S/25704 and Corr.1 and Add.1).

of the Charter of the United Nations, since it was incorporated into resolution 827 (1993) adopted by the Security Council under Chapter VII of the Charter.

3. It must be remembered that this exceptional approach cannot be followed in the establishment of a permanent international court, and we shall therefore be obliged to use the treaty approach. Only those States which so desire will become parties to the proposed convention. The fear is, however, that those countries whose nationals have little or nothing to be reproached for will be the ones to accede to the treaty while other States will refrain from doing so, thereby depriving the new instrument of some of its usefulness. This is merely an observation and not a criticism of the International Law Commission. Indeed, it is difficult to see what approach other than the treaty approach could be adopted.

4. The future international criminal court will therefore be a jurisdiction in the service of the States parties to the convention establishing it (art. 4) rather than in the service of all States Members of the United Nations. This situation may be distinguished from that of the International Court of Justice, the “principal judicial organ of the United Nations” (Art. 92 of the Charter), which is governed by a Statute to which all States automatically become parties upon their admission to membership of the United Nations (Art. 93, para. 1, of the Charter). This automatic quality is lacking in the proposed new criminal court, which cannot therefore become another of the “judicial organs” of the United Nations, as contemplated in the text bracketed in article 2 of the draft and as suggested by a number of representatives who spoke on the matter in the Sixth Committee of the General Assembly.<sup>2</sup> The Swiss Government is of the view that efforts should be aimed at another approach—that of the independence of the court, which should, nevertheless, be linked to the United Nations through a cooperation agreement.

#### COMMENTS ON SPECIFIC ARTICLES

##### *Part 1 (arts. 2 to 21)*

5. Part 1 of the Commission’s draft deals with the organization of the proposed international jurisdiction. The new tribunal would comprise the court, consisting of 18 members of different nationalities elected for a single term of 12 years, the procuracy, and the registry with its appropriate staff.

6. These three organs, including the procuracy, would appear to be quite essential. Indeed, it is difficult to see how States that file complaints could themselves undertake the prosecution. The general approval thus given by the Swiss Government to part 1 of the draft articles in no way implies that it agrees with all the institutional provisions of the draft. It finds the number of judges, 18, excessive (art. 5)—even the International Court of Justice must make do with 15 members—and would prefer the example of article 12 of the statute of the International Tribunal for the Former Yugoslavia, which provides for 11 judges (divided into two Trial Chambers with three members

each, and an Appeals Chamber consisting of five judges). The review clause contained in draft article 21 would further permit the number of members of the court to be increased in accordance with the workload. The Swiss Government also finds excessive the length of the non-renewable terms of the judges, which is set at 12 years (art. 7, para. 6), and proposes that it should be reduced to nine years.

##### *Part 2 (arts. 22 to 28)*

7. Part 2 of the draft statute, entitled “Jurisdiction and applicable law”, lists those crimes over which the court may have jurisdiction and the limits of such jurisdiction. It draws a distinction between what are defined as international crimes by the treaties that provide for the suppression of such crimes (art. 22) and the “undesirable conduct” that is punishable under customary international law or treaty law. Even for those crimes falling into the first category, the court does not have absolute jurisdiction; the State in question, which is identified with the aid of the criteria set out in article 24, must have accepted its jurisdiction.

8. Article 23 offers three alternative modalities of such acceptance. The Swiss Government prefers alternative B: the presumption of acceptance of the court’s jurisdiction for the international crimes listed in article 22; and the need for a unilateral declaration of acceptance for the “conduct” referred to in article 26.

##### *Part 3 (arts. 29 to 35)*

9. Part 3 of the draft concerns mainly the indictment and commencement of prosecution. Possible complainants who may refer a case to the prosecutor include a State (whether or not it is a party to the proposed convention) which has jurisdiction with respect to the crime in question and which has accepted the court’s jurisdiction over this type of crime, and the Security Council of the United Nations (art. 25) in respect of those crimes referred to in article 22 and the “conduct” that is punishable under general international law (art. 26, para. 2 (a)).

10. The precise scope of draft article 25 is unclear: this provision should either give rise to the automatic jurisdiction of the court in respect of cases brought before it by the Security Council, or retain the requirement, laid down in articles 23 and 26, for acceptance of the court’s jurisdiction by the State concerned. It is essential for the draft statute or the commentaries thereto to dispel all doubts in that regard. The Swiss Government would have serious reservations about subscribing to the former interpretation if the Commission decided to retain it. In other words, it believes that the requirement of the consent of the State in question should also exist for cases that are submitted to the court by the Security Council.

11. Again with respect to the commencement of prosecution, it is difficult to understand why the Commission should refuse to authorize the procuracy of the tribunal to initiate an investigation on the basis of information received, even if there is the possibility that the investigation might conclude that the court has no jurisdiction to

<sup>2</sup> *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee, 17th to 28th meetings.*

hear the case. The solution proposed in the draft articles differs from that adopted in article 18 of the statute of the International Tribunal for the Former Yugoslavia, which is preferred by the Swiss Government.

12. Still in part 3 of the draft articles, we also consider that the commentary to draft article 31 confers virtually unlimited discretion on the court in the matter of pre-trial detention. If it is impossible to limit the duration of detention, the Government of Switzerland believes that, at the very least, a mechanism should be established to permit the detainee to request his release on bail.

#### Part 4 (arts. 36 to 54)

13. Part 4 of the draft statute deals with the trial. One of the first questions to be raised in this regard is the invitation addressed by the Commission to States in paragraph 6 (b) of the commentary to article 38 to reply to the question of whether, as in the case of States (art. 38, para. 3), accused individuals should have the option to challenge the court's jurisdiction. Given that the objective of the draft statute is precisely to establish the international criminal responsibility of *individuals*, in the Swiss Government's view there can be no reason whatsoever to deny them this option.

14. Article 53 deals with applicable penalties. We note that the scale of penalties provided in this article is extremely flexible, ranging from imprisonment for a non-specified minimum term to life imprisonment, and that it authorizes fines of "any amount". It is true that in determining penalties, the court "may have regard to" (art. 53, para. 2) the criminal law of various States and aggravating or mitigating factors (article 54). Nevertheless, these rules seem to be too vague to do justice to the principle of *nulla poena sine lege*. Their clarity would be enhanced if article 53 provided that the trial chamber *must* (rather than "may") have regard to the penalties provided for in the national laws of the States in question.

15. Article 44, paragraph 1 (h), of the draft excludes the possibility of trials *in absentia*. According to the commentary to this provision, this possibility was excluded largely because of article 14 of the International Covenant on Civil and Political Rights, which requires the presence of the accused at the trial. The Commission has thus followed the precedent established for the International Tribunal for the Former Yugoslavia,<sup>3</sup> which has been denied the option of conducting trials *in absentia* for the same reason. This reason, however, does not appear to be decisive, at least in so far as a procedure would permit the convicted person to appeal on the grounds that he was tried *in absentia*. The key question is whether the power to try and to convict *in absentia* does not carry the risk of transforming the court into a totally ineffectual body. The Government of Switzerland believes that this is a very real danger and that article 44, paragraph 1 (h) should therefore be replaced by a provision which unconditionally prohibits trials *in absentia*.

<sup>3</sup> S/25704 (footnote 1 above), para. 101.

#### Part 5 (arts. 55 to 57)

16. Part 5 of the draft, entitled "Appeal and review", provides a recourse procedure for convicted individuals whose appeals are based on material errors of fact or of law, or on a manifest disproportion between the crime and the sentence (art. 55). While this provision should be maintained, it nevertheless raises a further problem.

17. International human rights instruments (International Covenant on Civil and Political Rights, art. 9, para. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, para. 4; American Convention on Human Rights, art. 7, para. 6) require national legislations to provide for recourse against arbitrary arrests. The draft articles should therefore authorize the introduction of an internal recourse procedure against arbitrary arrest when the aim is to bring a suspect before the court. The grounds on which such recourse may be based should, however, be strictly limited and largely procedural. Moreover, the time limits for the institution of recourse proceedings should be as short as possible.

#### Part 6 (arts. 58 to 64)

18. Lastly, part 6 of the draft lists important obligations in criminal matters for States parties to the statute of the future court, particularly in the following five areas: the location of persons; the taking of testimony; the production of evidence; the arrest and surrender of the accused; and the application of interim measures (arts. 58 to 63). Indeed, the cooperation thus contemplated between the national administrative and judicial authorities on the one hand and the court on the other seems to be essential in order to ensure the effective functioning of the court. In this connection, however, the draft fails to pronounce on the surrender of nationals (see article 63); this silence no doubt means that such surrender may be demanded by the court. However, certain countries refuse to extradite their nationals. Would it therefore not be preferable to determine the fate of the nationals of the State concerned by applying to it the principle of *aut dedere aut judicare*?

#### CONCLUSIONS

19. The preceding comments, which are based partly on the experience gained from the establishment of the International Tribunal for the Former Yugoslavia and partly on the problems that are currently being encountered in implementing its statute through national legal systems, are far from being exhaustive. They should not cause us to lose sight, however, of the fact that this thoughtful and valuable draft is also very timely. It therefore has the support of the Swiss Government. It is now important not to lose momentum and to take advantage of the keen interest which both States and the general public have shown in establishing an international criminal jurisdiction of a permanent nature.

20. We must act quickly and with determination. The Government of Switzerland sincerely hopes that the Commission will conclude its work on this topic during the course of its forty-sixth session (1994).

# DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 4]

DOCUMENT A/CN.4/460\*

## Twelfth report on the draft Code of Crimes against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur

[Original: French]  
[15 April 1994]

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### Multilateral instruments cited in the present report

	Source
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, p. 221.
International Pact on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, p. 171.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968)	<i>Ibid.</i> , vol. 754, p. 73.
American Convention on Human Rights (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, p. 123.



## Introduction

1. This report for the second reading of the draft Code of Crimes against the Peace and Security of Mankind will focus, this year, on the general part of the draft—definition, characterization and general principles.

2. Part II of the draft Code, concerning the crimes themselves, will be dealt with in the next report.

3. The Special Rapporteur intends to limit the list of such crimes to offences whose characterization as crimes against the peace and security of mankind is hard to challenge.

4. This report on part I of the draft reproduces, article by article, the draft adopted on first reading,<sup>1</sup> each article being followed by comments from Governments, then by the Special Rapporteur's comments. The observations of Governments are presented sometimes in full and some-

times partially, depending on their significance; more often than not, they are presented in full. With one or two exceptions, all the observations are reflected. When they are not, that is because, in the opinion of the Special Rapporteur, they seemed unrelated to the topic.<sup>2</sup>

5. Since most of the questions raised in the observations of Governments have already been dealt with at length in the Special Rapporteur's earlier reports and in a discussion in plenary meeting, the Special Rapporteur sees no point in restating the arguments and discussions for the second reading, and is content to refer back to earlier reports and to the Commission's discussions.

<sup>2</sup> The replies from Governments are reproduced *in extenso* in document A/CN.4/448 and Add.1. (*Yearbook . . . 1993, vol. II (Part One)*, pp. 59 et seq.) In the present report, paragraphs indicated in parentheses are the relevant paragraphs of Government observations as they appear in document A/CN.4/448 and Add.1.

<sup>1</sup> For the text, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94-107.

## Draft articles

### CHAPTER I. DEFINITION AND CHARACTERIZATION

#### Article 1

6. Article 1 adopted on first reading is as follows:

##### *Article 1 (Definition)*

**The crimes [under international law] defined in this code constitute crimes against the peace and security of mankind.**

##### *(a) Observations of Governments*

##### *Belgium*

7. The Belgian Government points out (para. 9) that:

it is not really necessary to choose between a conceptual definition and an enumerative list of crimes, since the two approaches are complementary. It is regrettable that no conceptual definition is given, since, whatever the difficulties involved in establishing such a definition, it remains true that the list of crimes must inevitably be based on it.

##### *Bulgaria*

8. Bulgaria proposes (para. 3) a general definition followed by an enumeration. The text would read as follows:

##### *"Article 1 (Definition)*

1. For the purposes of this Code, a crime against the peace and security of mankind is any act or omission committed by an individual, which is in itself a serious and immediate threat to the peace and/or security of mankind or results in violation thereof.

2. In particular the crimes defined in this Code constitute crimes against the peace and/or security of mankind."

##### *(b) Comments of the Special Rapporteur*

9. The observations of Governments on this article have focused essentially on whether a definition by enumeration would suffice or whether there should be a general definition instead.

10. These observations show that there is no agreement on any one method.

11. The compromise formula proposed by the Bulgarian Government might be adopted, subject to drafting improvements. Many penal codes contain no general definition of the concept of crime. They merely enumerate the acts regarded as crimes, on the basis of the criterion of seriousness.

12. Another topic of discussion raised by article 1 has to do with the words in square brackets "under international law". Ultimately, the Special Rapporteur has no objection to their deletion. This is a purely theoretical debate. Once the Code becomes an international instrument, the crimes defined therein would automatically come under international criminal law derived from treaties.

#### Article 2

13. Article 2 adopted on first reading is as follows:

*Article 2 (Characterization)*

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

*(a) Observations of Governments**Austria*

14. The Austrian Government takes the view (para. 3) that the idea expressed in the second sentence is not strictly necessary. It is "understood from the first sentence, according to which the characterization is independent of internal law".

*Brazil*

15. To the Government of Brazil (para. 4) there appears to be a contradiction between articles 2 and 3, inasmuch as article 2 envisages an act or omission, whereas article 3 refers only to the commission of an act, not to an omission.

*Costa Rica*

16. The Government of Costa Rica fears that the draft article, by providing for the complete autonomy of international law with regard to internal law, might permit a situation in which an accused person is tried twice for the same act, once under internal law and a second time under international law (para. 12).

*Nordic countries*

17. The Governments of the Nordic countries take the view that the provision in article 2 should be made less categorical, since the draft Code includes crimes normally punishable under internal law (para. 13).

*United Kingdom of Great Britain and Northern Ireland*

18. According to the Government of the United Kingdom (para. 6):

it is hardly conceivable that acts should be punishable pursuant to an international code which are not in general of a type punishable under national criminal law. It would appear that the drafters of the article had in mind that the perpetrator of an offence under a code may not be exonerated by virtue of the act not being criminal by the law of the place in which it was committed at the time of its commission.

*(b) Comments of the Special Rapporteur*

19. Article 2 establishes the autonomy of international criminal law with regard to internal law.

20. Thus the fact that a crime is characterized as murder by the internal law of a State would not preclude the characterization of the same act as genocide on the basis of the Code, if the constituent elements of genocide are present.

21. Some governments take the view that the second sentence of draft article 2 is redundant and therefore propose its deletion.

22. The Special Rapporteur has no objection to such deletion.

## CHAPTER II. GENERAL PRINCIPLES

## Article 3

23. Article 3 adopted on first reading is as follows:

*Article 3 (Responsibility and punishment)*

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in arts. . . ] is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.

*Comments of the Special Rapporteur*

## 1. EXPLANATORY REMARKS

24. Article 3 sets forth the principle of international criminal responsibility of the individual, a principle now accepted in international criminal law since the Judgment of the Tribunal at Nürnberg.<sup>3</sup>

25. Paragraph 3 of this article prompted reservations on the part of some members of the Commission, who noted—and quite pertinently—that the concept of attempt is not applicable to all crimes against the peace and security of mankind. It is difficult to imagine, for example, how there can be an attempted threat of aggression.

26. Nevertheless, there are cases where attempt is expressly covered by existing conventions, e.g. the Convention on the Prevention and Punishment of the Crime of Genocide (art. III, para. (d)).

27. That is why members of the Commission had proposed a case-by-case determination of the relevant crimes to which the concept of attempt might apply. Such an exercise is impossible and pointless. As the Government of Belarus remarks (para. 6), it is not advisable

to consider every crime with a view to determining whether the characterization of attempt is applicable to it; the competent courts should have the right to decide for themselves whether this characterization is applicable to the specific content of cases before them.

<sup>3</sup> United Nations, *Statute and Judgment of the Nürnberg Tribunal, History and Analysis, memorandum of the Secretary-General* (Sales No. 1949.V.7).

## 2. PROPOSAL OF THE SPECIAL RAPPORTEUR

28. The Special Rapporteur agrees. He proposes, however, a rewording of the first sentence of paragraph 3. The words "a crime against the peace and security of mankind" should be replaced by "one of the acts defined in this Code". The paragraph would therefore read as follows:

"An individual who commits an act constituting an attempt to commit one of the acts defined in this Code is responsible therefor and is liable to punishment."

29. In this way, the act is punishable only if the court considers that it actually constitutes an attempt.

## Article 4

30. Article 4 adopted on first reading is as follows:

*Article 4 (Motives)*

Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime.

**(a) Observations of Governments**

31. For some governments, it would be more appropriate to include this provision in article 14, which deals with defences and extenuating circumstances.

*Austria*

32. The Austrian Government thinks (para. 7) that motives should be taken into account as aggravating or extenuating circumstances.

*Costa Rica*

33. According to the Government of Costa Rica (para. 21), this provision goes too far. "Respect for justice begins with respect for the accused. It is therefore essential not to hinder the defence but instead to pave the way for solutions."

*Netherlands*

34. In the opinion of the Government of the Netherlands (para. 35), this article is redundant, as the same points are covered in article 14, which deals with extenuating circumstances.

*United Kingdom*

35. The Government of the United Kingdom (para. 9) thinks that "this provision would be more appropriately located as part of article 14".

**(b) Comments of the Special Rapporteur**

## 1. EXPLANATORY REMARKS

36. This article has prompted many reservations.

37. For some Governments, it interferes with the rights of the defence, in so far as it prohibits the accused from invoking his own motives in his defence. That is the opinion of the Government of Costa Rica.

38. For the Government of the United Kingdom, the text would be better placed in the draft article on extenuating circumstances. That is also the opinion of the Government of the Netherlands.

## 2. PROPOSAL OF THE SPECIAL RAPPORTEUR

39. The Special Rapporteur thinks that this article should be deleted. It is not clear. Sometimes the motive is part of the definition of an offence, sometimes it is not. In the case of genocide, for example, the motive is an element of the offence. Indeed, with the crime of genocide, the perpetrator is prompted by racial, political or religious motives. In the absence of such motives, that offence does not exist. There are, however, cases where the motive is not an integral part of the definition of the offence.

40. In the opinion of the Special Rapporteur, this article should simply be deleted.

## Article 5

41. Article 5 adopted on first reading is as follows:

*Article 5 (Responsibility of States)*

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

**(a) Observations of Governments***Belgium*

42. According to the Belgian Government (paras. 15 and 16):

There ought to be an article in the Code dealing with the question of the international responsibility of States. The State as such is inevitably involved in any crime against the peace and security of mankind, either directly as the active and, in some cases, the sole agent, or indirectly because of its failure to act or its own improvidence. It therefore seems unusual that State responsibility should not have been dealt with in the Code. It should also be noted that inclusion of State responsibility in the Code would make it possible to provide a sound juridical basis for the granting of compensation to the victims of crimes and other eligible parties.

Moreover, holding the State responsible for crimes, independently of the responsibility of the Government and agents of the State, would mean that the nation would feel some collective involvement in the act in question, thereby making it difficult for the nation to lay all the blame on the Government, on which it has conferred political power.

*Costa Rica*

43. The Government of Costa Rica (para. 22) finds this draft article necessary in terms of “damages in connection with the crimes under consideration”.

*Nordic countries*

44. The Nordic countries express the same opinion (para. 16) and refer to the need to “ensure that States are not relieved of responsibility for war reparations, and the like”.

*Poland*

45. That is also the opinion of the Polish Government (para. 28):

Prosecution, conviction and punishment of individuals under the provisions of the Code for the crimes described therein are in no way a substitute for the State’s responsibility.

**(b) Comments of the Special Rapporteur**

46. Article 5 sets forth the principle of the international responsibility of a State for damage caused by its agents as a result of a criminal act committed by them. The text has elicited no unfavourable comments. Governments all agree that a State should be held internationally liable for damage caused by its agents as a result of a criminal act committed by them.

47. A single criminal act often has dual consequences: criminal consequences, namely the penalty imposed on the perpetrator, and civil consequences, namely the obligation to compensate for the damage. Very often, the perpetrators of the crimes under consideration here are agents of a State acting in an official capacity. In such cases, State responsibility must be determined, especially as the scope and extent of the damage far exceed the resources for reparation available to the agents of the State who committed the crimes.

48. Accordingly, article 5 is useful and should be retained.

**Article 6**

49. Article 6 adopted on first reading is as follows:

*Article 6 (Obligation to try or extradite)\**

1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 do not prejudice the establishment and the jurisdiction of an international criminal court.

\* This article will be reviewed if an international criminal court is established.

**(a) Observations of Governments***Australia*

50. The Australian Government notes (para. 9 and 10) that:

The obligation to “try or extradite” is to be found in many multilateral conventions dealing with crimes in international law and is of fundamental importance to the enforcement of these conventions. The need to incorporate it in the Code is unquestionable.

51. That Government considers, however, that it might be necessary to specify the grounds on which extradition could be sought and to establish procedural rules.

52. The Government also takes the view that the draft does not solve the problem of priority when there is more than one request for extradition.

*Brazil*

53. The Brazilian Government stresses the need for sufficient evidence to support the request for extradition (para. 8).

*Costa Rica*

54. The Government of Costa Rica also stresses the need for adequate guarantees in support of the request for extradition (para. 25).

*Netherlands*

55. The Government of the Netherlands takes the view (para. 37) that it is essential to provide sufficient guarantees that the suspect will be treated in accordance with the provisions of article 8 of the Code. The Government indicates that this could be achieved either by adding a clause which explicitly prohibits extradition if the requesting State fails to provide the guarantees described in article 8, or by adding to article 6 the phrase “subject to the guarantees provided for in article 8”.

*United Kingdom*

56. The Government of the United Kingdom also notes that the principle set forth in article 6, paragraph 1, is found in many international conventions. According to that Government, however, the principle should be limited to States parties to the Code (para. 12).

57. With regard to paragraph 2, the Government refers to the difficulty encountered by the Commission in allocating priorities when extradition is sought by a number of States. According to that Government, priority is usually given to the State in whose territory the crime was committed.

58. It notes, however, that

realistically, the likelihood of any provision proving workable where extradition is sought for senior government or military figures from the State in which they have carried out their official acts is remote.

59. Lastly, the Government of the United Kingdom draws attention to the problem that arises where extradition is sought with no real intention to prosecute.

#### *Switzerland*

60. In common with the Government of the United Kingdom, the Swiss Government is concerned at the situation created when there are several extradition requests (para. 8).

#### *Uruguay*

61. The Government of Uruguay links the application of article 6 to the establishment of an international criminal jurisdiction (para. 3).

### **(b) Comments of the Special Rapporteur**

62. Governments do not challenge the principle set forth in article 6, but are concerned at how it might be applied.

63. One point relates to the guarantees to be provided to the accused whose extradition is being requested. That point was dealt with carefully in the Commission's report on the establishment of an international criminal jurisdiction.<sup>4</sup> In this connection, the formula adopted in the draft statute for an international criminal court should be used in the Code.

64. A second point has to do with the scope of the rule set out in article 6. According to some States, the rule should apply only to States parties to the Code. That view deserves favourable consideration.

65. A third point concerns the order of priority when there are several requests for extradition.

66. The principle of territoriality of criminal law is unanimously accepted and, accordingly, the request of the State where the crime was committed must have priority; nevertheless, this rule should not be considered absolute. As pointed out by some Governments, including the British and Swiss Governments, the rule gives rise to reservations when the State where the crime was committed bears some responsibility in its commission.

67. That rule might also prompt reservations if an international criminal court existed.

68. Can a request by a State in whose territory the crime was committed have priority over a request by an international criminal jurisdiction?

69. The answer must be in the negative.

#### **Article 7**

70. Article 7 adopted on first reading is as follows:

<sup>4</sup> *Yearbook* . . . 1993, vol. II (Part Two), document (A/48/10), annex.

### **Article 7 (Non-applicability of statutory limitations)**

No statutory limitation shall apply to crimes against the peace and security of mankind.

### **(a) Observations of Governments**

#### *Costa Rica*

71. According to the Government of Costa Rica (paras. 27 and 28), "the issue of statutory limitations is one of policy regarding crime, and . . . States do not follow uniform rules in this respect; . . . the monstrosity of these types of crimes would 'morally' justify the non-applicability of statutory limitations; however, the contemporary legal trend is towards short statutory-limitation periods". For the Government of Costa Rica, however, the solution would be the establishment of a "statutory-limitation period to be negotiated with countries on the basis of the longest such limitation periods for ordinary crimes in internal law".

#### *Netherlands*

72. For the Government of the Netherlands, the acceptability of the provision depends largely on the crimes to be included in the Code; the rule on non-applicability of statutory limitations can be accepted only if the crimes are serious enough to justify that provision (para. 39).

#### *Nordic countries*

73. The Nordic countries also take the view (para. 18) that non-applicability of statutory limitations might be acceptable in regard to the most serious crimes, but is "much more doubtful in those cases where conflicting national criminal laws prescribe statutory limitation after a certain period of time".

#### *Paraguay*

74. The Government of Paraguay proposes, in place of non-applicability of statutory limitations, the establishment of a time limit longer than that applicable to common crimes.

#### *Poland*

75. For the Polish Government (para. 30):

the provision providing that no statutory limitation shall apply to crimes against the peace and security of mankind is direct evidence that these crimes are primarily crimes of international law, determined and constituted by this law.

#### *Turkey*

76. The Government of Turkey proposes "perhaps a relatively extensive" statute of limitations (para. 5).

*United Kingdom*

77. For the Government of the United Kingdom, "the suggested rule could hamper attempts at national reconciliation and the granting of amnesty for crimes".

**(b) Comments of the Special Rapporteur****1. EXPLANATORY REMARKS**

78. The foregoing observations demonstrate that the rule of non-applicability of statutory limitations is not universally accepted by States.

79. This rule is of recent date. It emerged after the Second World War, on the initiative of the United Nations, in the form of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and General Assembly resolution 3074 (XXVIII), concerning the principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. Paragraph 1 of the resolution states that such crimes must be prosecuted "whenever committed".

80. However, those instruments are limited in scope, since they cover only war crimes and crimes against humanity. It would seem difficult to extend the rule to all other crimes covered by the Code.

**2. PROPOSAL OF THE SPECIAL RAPPORTEUR**

81. In the circumstances, the Special Rapporteur considers that article 7 of the draft Code should be deleted. Only general rules applicable to all crimes against the peace and security of mankind should be included in the Code. The rule set forth in draft article 7 does not appear to be applicable to all the crimes listed in the Code, at least according to the terms of existing conventions.

**Article 8**

82. Article 8 adopted on first reading is as follows:

*Article 8 (Judicial guarantees)*

An individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to both the law and the facts. In particular: he shall be presumed innocent until proven guilty, and he has the right:

(a) in the determination of any charge against him, to have a fair and public hearing before a competent, independent and impartial tribunal duly established by law or by treaty;

(b) to be informed promptly and in detail, in a language that he understands, of the nature and cause of the charge against him;

(c) to have sufficient time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) to be tried without undue delay;

(e) to be present at his trial and to defend himself in person or through legal assistance of his own choosing; to be informed if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) not to be compelled to testify against himself or to confess guilt.

**(a) Observations of Governments***Australia*

83. Australia believes that this article "provides the minimum guarantees necessary to ensure that an alleged offender would receive a fair trial" (para. 12).

*Austria*

84. The Government of Austria is "in general agreement with the substance of this provision, which essentially corresponds to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms" (para. 8).

*Brazil*

85. The Government of Brazil suggests (para. 10) that:

subparagraphs (c) and (g) of this article should be improved. In fact, the right of an individual charged with a crime to communicate with counsel of his own choosing should be extended to the counsel assigned to him ...

*Costa Rica*

86. The Government of Costa Rica, invoking the American Convention on Human Rights, asserts that "in Costa Rica, even if draft article 8 did not exist, the Convention and the constitutional rules of due process would be applied" (para. 29).

*Netherlands*

87. The Government of the Netherlands also ascribes great importance to the guarantees set forth in article 8.

**(b) Comments of the Special Rapporteur**

88. Article 8 has garnered a broad consensus. It conforms to the provisions of the Universal Declaration of Human Rights<sup>5</sup> and the International Covenant on Civil and Political Rights.

**Article 9**

89. Article 9 adopted on first reading is as follows:

<sup>5</sup> General Assembly resolution 217 A (III).

*Article 9 (Non bis in idem)*

1. No one shall be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.\*

2. Subject to paragraphs 3, 4 and 5, no one shall be tried or punished for a crime under this Code in respect of an act for which he has already been finally acquitted or convicted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by an international criminal court or by a national court for a crime under this Code if the act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

(a) if the act which was the subject of the previous judgement took place in the territory of that State; or

(b) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

\* The reference to an international criminal court does not prejudice the question of the establishment of such a court.

*(a) Observations of Governments**Australia*

90. In the view of the Government of Australia (paras. 14-16), paragraph 1 provides for full protection against prosecution for crimes under the Code where persons have already been finally acquitted or convicted by an international criminal court.

91. Paragraph 2, however, provides for a more limited protection against "double jeopardy" in the case where a person has already been finally acquitted or convicted by a national court. However, the protection offered in paragraph 2 is made subject to exceptions contained in paragraphs 3 and 4.

92. Paragraph 3 envisages that a person can be tried both under the Code and under the domestic criminal law of a State. Although such cases may not be common, they certainly would weaken the concept of "double jeopardy", which is a fundamental principle of the criminal law of many countries.

*Costa Rica*

93. In the view of the Government of Costa Rica (para. 32), paragraph 3 "directly violates the *non bis in idem* principle and should be deleted". Paragraph 5 "should also be eliminated, since it allows for a second conviction for acts already punished as ordinary crimes" (para. 34).

*Netherlands*

94. The Government of the Netherlands (para. 42) considers paragraph 3 of the draft article incompatible with the principle of *non bis in idem*.

95. Furthermore, it considers (para. 44) that:

problems relating to the principle of *non bis in idem* can only be prevented by granting exclusive competence to an international criminal court. In any other circumstances, this principle would raise problems.

*United Kingdom*

96. The Government of the United Kingdom (para. 15)

reserves its position on this proposal, which at first sight conflicts with the corresponding provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

*(b) Comments of the Special Rapporteur*

## 1. GENERAL COMMENTS

97. The foregoing observations by governments indicate that they have entered many reservations to article 9.

98. In view of the objections it raised in the Drafting Committee, the article represents a compromise between two opposing schools of thought.

99. One school of thought endorses the principle of *non bis in idem* and supports its incorporation in the draft Code, while the other opposes its incorporation. It then becomes evident that there are many exceptions to the principle set forth in paragraph 1. Two assumptions can be made: (a) the decision is rendered by an international criminal jurisdiction, or (b) it is rendered by a national jurisdiction.

## 2. FIRST ASSUMPTION: AN INTERNATIONAL CRIMINAL COURT IS IN EXISTENCE

*(a) Explanatory remarks*

100. The assumption under which the *non bis in idem* principle is most likely to be accepted is that of the existence of an international criminal tribunal.

101. In the event that this tribunal has exclusive jurisdiction, the question of the applicability of the *non bis in idem* principle would not arise since in that case—purely hypothetical at this point—no other court would be competent to hear a case that falls within the competence of an international criminal court.

102. If, on the contrary, the international jurisdiction has concurrent jurisdiction with national jurisdictions, the *non bis in idem* rule would be relevant since it might raise the question whether a national court has jurisdiction over a case that has already been tried by the international criminal court.

103. The answer has to be no; it would destroy the authority of the international court if national courts had jurisdiction over cases already tried under that international jurisdiction.

(b) *New text of article 9 proposed by the Special Rapporteur*

104. Article 9 might be modelled after draft article 10 of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991<sup>6</sup> and would read as follows:

“1. No person shall be tried before a national court for acts constituting crimes against the peace and security of mankind for which he or she has already been tried by an international tribunal.

2. A person who has been tried by a national court for acts constituting crimes against the peace and security of mankind may be subsequently tried by the International Tribunal only if:

(a) The act for which he or she was tried was characterized as an ordinary crime and not as a crime against the peace and security of mankind;

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not vigorously prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Code, the Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.”

3. SECOND ASSUMPTION: AN INTERNATIONAL CRIMINAL TRIBUNAL DOES NOT EXIST

105. If there is no international criminal tribunal, it becomes much more difficult to apply the *non bis in idem* principle to decisions already handed down by a national court. Consequently, paragraph 2 allows for many exceptions to the application of the *non bis in idem* principle.

106. The first exception is the case of incorrect characterization of the crime. This exception is not merely theoretical; an act might be characterized as an ordinary crime—homicide, for example—whereas it actually constituted a crime against the peace and security of humanity, such as genocide.

107. This incorrect characterization might be voluntary and prompted by sympathy for the alleged perpetrator of the crime. This might occur where an individual who is being prosecuted takes refuge in a friendly State or one he finds politically compatible. That State may then agree to bring him to trial and the *non bis in idem* principle will prevent him from being tried under any other national jurisdiction. In that case, application of this principle would open the door to manipulation and create loop-

holes, making it difficult to apply the *non bis in idem* principle fairly and faithfully.

108. But the most important exceptions are those provided for in paragraph 4 because they uphold the authority of the State in whose territory the crime was committed or the State that was the victim or whose nationals were victims. Being subject to these exceptions, the scope of applicability of the *non bis in idem* principle can be expected progressively to shrink. Moreover there is no guarantee that those States would demonstrate greater objectivity or impartiality than the ones whose ruling they question.

109. It is the view of the Special Rapporteur that if exceptions are to be made in support of the State in whose territory the crime was committed or the State whose nationals were victims, those States should not be empowered to try a case in their own courts which has already been tried by another national court. Such cases should be retried in the court of a neutral State.

110. On the other hand, that solution would be difficult to carry out. That is why the Special Rapporteur finds that the *non bis in idem* principle appears to be applicable only under the first of the above assumptions, that is, provided an international criminal tribunal exists.

Article 10

111. Article 10 adopted on first reading is as follows:

*Article 10 (Non-retroactivity)*

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

(a) *Observations of Governments*

*Netherlands*

112. In the view of the Government of the Netherlands, the expression “in conformity with international law” should be deleted (para. 45).

*Paraguay*

113. The Government of Paraguay states (para. 10) that non-retroactivity

is a cardinal principle of the legal order and it is dangerous to permit exceptions to it. Paraguay believes, therefore, that paragraph 2 of this article should be deleted.

The Government of Paraguay is also concerned that the commentary on the article gives the word “lex” a very broad meaning, encompassing not only written law but also custom and general principles of law.

<sup>6</sup> S/25704, annex.



*Turkey*

114. The Turkish Government believes that paragraph 2 sets forth a principle which is “among the basic principles of criminal law and should be made use of in the draft” (para. 6).

**(b) Comments of the Special Rapporteur**

115. Paragraph 1 has not given rise to any objections on the part of Governments. It reaffirms a basic principle of criminal law.

116. Only one Government objected to paragraph 2. It should be recalled that this paragraph merely reproduces the text of article 11 of the Universal Declaration of Human Rights and article 15, paragraph 2, of the International Covenant on Civil and Political Rights. It would be desirable to retain the text in its entirety.

**Article 11**

117. Article 11 adopted on first reading is as follows:

*Article 11 (Order of a Government or a superior)*

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order.

**(a) Observations of Governments***Austria*

118. The Austrian Government proposes (para. 13) inserting the following words after the word “if” in the third line: “. . . he knew or should have known of the illegality of the order and if . . .”.

*Belarus*

119. The Government of Belarus proposes (para. 12) that the words “if, in the circumstances at the time, it was possible for him not to comply with that order” should be replaced by the words “if, in that situation, he had a genuine possibility of not carrying out the order”.

*Costa Rica*

120. The Government of Costa Rica notes (para. 37) that under the article,

the possibility of punishment arises only where an order which is blatantly illegal or in violation of human rights has been carried out by a subordinate agent of the State.

The Government proposes that the draft penal code for Spain (1992) should be used as a model.

*Nordic countries*

121. In the view of the Nordic countries (para. 21), the word “possible” must be more clearly defined.

*Poland*

122. The Polish Government also has doubts (para. 36) about the meaning of the expression “if, in the circumstances at the time, it was possible for him not to comply with that order”.

**(b) Comments of the Special Rapporteur**

123. This principle has already been affirmed in the Principles of International Law Recognized in the Charter and Judgement of the Nürnberg Tribunal (Principle IV).<sup>7</sup> The Commission has merely replaced the expression “provided a moral choice was in fact possible to him” by the expression “if, in the circumstances at the time, it was possible for him not to comply with that order”.

124. This principle, which was elaborated by ILC and adopted by the General Assembly, should not be called into question without good reason.

**Article 12**

125. Article 12 adopted on first reading is as follows:

*Article 12 (Responsibility of the superior)*

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

**(a) Observations of Governments***Nordic countries*

126. In the view of the Nordic countries (para. 22):

This provision, which concerns a superior's failure to attempt to prevent a criminal act, goes further in terms of criminalizing such failure than is acceptable in the Nordic countries. In order for such responsibility to exist, it is generally required that the substantive provisions give rise to an obligation to act on the part of the person who has omitted to act. Moreover, it may be difficult to reconcile the provision with the definition of individual responsibility set out in article 3.

**(b) Comments of the Special Rapporteur**

127. Article 12 establishes a presumption of responsibility on the part of the superior for crimes committed by his subordinates. This presumption of responsibility

<sup>7</sup> Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316), pp. 12 et seq. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

derives from the jurisprudence of the international military tribunals established after the Second World War to deal with crimes committed during the war and to which the Special Rapporteur referred at some length in his fourth report.<sup>8</sup> This jurisprudence is based on a presumption of responsibility on the part of the superior owing to negligence, failure to supervise or tacit consent, all of which are offences that make the superior criminally responsible for crimes committed by his subordinates.<sup>9</sup>

## Article 13

128. Article 13 adopted on first reading is as follows:

### *Article 13 (Official position and responsibility)*

**The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.**

#### **(a) Observations of Governments**

##### *Costa Rica*

129. The Costa Rican Government believes (para. 39) that:

all systems of immunity appear to be excluded by this article; however, account should be taken, as a rule of penal procedure, of the various cases in which these types of government officials can be prosecuted, rather than leaving it as a rule in principle which, as such, could be inapplicable.

##### *Nordic countries*

130. The Nordic countries consider (para. 23) that:

it must be presumed that even heads of State cannot be absolved of international responsibility for their acts if these acts constitute a crime

<sup>8</sup> See *Yearbook . . . 1986*, vol. II (Part One), pp. 53 et seq., document A/CN.4/398.

<sup>9</sup> In the *Yamashita Case*, it is stated, *inter alia*, that:

"the question then is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the Law of War . . ."

(*Law Reports of Trials of War Criminals* (15-volume series prepared by United Nations War Crimes Commission) (London, H.M. Stationery Office, 1947-1949), vol. IV, p. 43).

In the *High Command Case*, it is stated that responsibility does not automatically attach to a commander for all acts of his subordinates; there must be an unlawful act on his part or a failure to supervise his subordinates constituting criminal negligence on his part.

The commander must have had knowledge of these offences and must have acquiesced or participated or have criminally neglected to interfere in their commission (*ibid.*, vol. XV, p. 70).

Likewise, the judgement delivered in the Tokyo Trial includes an interesting passage on responsibility for offences against prisoners of war, which shows that the International Military Tribunal for the Far East also was willing to postulate a duty on the part of a superior to find out whether offences were being committed by his subordinates.

"It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes" (*ibid.*, vol. XV, p. 73).

against the peace and security of mankind. This must apply even if the constitution of a particular State provides otherwise.

##### *Poland*

131. In the view of the Polish Government (para. 37):

the provisions [of article 13] do not recognize any kind of immunity with respect to the position or office of an individual who commits a crime, including persons that are heads of State or Government. It is a serious but logical and reasonable limitation of the full immunity of heads of State. Such immunity cannot be a measure which would allow them to be over and outside criminal responsibility for crimes against the peace and security of mankind.

##### *United Kingdom*

132. The Government feels (para. 17) that

it is obviously important for the effective implementation of the Code that officials, including heads of State or Government, are not relieved of criminal responsibility by virtue of their official position. However, the Commission has failed to address here, and in article 9, the possible immunity of such officials from judicial process. The Commission should consider the immunity from jurisdiction to which officials may be entitled under international law, and to consider the relationship of this draft with existing rules on the subject.

#### **(b) Comments of the Special Rapporteur**

133. The opinion of the Government of Costa Rica does not appear to be acceptable.

134. It is difficult to provide in detail for the various cases in which heads of State or Government should be prosecuted. What can be said is that whenever a head of State or Government commits a crime against the peace and security of mankind, he should be prosecuted. Article 13 should be retained as it stands.

## Article 14

135. Article 14 adopted on first reading is as follows:

### *Article 14 (Defences and extenuating circumstances)*

**1. The competent court shall determine the admissibility of defences under the general principles of law in the light of the character of each crime.**

**2. In passing sentence, the court shall, where appropriate, take into account extenuating circumstances.**

#### **(a) Observations of Governments**

##### *Australia*

136. The Government of Australia believes (para. 18) that:

an effort should be made to elucidate the reference to "defences under general principles of law" in paragraph 1 of article 14. If the Code is to deal with some essential ingredients of a crime—penalties for example—then it should also deal with other necessary incidents such as defences. In systems with constitutional guarantees of due process, draft article 14 may well be held to be unconstitutionally vague.

137. The Government of Australia also believes (para. 19) that:

consideration should be given to separating article 14 into two articles, one dealing with defences and the other dealing with extenuating circumstances. As noted by some members of the Commission, defences and extenuating circumstances are two different concepts best treated separately.

#### *Austria*

138. The Austrian Government points out (para. 14) that:

This article deals with two different principles: the need to take into account circumstances excluding criminal responsibility (para. 1) and extenuating circumstances (para. 2). The latter principle (as well as aggravating circumstances) comes into play by determining the extent of the penalty applicable to the perpetrator of a crime but has nothing to do with criminal responsibility.

139. The Austrian Government (paras. 15 and 16)

does not share the negative attitude of some members of the Commission towards taking into account reasons for exemption from punishment (i.e. plea of insanity) with regard to crimes against the peace and security of mankind. Paragraph 2 should be completed by mentioning aggravating circumstances, which are also to be taken into account in determining the extent of penalty. It shares the view of some members of the Commission regarding the insertion of a descriptive enumeration of possible extenuating (and aggravating) circumstances.

#### *Belarus*

140. The Government of Belarus points out (para. 13) that:

the Russian version of article 14 should refer to circumstances attenuating responsibility rather than circumstances attenuating guilt. Moreover, this article should be divided into separate articles, since paragraphs 1 and 2 refer to different legal concepts. In the article referring to the grounds which would allow for adjustability of the penalty, these grounds should be specified and should include self-defence, state of necessity, coercion and bona fide confusion. The possibility of applying them to each type of crime could be left for the court to consider.

141. The Belarusian Government states (paras. 14 and 15) that:

the question of extenuating circumstances can be considered in conjunction with the question of penalties. It would be preferable to formulate a general article on penalties for all crimes, establishing the minimum and maximum penalties and listing the extenuating circumstances. An alternative to including a scale of penalties, in the event that the provisions of the Code are applied by national courts, could be to require that the crimes should be punished in a manner commensurate with their extreme danger and gravity.

The list of extenuating circumstances could be indicative in nature and could include, in particular, the commission of a crime under duress, on the order of a superior; and sincere remorse or acknowledgment of guilt.

142. The Government of Belarus finds it commendable (para. 16) that:

the draft Code refrains from drawing a distinction between crimes against peace, war crimes and crimes against humanity . . . care should be taken to avoid distinguishing between crimes on the basis of State participation at the stage of formulating substantive legal provisions. The criterion of State participation will be of crucial importance at a later stage when the mechanism for implementing the Code is worked out.

#### *Belgium*

143. According to the Belgian Government (paras. 17 and 18),

the concept of defences, as provided for under draft article 14, would appear difficult to apply to crimes against the peace and security of mankind. The question thus arises whether it would be preferable to delete article 14. Hypothetically, a judge could invoke the general principles of criminal law, such as extenuating circumstances, when having to assess the situation in which the crime\* was perpetrated\*.

#### *Brazil*

144. The Government of Brazil notes (para. 12) that:

as far as article 14 is concerned, what is stated about "defences and extenuating circumstances under the general principles of law" seems to be insufficient. The provisions are somewhat vague since it is difficult, based only upon "the general principles of law", to indicate which circumstances should be taken into account. As a matter of fact, the great number of provisions of a broad scope seems to be one of the most difficult problems hampering the Commission's effort to codify. As far as the draft is concerned, criminal law, by its own nature and the values involved, requires a greater level of definition and demands a more detailed regulation.

#### *Costa Rica*

145. According to the Government of Costa Rica (para. 40),

if a more technical formulation of the need for judges to evaluate such circumstances is desired, it is necessary to draft a generic rule concerning the aspects which should be taken into account in apportioning blame, as is done in article 71 of the Costa Rican Penal Code.\* In any case, even though this article takes many defences and extenuating circumstances into account for this purpose, while penal characterization can take into account the existence of qualifying aspects which influence the extent of the penalty on the basis of the same indictment, thereby reducing the extent of the judge's discretion, it is a decision relating to policy regarding crime which needs to be evaluated.

#### *Nordic countries*

146. The Nordic countries consider (paras. 24 to 26) that:

paragraphs 1 and 2 should be placed in separate articles because there is a fundamental difference between circumstances that absolve a perpetrator of responsibility for an act and circumstances that have a bearing on the sentence.

As the article is currently worded, it gives no indication of the circumstances to be taken into account when trying a crime. Thus, any court is free to interpret the provision, which is hardly in conformity with the rule of law. The Nordic countries deem it appropriate to determine the significance of self-defence and state of necessity. The problem of consent may also arise in various contexts.

Furthermore the draft Code includes two other articles (arts. 11 and 13) that deal with grounds on which a perpetrator may be relieved of responsibility. These should be combined with article 14. One way of doing this could be to enumerate the circumstances that exempt an individual from accountability, and those that do not. The circumstances set out in articles 11 and 13 of the current draft would then be among those that do not in any case relieve of accountability.

147. The Nordic countries note further (para. 27) that:

another problem with the draft is that it does not include any provisions that govern cases in which a perpetrator is insane or otherwise unaccountable for his actions at the time of committing the act.

148. It is the view of the Nordic Governments (para. 28) that article 14, paragraph 2

should also govern aggravating circumstances. Moreover, it is necessary to define and exemplify what is meant by the terms "extenuating" and "aggravating" circumstances, as the provision in its present wording is practically without substance.

#### Poland

149. With regard to paragraph 1, the Government of Poland would like to underscore (para. 38) that:

this paragraph includes traditional criminal law defences such as self-defence, coercion, state of necessity, *vis maior* and error—all related to the existence or non-existence of responsibility. Extenuating and maybe other kinds of circumstances, which might be taken into account by the Commission in the second reading, determine only the increasing or the lowering of the penalty.

150. In the opinion of the Polish Government (para. 39):

paragraph 2 should be supplemented by adding "aggravating circumstances" and also "other circumstances" such as, for example, the personality of the offender, the gravity of the effects of the crime and others, as the case may be.

#### Paraguay

151. The Government of Paraguay notes (para. 11) that article 14, paragraph 1, provides that:

the competent court shall determine the admissibility of defences under the general principles of law in the light of the character of each crime.

152. It is that Government's opinion that:

defences (justifications, grounds for inculpability and for non-imputability) are so important a matter in penal law that to refer to "general principles of law", thereby leaving a great deal to the judge's discretion, seems inappropriate. It would be wiser, if we do not wish to spell out the grounds for the defence, to refer to the laws of the country in which the crime was committed.

#### Switzerland

153. The Swiss Government (para. 9) is of the view that:

the notion of combining in a single article two basic concepts of penal law which are as alien to each other as defences and extenuating circumstances would appear to be questionable. The effect of a defence is to strip the act of its unlawful character on the ground that the perpetrator did not act knowingly and wilfully. In short, responsibility, which is the prerequisite for punishment, is lacking. Extenuating circumstances, by contrast, do not strip the act of its unlawful character; they simply moderate its penal consequences. It would therefore be advisable to envisage two separate provisions.

#### United Kingdom

154. The Government of the United Kingdom notes (para. 18) that:

it is clearly undesirable to leave vague a provision so vital both to the conceptualization of a crime against the peace and security of mankind and to the rights of the defendant. The more grave the crime, the less likely it is that a wide panoply of defences and extenuating circumstances will be permitted. If, as currently envisaged under article 6, it is national courts which will have jurisdiction under the Code, article 14

needs to be redrafted. National courts cannot be left to delineate defences and extenuating circumstances which will be admitted under the Code. Fairness and consistency would be entirely lost. It is symptomatic of the haste and lack of precision with which these articles have been drafted that paragraph 1 leaves open the possibility of defences to match specific crimes without any attempt at enumeration. Separate enumeration would be the better approach; although certain general defences will apply to all crimes, it is difficult to conceive of "blanket defences" which will adequately cover the circumstances of each and every crime set out in part II.

### (b) Comments of the Special Rapporteur

#### 1. EXPLANATORY REMARKS

155. The Special Rapporteur agrees with those governments that believe that the concept of defences and that of extenuating circumstances should be dealt with separately. The two concepts are not in the same category. While defences strip an act of its criminal character, extenuating circumstances do not remove this criminal character, but merely reduce the offender's criminal responsibility. In other words, defences relate to the existence or non-existence of a crime, extenuating circumstances relate to the penalty.

156. The Special Rapporteur shares the view that defences, because they seek to prove that no crime exists, should be defined in the Code in the same way that crimes are defined in the Code according to the *nullum crimen sine lege* principle.

157. The Special Rapporteur has therefore proposed a new article 14 to deal with the issue of defences, namely, *self-defence, coercion and state of necessity*.

#### 2. NEW TEXT PROPOSED BY THE SPECIAL RAPPORTEUR

158. The Special Rapporteur proposes a new text for article 14 which reads as follows:

#### "Article 14 (Self-defence, coercion and state of necessity)"

There is no crime when the acts committed were motivated by self-defence, coercion or state of necessity."

#### 3. COMMENTS ON THE PROPOSED NEW DRAFT ARTICLE 14

159. The self-defence referred to here is not related to the international responsibility of the State provided for in Article 51 of the Charter of the United Nations, which exempts the State from international responsibility for an act committed by that State in response to an aggression. However, because it makes that exception to the international responsibility of the State, self-defence also relieves the leaders of that State of international criminal responsibility for that act. As for the concepts of coercion and state of necessity, the juridical precedents of the International Military Tribunals established by the Charter of the Nürnberg Tribunal<sup>10</sup> and by law No. 10 of the Allied

<sup>10</sup> Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

Control Council,<sup>11</sup> had admitted these concepts with the following reservations and conditions:

(a) Coercion and state of necessity must constitute a present or imminent danger.<sup>12</sup>

(b) An accused person who invokes coercion or state of necessity must not have helped, by his own behaviour, to bring about coercion or the state of necessity.<sup>13</sup>

(c) There should be no disproportion between what was preserved and what was sacrificed in order to avert the danger.<sup>14</sup>

<sup>11</sup> Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, Military Government Legislation (Berlin, 1946)).

<sup>12</sup> The requirement regarding the imminence of danger was affirmed by the German Federal Court, which stated that "the order of a superior may constitute the moral coercion provided for in paragraph 52 of the German penal code, but that presupposes that the perpetrator was coerced to commit the act under the threat of imminent danger. The meaning of paragraph 52 is not that all those who served crime and terror under the national socialist regime for many years of their own volition can escape responsibility by simply claiming that they feared for their physical integrity and their life had they refused to continue to participate in criminal acts" (*Bundesgerichtshof*, 14 October 1952, *Neue Juristische Wochenschrift*, 1953, p. 112). See also Henri Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi No. 10 du Conseil de contrôle allié* (Paris, Librairie général de droit et de jurisprudence, 1962), p. 406.

<sup>13</sup> The requirement that an accused person who invokes the defence of coercion or of necessity may not have participated, by his own behaviour, in bringing about the coercion or state of necessity was emphasized in the *I.G. Farben* case. The American Military Tribunal declared that the excuse of necessity is not admissible when the accused person who invokes it has himself been responsible for the existence or non-existence of such an order or when his participation has gone beyond that which was required or was the result of his own initiative (See *Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10 (Nürnberg, October 1946-April 1949)* (Washington, D.C., United States Government Printing Office, 1949-1953, case No. 6, vol. VIII, p. 1179).

<sup>14</sup> The requirement of proportionality between the good or preserved interest and the good or sacrificed interest was emphasized, in particular in the *Krupp* case and others. The accused, out of fear that they

160. Finally, it must be noted that judicial practice, which has its origins in Anglo-American law, makes no distinction between coercion and state of necessity.<sup>15</sup>

#### New article 15

161. The Special Rapporteur proposes a new article 15, as follows:

#### *"Article 15 (Extenuating circumstances)"*

When passing applicable sentences, extenuating circumstances may be taken into account by the court hearing the case."

#### *Comments of the Special Rapporteur*

162. It is generally admitted in criminal law that any court hearing a criminal case is entitled to examine the circumstances in which an offence was committed and to determine whether there are any circumstances that diminish the responsibility of the accused.

163. Furthermore, the Special Rapporteur did not believe it appropriate to discuss aggravating circumstances since the crimes considered here were deemed to be the most serious of the most serious crimes. However, the question was one for the Commission to decide.

would be dismissed as company executives if they failed to follow general and specific instructions, had subjected prisoners to forced labour. That fear, according to the Tribunal, could not justify a choice which benefited them but went against the unfortunate victims who, in this case, had no choice at all.

Furthermore, it was only fair to say, in the light of the evidence, that in a concentration camp, the accused would not have found themselves in a worse situation than the thousands of defenceless victims whom they exposed daily to the danger of death, to serious physical suffering due to privation and to the relentless aerial bombings of weapons factories, not to mention the forced servitude and other outrages they had to endure. The disproportion between the number of actual victims and the number of possible victims is equally shocking (*ibid.*, case No. 10, vol. IX, p. 1446).

<sup>15</sup> Henri Meyrowitz, *op. cit.*



# THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 5]

DOCUMENT A/CN.4/462

**Second report on the law of the non-navigational uses of  
international watercourses, by Mr. Robert Rosenstock, Special Rapporteur**

[Original: English]  
[21 April 1994]

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## Introduction

1. The Special Rapporteur, in this his second report on the law of the non-navigational uses of international watercourses proposes to focus on three themes:

- (a) His affirmative conclusions on the wisdom and utility of including unrelated confined groundwaters;
- (b) Recommendations for the articles not dealt with in his first report<sup>1</sup> (i.e. arts. 11-32);
- (c) Provisions concerning dispute settlement.

<sup>1</sup> *Yearbook* . . . 1993, vol. II (Part One), p.179, document A/CN.4/451.

## CHAPTER I

### Groundwaters

2. The Special Rapporteur, in his first report,<sup>2</sup> raised the possibility of including "unrelated" confined groundwaters in the draft articles on the non-navigational uses of international watercourses. Following an exchange of views at its forty-fifth session held in 1993, the International Law Commission considered that more information was needed. It therefore requested the Special Rapporteur to undertake a study on the question of unrelated "confined groundwaters" in order to determine the feasibility of incorporating them into the topic.<sup>3</sup> The Special Rapporteur has carried out the study called for by the Commission. The study is contained in the annex to the present report.

3. The study carried out by the Special Rapporteur has demonstrated the wisdom of including unrelated confined groundwaters in the draft articles. The recent trend in the management of water resources has been to adopt an integrated approach. Inclusion of "unrelated" confined groundwaters is the bare minimum in the overall scheme of the management of all water resources in an integrated manner.<sup>4</sup>

4. The Special Rapporteur is convinced that the principles and norms applicable, in a framework convention or model rules, to watercourses and related groundwaters are equally applicable to unrelated confined groundwaters. It is moreover the Special Rapporteur's view that the

changes required in the draft, which emerged from first reading<sup>5</sup> to achieve this wider scope, are relatively few and uncomplicated.

5. It would therefore seem unwise to retain the existing scope, which excludes unrelated confined groundwaters, and embark on a separate subsequent effort to draft a similar instrument concerning unrelated confined groundwaters. In the nature of things, this would involve delaying the conclusion of work on the subject until well into the next quinquennium of members of the ILC.

6. The changes required to include unrelated groundwaters are not complicated. One approach would commence with dropping the requirement of a "common terminus".

7. The Special Rapporteur continues to hold the view that the term "flowing into a common terminus" should be deleted from article 2 of the draft. Such a deletion would not, in the opinion of the Special Rapporteur, lead to an unmanageable expansion of the scope of the draft articles as a whole. In support of the deletion of the words "flowing into a common terminus", the Water Resources Committee of the ILA observed that those words seem to reflect a concern that a national watercourse that is artificially connected to an international watercourse system might be held to have become part of that system. In its view, which is shared by the Special Rapporteur, "this concern, however, would be better met by an express statement excluding such an interpretation of "watercourse".<sup>6</sup> The argument for the inclusion of the notion of "flowing into a common terminus" is an artificial one. This point is demonstrated, for example, by the flow of the waters of the Danube river. At certain times of the year, waters of that river flow into Lake Constance and the

<sup>2</sup> *Ibid.*, para. 11.

<sup>3</sup> *Yearbook* . . . 1993, vol. II (Part Two), paras. 371 and 441.

<sup>4</sup> ILA, "The International Law Commission's draft articles on the Law of the non-navigational uses of international watercourses: Comments by the Water Resources Committee of the International Law Association" (copy of the report on file with the Special Rapporteur). As noted by the Water Resources Committee of the ILA, "The notion that the waters of a watercourse must always flow into a common terminus cannot be justified in the light of today's knowledge of the behaviour of water, in particular of the nature of aquifers and their relationship to surface waters".

<sup>5</sup> For the articles adopted provisionally on first reading, see *Yearbook* . . . 1991, vol. II (Part Two), pp. 66-70.

<sup>6</sup> See note 4 above.



Rhine river. Yet no one considers the Rhine and the Danube part of a single system.<sup>7</sup>

8. Should the Commission be willing to delete the "common terminus" requirement, the Special Rapporteur would be amenable to expanding the definition of watercourses and eschewing any addition of references to "aquifer" or "transboundary aquifer".

9. If the deletion of the requirement of a "common terminus" is not widely agreed upon, there are several relatively simple methods of including unrelated confined groundwaters.

<sup>7</sup> *Streitsache des Landes Württemberg und des Landes Preussen gegen das Land Baden, betreffend die Donauversinkung, Staatsgerichtshof, Germany, 18 June 1927, Entscheidungen des Reichsgerichts in Zivilsachen*, Berlin, vol. 116, appendix, pp. 18 et seq. The record of the case is found in the *Annual Digest of Public International Law Cases, 1927 and 1928* (A. McNair and H. Lauterpacht, eds., London, Longmans, 1931), p. 128. The case is analysed in Lederle, "Die Donauversinkung", *Annalen des Deutschen Reichs, 1917* (Munich, 1917), p. 693.

10. The changes required to include unrelated confined groundwaters could be achieved by defining "watercourse" to include "unrelated confined groundwaters" or by adding a reference to "groundwaters" to the various articles as necessary. The Special Rapporteur believes that it is slightly preferable to follow the latter approach rather than use a strained definition of watercourse.

11. The Special Rapporteur has redrafted the articles on the assumption that unrelated confined groundwaters are to be included and that the deletion of the term "flowing into a common terminus" was either rejected or, if accepted, not considered a sufficiently clear indication of the inclusion of unrelated confined groundwaters (see redrafted text in chapter IV below).

See also the analysis of this case in J.A. Barberis, *Le statut des eaux souterraines en droit international*, (FAO, Etude législative 40, 1987), pp. 40 and 41. See also the examination of the case in the seventh report of the previous Special Rapporteur, Mr. Stephen C. McCaffrey (*Yearbook . . . 1991*, vol. II (Part One), pp. 45 et seq., document A/CN.4/436, especially pp. 56-57, paras. 39-43).

## CHAPTER II

### Other recommended changes in articles 11 to 32<sup>8</sup>

#### *Obligations of the notified State (art.16)*

12. The Special Rapporteur considers that it is appropriate to provide some sanction against a State which, having been notified, nevertheless fails to respond to the notification within the prescribed time. As article 16 is currently worded, there is no incentive for a notified State to reply to the notification. There is, moreover, too little protection for a notifying State which incurs expenses as a result of the failure of the notified State to respond in a timely manner. Perhaps most seriously, there is no incentive for the notified State to seek solutions to problems of conflicting uses consistent with equitable and optimal utilization. The notifying State, however, is unable to proceed with its

<sup>8</sup> The only articles which the Special Rapporteur suggests be changed (leaving aside the consequential minor amendments required to include unrelated confined groundwaters) are article 16 and article 21, where it is suggested that "or energy" be added in para. 3, after the word "substances".

planned measures for six months while waiting for a reply to its notification. If no reply is forthcoming, that State has lost time in implementing its planned measures and is also deprived of the opportunity to modify its planned measures in order to avoid possible infringement of the rights of other watercourse States.<sup>9</sup>

13. In order to correct these problems, the Special Rapporteur has introduced a new paragraph 2 in article 16 (see chapter IV below).

<sup>9</sup> For a more detailed comment on this point, see C. B. Bourne, "The International Law Commission's draft articles on the law of international watercourses: principles and planned measures", *Colorado Journal of International Environmental Law and Policy* (Boulder, 1992), vol. 3, No. 1, pp. 68-69. See also the comments by the Water Law Resources Committee of the International Law Association (footnote 4 above); and paragraphs 18 and 19 of the comments and observations of the Government of the Netherlands (*Yearbook . . . 1993*, vol. II (Part One), p. 161, document A/CN.4/447/Add.1-3).

## CHAPTER III

### Dispute settlement

14. The Commission has declined, owing to lack of time or otherwise, to accept the sophisticated and complex provisions of previous Special Rapporteurs on dispute settlement. It is, moreover, a framework convention with which we are dealing.

15. The Special Rapporteur remains convinced that, at a minimum, a tailored, bare-bones provision on the settlement of disputes is an indispensable component of any convention the Commission would put forward on the current topic.

16. While the Special Rapporteur would be more than willing to return *in toto*, should the members so desire, to the scheme contained in Mr. McCaffrey's sixth report (1990),<sup>10</sup> he urges, as an alternative and at a minimum, consideration of the addition in the main body of the draft of the simplified article reproduced below (see chap. IV below).

<sup>10</sup> *Yearbook . . . 1990*, vol. II (Part One), p. 41, document (A/CN.4/427 and Add.1).

## CHAPTER IV

**Text of the draft articles incorporating the changes proposed by the Special Rapporteur**

17. The text of the draft articles, incorporating the changes proposed by the Special Rapporteur (*in italics*), is as follows:

## PART I

## INTRODUCTION

*Article 1*

18. In paragraph 1, the words “and transboundary aquifers” should be added after “international watercourses” and “and aquifers” after “those watercourses”, so that the article would read:

*“Article 1. Scope of the present articles*

1. The present articles apply to uses of international watercourses *and transboundary aquifers* and of their waters for purposes other than navigation and to measures of conservation *and management* related to the uses of those watercourses *and aquifers* and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.”

*Article 2*

19. In subparagraph (a), the definition of an “international watercourse” should include the words “transboundary aquifers”; in subparagraph (b) the words “flowing into a common terminus” should be deleted; a new subparagraph (b) *bis* should add a definition of the term “confined groundwaters” and other terms related to it; and subparagraph (c) should add the words “transboundary aquifer”. Article 2 would then read as follows:

*“Article 2. Use of terms*

For the purposes of the present articles:

(a) “International watercourse” means a watercourse or aquifer, parts of which are situated in different States;

(b) “Watercourse” means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole [and flowing into a common terminus];<sup>11</sup>

<sup>11</sup> The inclusion or exclusion of this phrase is not critical with regard to the draft articles covering confined groundwaters. The Special Rapporteur suggests its deletion since it is a hydrologically unsound oversimplification which serves no useful purpose.

(b) *bis*. “Confined groundwaters” means waters in aquifers;

“Transboundary confined groundwaters” means waters in transboundary aquifers;

“Aquifer” means a subsurface, water-bearing geologic formation from which significant quantities of water may be extracted; and the waters therein contained;

“Transboundary aquifer” means an aquifer intersected by an international boundary;<sup>12</sup>

(c) “Watercourse State” means a State in whose territory part of an international watercourse or a transboundary aquifer is situated.”

*Article 3*

20. The words “or aquifer” and “or transboundary aquifer” should be added in paragraphs 1, 2 and 3. Article 3 would thus read:

*“Article 3. Watercourse or aquifer agreements*

1. Watercourse States may enter into one or more agreements, hereinafter referred to as ‘watercourse or aquifer agreements’, which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or transboundary aquifer or part thereof.

2. Where a watercourse or aquifer agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or transboundary aquifer or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a significant\* extent, the use by one or more other watercourse States of the waters of the watercourse or aquifer.

\* In accordance with the decision of the Drafting Committee at the forty-fifth session (1993) of the International Law Commission, the term “significant” will replace the term “appreciable” throughout. It was agreed by the Drafting Committee that the commentary would reflect the fact that the term was changed from “appreciable” to “significant” to avoid the ambiguity of the term “appreciable” (which may mean either “capable of being measured” or “significant”) and not as a means of seeking to raise the threshold. See *Yearbook . . . 1993*, vol. I, 2322nd meeting, para. 4; and *ibid.*, vol. II (Part Two), paras. 374-389.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse *or transboundary aquifer*, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse *or aquifer* agreement or agreements.

<sup>12</sup> For the source of these definitions, see Robert D. Hayton and Albert E. Utton, “Transboundary groundwaters: The Bellagio draft treaty”, *Natural Resources Journal* (Albuquerque, N.M.), vol. 29, No. 3, 1989, p. 663.

## Article 4

21. The words “or aquifer” and “or transboundary aquifer” should be added throughout the text, so that the article would read:

“Article 4. *Parties to watercourse or aquifer agreements*

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse *or aquifer* agreement that applies to the entire international watercourse *or transboundary aquifer*, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse *or transboundary aquifer* may be affected to a significant\* extent by the implementation of a proposed watercourse *or aquifer* agreement that applies only to a part of the watercourse *or aquifer* or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.”

\* See the note to article 3.

## PART II

## GENERAL PRINCIPLES

## Article 5

22. The words “or transboundary aquifer” and “or aquifer” should be added, so that article 5 would read:

“Article 5. *Equitable and reasonable utilization and participation*

1. Watercourse States shall in their respective territories utilize an international watercourse *or transboundary aquifer* in an equitable and reasonable manner. In particular, an international watercourse *or transboundary aquifer* shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse *or aquifer*.

2. Watercourse States shall participate in the use, management, development and protection of an international watercourse *or transboundary aquifer* in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse *or aquifer* and the duty to cooperate in the protection and development thereof, as provided in the present articles.”

## Article 6

23. The words “or transboundary aquifer” and “or aquifer” should be added, so that article 6 would read:

“Article 6. *Factors relevant to equitable and reasonable utilization*

1. Utilization of an international watercourse *or transboundary aquifer* in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) The social and economic needs of the watercourse States concerned;

(c) The effects of the use or uses of the watercourse *or aquifer* in one watercourse State on other watercourse States;

(d) Existing and potential uses of the watercourse *or aquifer*;

(e) Conservation, protection, development and economy of use of the water resources of the watercourse *or aquifer* and the costs of measures taken to that effect;

(f) The availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.”

## Article 7

24. In the amended version of the article proposed by the Special Rapporteur in his first report,<sup>13</sup> the words “or transboundary aquifer” and “or aquifer” should be added, so that article 7 would read:

“Article 7. *Obligation not to cause appreciable harm*

Watercourse States shall exercise due diligence to utilize an international watercourse *or transboundary aquifer* in such a way as not to cause significant\* harm to other watercourse States, absent their agreement, except as may be allowable under an equitable and reasonable use of the watercourse *or aquifer*. A use which causes significant\* harm in the form of pollution shall be presumed to be an inequitable and unreasonable use unless there is: (a) a clear showing of special circumstances indicating a compelling need for ad hoc adjustment; and (b) the absence of any imminent threat to human health and safety.”

\* See the note to article 3.

<sup>13</sup> (A/CN.4/451) (footnote 1 above), para. 27.

## Article 8

25. The words "or transboundary aquifer" should be added at the end of the text, so that article 8 would read:

*"Article 8. General obligation to cooperate*

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse *or transboundary aquifer*."

## Article 9

26. The words "or aquifer" should be added to paragraph 1, so that article 9 would read:

*"Article 9. Regular exchange of data and information*

1. Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse *or aquifer*, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated."

## Article 10

27. The words "or transboundary aquifer" should be added, so that article 10 would read:

*"Article 10. Relationship between different categories of uses*

1. In the absence of agreement or custom to the contrary, no use of an international watercourse *or transboundary aquifer* enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse *or transboundary aquifer*, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs."

## PART III

## PLANNED MEASURES

## Article 11

28. The words "or transboundary aquifer" should be added at the end of the text, so that article 11 would read:

*"Article 11. Information concerning planned measures*

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse *or transboundary aquifer*."

## Articles 12 to 15

29. No change is proposed for articles 12 to 15, which read as follows:

*Article 12. Notification concerning planned measures with possible adverse effects*

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

*Article 13. Period for reply to notification*

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

*Article 14. Obligations of the notifying State during the period for reply*

During the period referred to in article 13, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement or permit the implementation of the planned measures without the consent of the notified States.

*Article 15. Reply to notification*

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall communicate this finding to the notifying State within the period referred to in article 13, together with a documented explanation setting forth the reasons for the finding.

## Article 16

30. A paragraph 2 should be added, so that article 16 would read as follows:

*“Article 16. Absence of reply to notification*

1. If, within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

2. Any rights of a notified State which has failed to reply may be offset by any costs incurred by the notifying State for action undertaken after the expiration of the time for reply. Reparations shall not lie for damage suffered between the date by which the notified State was required to reply and sufficient time after the receipt of the complaint from the notified State for the notifying State to terminate the conduct which is causing harm.”

*Articles 17 to 19*

31. No change is proposed for articles 17 to 19, which read as follows:

*Article 17. Consultations and negotiations concerning planned measures*

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

*Article 18. Procedures in the absence of notification*

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have a significant\* adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

*Article 19. Urgent implementation of planned measures*

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of article 17.

## PART IV

## PROTECTION AND PRESERVATION

*Article 20*

32. The words “or transboundary aquifers” should be added at the end of the text, so that article 20 would read:

*“Article 20. Protection and preservation of ecosystems*

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses *or transboundary aquifers*.”

*Article 21*

33. Paragraph 1 of article 21, which deals with the definition of pollution, should be moved to article 2 (Use of terms), adding “or transboundary aquifer” after “international watercourse” in paragraphs 1, 2 and 3. In paragraph 3, add “or energy” after “list of substances”. On the understanding that paragraph 1 is to be moved to article 2, article 21 would read:

*“Article 21. Prevention, reduction and control of pollution*

1. For the purpose of this article, ‘pollution of an international watercourse *or transboundary aquifer*’ means any detrimental alteration in the composition of quality of the waters of an international watercourse *or transboundary aquifer* which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse *or transboundary aquifer* that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

\* See the note to article 3.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances *or energy*, the introduction of which into the waters of an international watercourse *or transboundary aquifer* is to be prohibited, limited, investigated or monitored.”

#### Article 22

34. The words “or transboundary aquifer” should be added after “an international watercourse” and “or aquifer” after “the watercourse”, so that article 22 would read:

“Article 22. *Introduction of alien or new species*

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse *or transboundary aquifer* which may have effects detrimental to the ecosystem of the watercourse or aquifer resulting in significant\* harm to other watercourse States.”

\* See the note to article 3.

#### Article 23

35. No change is proposed for article 23, which reads as follows:

Article 23. *Protection and preservation of the marine environment*

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

### PART V

#### HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

#### Articles 24 and 25

36. No change is proposed for articles 24 and 25, which read as follows:

Article 24. *Prevention and mitigation of harmful conditions*

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, waterborne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Article 25. *Emergency situations*

1. For the purposes of this article, ‘emergency’ means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, as for example in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

### PART VI

#### MISCELLANEOUS PROVISIONS

#### Article 26

37. In paragraphs 1 and 2 (a), the words “or transboundary aquifer” should be added after “international watercourses”. In paragraph 2 (b), the words “or aquifer” should be added after “watercourse”. Article 26 would thus read:

“Article 26. *Management*

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse *or transboundary aquifer*, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, “management” refers, in particular, to:

(a) Planning the sustainable development of an international watercourse *or transboundary aquifer* and providing for the implementation of any plans adopted; and

(b) Otherwise promoting rational and optimal utilization, protection and control of the watercourse *or aquifer*.”

#### Article 27

38. In paragraphs 1 and 3, the words “or transboundary aquifer” should be added at the end. Article 27 would thus read:

“Article 27. *Regulation*

1. Watercourse States shall cooperate where appropriate to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse *or transboundary aquifer*.

2. Unless they have otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the

costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, 'regulation' means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse *or transboundary aquifer*."

#### Article 28

39. In paragraphs 1 and 2 (a), the words "or transboundary aquifer" should be added after "watercourse". Article 28 would thus read:

#### "Article 28. Installations

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse *or transboundary aquifer*.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer significant\* adverse effects, enter into consultations with regard to:

(a) The safe operation or maintenance of installations, facilities or other works related to an international watercourse *or transboundary aquifer*; or

(b) The protection of installations, facilities or other works from wilful or negligent acts or the forces of nature."

\* See the note to article 3.

#### Articles 29 to 32

40. While the Special Rapporteur is not necessarily advocating deletion of article 29, he notes that several States have so suggested in statements and written comments and that the article does not lay down any rule which does not, by the terms of the article, exist already as a binding obligation. No change is proposed for the article. No change is proposed, either, for articles 30 to 32. Articles 29 to 32 would read as follows:

#### "Article 29. International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules."

#### Article 30. Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of

data and information, notification, communication, consultations and negotiations, through any indirect procedure accepted by them.

#### Article 31. Data and information vital to national defence or security

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

#### Article 32. Non-discrimination

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered significant\* harm as a result of an activity related to an international watercourse or is exposed to a threat thereof."

\* See the note to article 3.

#### Article 33

41. The Special Rapporteur proposes the following provision on dispute settlement.

#### "Article 33. Settlement of disputes

1. Watercourse States shall settle their watercourse disputes by peaceful means.

2. In the absence of an applicable agreement between the States concerned for the settlement of such disputes, the disputes are to be settled in accordance with the following:

(a) If a dispute arises concerning a question of fact or concerning the interpretation or application of the present articles, the States concerned shall expeditiously enter into consultations and negotiations with a view to arriving at an equitable resolution of the dispute;

(b) If the States concerned have not arrived at a settlement of the dispute through consultations and negotiations within six months, they shall have recourse to impartial fact-finding or conciliation;

(c) If after twelve months from the initial request for fact-finding or conciliation or, if there has been agreement to establish a fact-finding or conciliation commission, six months after receipt of a report from the fact-finding or conciliation commission, whichever is later, the parties have been unable to settle the dispute, any of the parties may submit the dispute to binding arbitration by any permanent or ad hoc tribunal that has been accepted by all the parties to the dispute.





## Annex

### THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

#### "UNRELATED" CONFINED GROUNDWATERS

##### A. Transboundary groundwaters

1. Transboundary groundwaters are found in virtually every continent of the world. For example, there are extensive aquifers found in north-eastern Africa, north-central Africa and in north-western Africa.<sup>1</sup>

2. The North-Eastern Aquifer underlies the Libyan Arab Jamahiriya, Egypt, Chad and the Sudan; that on the Arabian peninsula is shared by Saudi Arabia, Bahrain, and perhaps Qatar and the United Arab Emirates; the aquifer in the northern Sahara basin is shared by Algeria, Tunisia and the Libyan Arab Jamahiriya; the Chad aquifer is shared by Chad, Niger, the Sudan, the Central African Republic, Nigeria and Cameroon; the aquifer on the Taoudeni basin is shared by Chad, Egypt, the Libyan Arab Jamahiriya and the Sudan; and the Maestrichian aquifer or basin is shared by Senegal, the Gambia, Guinea-Bissau and Mauritania.<sup>2</sup> A recent study of the Nubian Sandstone Aquifer showed that the aquifer underlies vast areas of Chad, Egypt, the Libyan Arab Jamahiriya and the Sudan, and is subdivided into hydraulically interconnected sub-basins. Other examples could be cited in North America, Asia and Europe. It has been pointed out that, "apart from remote islands, virtually all countries share a groundwater system with one or more other countries".<sup>3</sup>

3. A number of transboundary groundwaters are not related to surface water, and do not flow into a common terminus, especially in arid regions.<sup>4</sup> These unrelated confined groundwaters are completely enclosed and the only outlets for water are through capillary action and evaporation, and they may for all practical purposes be independent of any identifiable inland surface water system. They may periodically recharge from water filtering through floods along dry gulches and into dry pans in the desert.<sup>5</sup> These

<sup>1</sup> ILA, *Report of the Sixty-second Conference*, Seoul, 1986, London, 1987, pp. 231 et seq. (hereinafter referred to as the Seoul report), particularly p. 238.

<sup>2</sup> D. A. Caponera and D. Alhéritière, "Principles for International Groundwater Law", *Natural Resources Journal* (Albuquerque, N.M.), vol. 18, No. 3, 1978, pp. 589 et seq., particularly p. 590.

<sup>3</sup> Ibid., citing *Ground Water in Africa* (United Nations Sales No. E.71.II.A.16); and *Ground Water in the Western Hemisphere*, Natural Resources Water Series No. 4 (United Nations publication, Sales No. E.76.II.A.5).

<sup>4</sup> ILA, Seoul report, p. 256.

<sup>5</sup> Ibid., citing Margat, "Groundwater reservoirs, physical basis for their use", in *Groundwater Seminar Granada*, report of the FAO/UNDP seminar organized by the Government of Spain on the role of groundwater in the optimal utilization of hydraulic resources; Granada, 1971, FAO Irrigation and Drainage Paper No. 18 (Rome, 1973).

confined groundwaters are said to have occurred through clogging of the overlying terrain, or the geologic movement of the earth may have resulted in the original surface recharge zones being cut off from the aquifer formation. Additionally, climatic changes a long time ago may have caused rivers and lakes which once fed the aquifers to disappear. The recharge of these aquifers takes place in many cases from precipitation or melting of ice or snow, in cases where these are present. Thus, from all points of view, such aquifers are "independent" reservoirs and do not interact significantly with existing surface water.<sup>6</sup>

##### B. Human dependence on groundwater

4. Groundwater is the largest source of fresh water available in storage on earth. It is estimated that, in comparison with freshwater lakes which hold 120,000 cubic kilometres of water, the amount of groundwater to a depth of 800 metres into the crust of the earth is about 4 million cubic kilometres. A further 14 million cubic kilometres of water is said to occur at depths of between 1 and 3 kilometres.<sup>7</sup>

5. Throughout the world, the majority of people are dependent on groundwater reserves for their supplies. For example, in the States members of the European Union, groundwater accounts overall for 70 per cent of the drinking water, with a much higher percentage in Germany and in the Benelux countries, and 93 per cent in Italy.<sup>8</sup> Half of all drinking water in the United States comes from groundwater,<sup>9</sup> and 97 per cent of that is used by the rural population. According to the OECD, groundwater in Europe provides 75 per cent of all drinking-water supplies. In some countries, groundwater is virtually the only source of drinking water. In Denmark, for example, groundwater accounts for 98 per cent of drinking water. Groundwater is often the only source of water in arid and semi-arid regions. In such regions, groundwater is of vital importance to any socio-economic development. With an ever increasing human population, coupled with the

<sup>6</sup> Ibid.

<sup>7</sup> *Groundwater Storage and Artificial Recharge*, Natural Resources/Water Series No. 2 (United Nations publication, Sales No. E.74.II.A.11), p. 1.

<sup>8</sup> L.A. Teclaff and E. Teclaff, "Transboundary Ground Water Pollution: Survey and Trends in Treaty Law", *Natural Resources Journal* (Albuquerque, N.M.), vol. 19, No. 3, 1979, p. 629.

<sup>9</sup> Ibid., citing the Environmental Protection Agency (EPA), *Federal Register*, vol. 43, p. 58948 (1978).

depletion or contamination of surface water, the value of groundwater has taken centre stage in many parts of the world. In Africa, where surface water is scanty away from big rivers, most of the water for consumption is drawn from underground wells. In recent times there has been a sharp increase in the use of groundwater as a result of Africa's rapid entry into the modern industrial economy.

6. In both North and South America, groundwater is extensively utilized. In Mexico in particular, "where desert and arid and semi-arid conditions prevail over two thirds of the territory, groundwater is a priceless resource". About 12 billion cubic metres of water per annum is extracted from wells for various uses.<sup>10</sup> Similarly, in the Eastern Mediterranean and Western Asia, there has been a correspondingly rapid increase in the demand for water. For the most part, groundwater is the only source of water supply in most of the region. This rapid demand is the result of industrial development and urbanization, especially following the discovery of large reserves of oil, and the need to increase agricultural production. In some countries of the region, "groundwater exploration and development have reached spectacular levels".<sup>11</sup> In general, groundwater has become a more reliable and controllable source of water than surface water for irrigation.<sup>12</sup> Throughout the world "the general picture is one of more recent resort to groundwater".<sup>13</sup>

### C. Pollution of groundwater

7. Present-day concerns for all water resources, and for groundwater in particular, are over their increased pollution. This concern has been encapsulated in a recent Charter on groundwater management, adopted by the ECE:

Groundwater—as a natural resource with both ecological and economic value—is of vital importance for sustaining life, health and the integrity of ecosystems. This resource is, however, increasingly threatened by overuse and insidious long-term effects of pollution. Pollution comes from both point sources and diffuse sources. Potential risks or actual impacts could permanently impair underground water resources, with far-reaching and unpredictable implications for present and future generations. Action is urgently needed.<sup>14</sup>

8. Pollution of transboundary aquifers could be catastrophic to countries sharing their waters.<sup>15</sup> The pollution of groundwater, and particularly confined groundwater, could be even more serious than that of surface water

since, owing to the groundwater's slow movement, the pollutants tend to be stored in the aquifer.<sup>16</sup> According to experts, it could take up to 100 years of constant recharging with clean water before a polluted aquifer is again capable of discharging potable water, if in fact the contaminant could be degraded.<sup>17</sup> On the other hand, it could take an indefinite period of time to get rid of a pollutant which is not readily degradable or absorbable underground, "since the average residence time of groundwater is of the order of 200 years".<sup>18</sup>

9. The sources of pollution for groundwater, related or unrelated, and surface water as well, for that matter, include agricultural fertilizers, animal wastes and pesticides, septic tanks, underground storage tanks, waste sites, underground injection wells, surface impoundments, materials storage and transport, urban runoff, chemical and other processing plants and mining and saline intrusion.<sup>19</sup> Contamination may also occur when groundwater is depleted, thus allowing the intrusion of salt water into the aquifer.

### D. State practice concerning transboundary groundwater

10. In the past, there has been little concern by States over the proper utilization of groundwater and its protection from pollution owing to lack of a better understanding of the hydraulic cycle and also because, unlike surface water, groundwater is out of sight, and its pollution is not readily apparent until at a very late stage.<sup>20</sup> State practice concerning transboundary groundwater in particular is scanty. Only a few treaties dealing with shared water resources include groundwater. Examples of such treaties are: the 1925 agreement between Egypt and Italy concerning the Ramla well,<sup>21</sup> the 1927 Convention and Protocol between the Soviet Union and Turkey regarding the use of frontier waters<sup>22</sup> and the 1947 Treaty of Peace between the Allies and Italy which set out the guarantees between Italy and Yugoslavia on springs in the Commune of Gorizia.<sup>23</sup> Some treaties deal with the question of protection of groundwater against pollution. These include the 1955 agreement between Yugoslavia and Hungary,<sup>24</sup>

<sup>16</sup> *Ibid.*, p. 108. See also Teclaff and Teclaff, *loc. cit.*, p. 632.

<sup>17</sup> M.C. Haase, "Interrelationship of ground and surface water: an enigma to Western water law", *Southwestern University Law Review* (Los Angeles, Calif.), vol. 10, 1978, pp. 2069 et seq., particularly 2079 (1978), cited in Teclaff and Teclaff, *loc. cit.*, p. 632.

<sup>18</sup> Environmental Protection Agency estimate (see footnote 9 above); also cited in Teclaff and Teclaff, *loc. cit.*, p. 632.

<sup>19</sup> OECD, *Water Resource Management—Integrated policies* (Paris, October 1989), p. 222.

<sup>20</sup> See Teclaff and Teclaff, *loc. cit.*, p. 636.

<sup>21</sup> Agreement between Egypt and Italy fixing the frontier between Cyrenaica and Egypt (Cairo, 6 December 1925) (United Nations, *Legislative Texts* . . . (ST/LEG/SER.B/12)), p. 99, Treaty No. 6.

<sup>22</sup> *Ibid.*, p. 384, Treaty No. 106.

<sup>23</sup> United Nations, *Treaty Series*, vol. 49, pp. 3 et seq., particularly p. 13.

<sup>24</sup> Agreement concerning water-economy questions, together with the Statute of the Yugoslav-Hungarian Water Economy Commission (Belgrade, 8 August 1955) (United Nations, *Legislative Texts*, Treaty No. 228, p. 830).

<sup>10</sup> *Ground Water in the Western Hemisphere*, see footnote 3 above, p. 2.

<sup>11</sup> *Ground Water in the Eastern Mediterranean and Western Asia*, Natural Resources/Water Series No. 9 (United Nations publication, Sales No. E.82.II.A.8), p. 4.

<sup>12</sup> E. Fano and M. Brewster, "Issues in ground water economics", in United Nations, Department of Technical Cooperation for Development, *Ground Water Economics*; report of a United Nations international symposium and workshop convened in cooperation with the Government of Spain, Barcelona, Spain, 19-23 October 1987, document TCD/SEM.88/2, p. 35.

<sup>13</sup> R.D. Hayton, "The ground water legal regime as instrument of policy objectives and management requirements", *Natural Resources Journal* (Albuquerque, N.M.), vol. 22, No. 1, 1982, p. 119.

<sup>14</sup> ECE, *Charter on groundwater management* (United Nations publication, Sales No. 89.II.E.21), "Foreword".

<sup>15</sup> See A. E. Utton, "The development of international ground water law", *Natural Resources Journal* (Albuquerque, N.M.), vol. 22, No. 1 (1982), p. 109.

the 1956 agreement between Yugoslavia and Albania,<sup>25</sup> the 1958 agreement between Yugoslavia and Bulgaria,<sup>26</sup> the 1958 agreement between Poland and Czechoslovakia,<sup>27</sup> the 1964 agreement between Poland and the USSR,<sup>28</sup> the 1971 agreement between Finland and Sweden concerning frontier rivers,<sup>29</sup> the 1972 Convention between Switzerland and Italy concerning the protection of frontier water against pollution<sup>30</sup> and the 1973 agreement between the United States and Mexico concerning the problems of salinity of the Colorado River.<sup>31</sup>

11. All the treaties on this subject refer to "groundwater" and apply equally to both unrelated confined groundwater as well as to those watercourses which flow into a common terminus. The Yugoslav agreements, for example, apply to "all water economy questions". The expression "water system" is defined to mean "all watercourses (surface or underground, natural or artificial)".

12. The 1964 agreement between Poland and the USSR defines "frontier waters" to include "groundwaters intersected by the State frontier" (art. 2, para. 3). By that agreement, the parties undertook to cooperate in economic, scientific and technical activities relating to the use of water resources in frontier waters, including, in particular, "the protection of surface and groundwaters against depletion and pollution" (art. 3, para. 7). The treaty between Finland and Sweden applies, *inter alia*, to "measures taken in any waters which may affect groundwater conditions" (chap. 3, art. 1).

13. The 1973 agreement between the United States and Mexico limits the pumping of groundwater in each territory within 5 miles (8 kilometres) of the Arizona-Sonora boundary near San Luis to 160,000 acre-feet (197,558 cubic metres), pending the conclusion of a more comprehensive agreement on groundwater. The two countries are required to consult with each other "prior to the undertaking of any new development of either the surface or the groundwater resources, or undertaking substantial modifications of present developments, in its own territory in the border area that might adversely affect the other country". By taking these measures, Mexico, which is the lower riparian State, was to receive a consistent volume of

water, as well as qualitatively clean water for its use in agriculture, industry and for human consumption.<sup>32</sup>

14. As for the Convention between Italy and Switzerland, a Pollution Control Joint Commission was established to undertake all necessary investigations on the origin, nature and magnitude of pollution of surface and groundwater which might contribute to the pollution of Lake Maggiore, Lake Lugano and other waters.<sup>33</sup>

### E. Integrated water resource management

15. State practice on the management of groundwater resources has been found to be lacking. The tendency in the past has been for States to treat groundwater as separate from surface water. This approach has resulted mainly from a lack of proper understanding of the interconnection between groundwater and surface water and the hydrologic cycle in particular. This segregation of groundwater from surface water:

has been common among hydrologists as well as the general public, and is reflected in legislation, in the division of responsibility among government agencies, in development and regulation . . . Any water pumped from wells under equilibrium conditions is necessarily diverted into the aquifer from somewhere else, perhaps from other aquifers, perhaps from streams or lakes, perhaps from wetlands—ideally, but not necessarily, from places where it was of no use to anyone. There are enough examples of stream flow depletion by groundwater development, and of groundwater pollution from wastes released into surface waters, to attest to the close though variable relation between surface water and groundwater.<sup>34</sup>

16. More recently, however, there has been a concerted effort "to optimize the utilization of available water resources in the face of increasing demand".<sup>35</sup> There is now a search for a better understanding of the hydrologic cycle. Contamination of water has also "provided additional emphasis on the resolution of water management problems in which rational development, use and conservation of groundwater have become major factors".<sup>36</sup> It has been recommended that the most viable way in which to attain proper utilization and management of water is to adopt an integrated management of all the water resources, including, in particular, groundwater.

17. A series of recommendations and resolutions on the proper utilization and management of water resources has been adopted, starting with the United Nations Water Conference, at which it was recommended that:

measures be taken to utilize groundwater aquifers in the form of collective and integrated systems, where possible and useful, taking into account the regulation and use of surface-water resources. This will provide an opportunity to exploit the groundwater aquifers to their

<sup>25</sup> Agreement concerning water-economy questions, together with the Statute of the Yugoslav-Albanian Water Economy Commission and with the Protocol concerning fishing in frontier lakes and rivers (Belgrade, 5 December 1956) (*ibid.*, p. 441, Treaty No. 128).

<sup>26</sup> Agreement (with annex) concerning water economy questions (Sofia, 4 April 1958) (United Nations, *Treaty Series*, vol. 367, p. 89).

<sup>27</sup> Agreement concerning the use of water resources in frontier waters (with annex) (Prague, 21 March 1958) (*ibid.*, vol. 538, p. 89).

<sup>28</sup> Agreement concerning the use of water resources in frontier waters (Warsaw, 17 July 1964) (*ibid.*, vol. 552, p. 175).

<sup>29</sup> Signed at Stockholm on 16 September 1971 (*ibid.*, vol. 825, p. 191).

<sup>30</sup> Signed at Rome on 20 April 1972 (*ibid.*, vol. 957, p. 277).

<sup>31</sup> Exchange of notes between the United States of America and Mexico constituting an agreement confirming minute No. 242 of the International Boundary and Water Commission, United States and Mexico, relating to Colorado River salinity, Mexico and Tlatelolco, 30 August 1973 (United Nations, *Treaty Series*, vol. 915, p. 203; *United States Treaties and Other International Agreements*, vol. 24 (2), 1973 (Washington, D.C., United States Government Printing Office, 1974), p. 1968).

<sup>32</sup> J. Barona Lobaoto, "Legal considerations, interpretations and projections of Minute 242", *Natural Resources Journal* (Albuquerque, N.M.) vol. 15, 1975, p. 37.

<sup>33</sup> Article 2 of the Convention (see footnote 30 above).

<sup>34</sup> H. E. Thomas and L. B. Leopold, "Groundwater in North America", *Science* (Washington, D.C.), vol. 143, No. 3610, 1964, pp. 1001 et seq., particularly p. 1003.

<sup>35</sup> Hayton, "Institutional alternatives for Mexico-U.S. ground water management", *International Groundwater Law* (New York, Oceana Publications, Inc., 1981), p. 135.

<sup>36</sup> *Ibid.*

physical limits, to protect spring and groundwater from over-draught and salinity, as well as to ensure proper sharing of the resources.<sup>37</sup>

18. A call for the adoption of the integrated development and management of shared water resources for their optimum utilization, conservation and protection was also made at the 1982 Dakar interregional meeting, proposing that:

1. Whenever shared international aquifers or basins are present, technical cooperation for integrated development is required.

2. To arrive at correct modelling and proper management of shared aquifers, their potential must be assessed, the source of water and its possible replenishment defined and also the water flow within the aquifer. These and many other factors essential to the evaluation and proper management of the aquifer can be properly dealt with only by investigations across the national boundaries of the countries.

3. An integrated approach to groundwater is desirable: integration not only with other water resources, such as rivers and rainfall, but also with other inputs required for successful use of water, in particular, soil survey and land classification.<sup>38</sup>

19. With regard to groundwater development in an integrated manner, the meeting recommended that governments should, *inter alia*:

actively plan for groundwater studies and development, for its integrated use with surface water and other agricultural inputs, and for the economic and social evaluation of groundwater development schemes

[...]

and that:

groundwater development should be seen as an integral component of overall water resources development; hence groundwater development should be considered in relation to surface water development, with effective utilization of direct precipitation; and it should be considered alone only with regard to the more arid areas.<sup>39</sup>

20. The project findings and recommendations concerning the Nubian Sandstone aquifer also recommended that "the development of groundwater of the Nubian Sandstone aquifer in each area should be part of its integrated development plan".<sup>40</sup>

21. With respect to groundwater pollution control, the 1977 United Nations Water Conference recommended that States should, *inter alia*:

(a) Conduct surveys of present levels of pollution in surface water and groundwater resources, and establish monitoring networks for the detection of pollution;

[...]

(f) Conduct research on and measures of the pollution of surface and groundwater by agricultural fertilizers and biocides with a view to lessening their adverse environmental impact;

[...]

<sup>37</sup> Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977 (United Nations publication, Sales No. E.77.II.A.12), Part One, chap. 1, p. 11, para. 10.

<sup>38</sup> Experience in the Development and Management of International River and Lake Basins, Proceedings of the United Nations Interregional Meeting of International River Organizations, Dakar, 5-14 May 1981, Natural Resources/Water Series No. 10 (United Nations publication, Sales No. E.82.II.A.17), p. 334.

<sup>39</sup> Ibid., p. 307.

<sup>40</sup> United Nations Department of Technical Cooperation for Development, Transnational Project on the Major Regional Aquifer in North-East Africa, Egypt and the Sudan, Project Findings and Recommendations (DP/UN/RAB-82-013/1), 1988.

(m) Promote the use of infiltration techniques when the nature of the applicants and the terrain make it possible to do so without endangering surface and groundwater resources;

[...]

(o) Apply appropriate land-use planning as a tool for preventing water pollution, especially in the case of groundwater.

[...].<sup>41</sup>

22. The Charter on groundwater management adopted by the ECE has also made a number of recommendations on how groundwater should be treated. In the area of groundwater policy, governments are requested to:

formulate and adopt a long-term policy to protect groundwater by preventing pollution and overuse. This policy should be comprehensive and implemented at all appropriate levels. It should be consistent with other water-management policies and be duly taken into account in other sectoral policies.<sup>42</sup>

23. As for the strategies to be adopted on the use and protection of groundwater, the Charter recommends that:

1. As groundwater should be recognized as a natural resource with economic and ecological value, groundwater strategies should aim at the sustainable use of groundwater and preservation of its quality. These strategies should be flexible so as to respond to changing conditions and various regional and local situations.

2. Groundwater pollution is interrelated with the pollution of other environmental media (surface water, soils, atmosphere). Groundwater protection planning should be incorporated into general environmental protection planning.

3. Protection measures aimed at prevention of groundwater pollution and overuse should be the basic tools for groundwater management. Such protection measures include, *inter alia*, monitoring of groundwaters, development of aquifer vulnerability maps, regulations for industry and waste disposal sites paying due account to groundwater protection considerations, geo-economic assessment of the impact of industrial and agricultural activities on groundwater, and zoning of groundwater protection areas.<sup>43</sup>

24. Another practical measure recommended by the Charter on groundwater management is that in issuing permits for regulating the discharge, disposal and possible storage of waste, officials should specifically take into account the vulnerability of the aquifer concerned and the provisions necessary for its protection. Those provisions should, in particular, apply to production, handling, trading, transporting, storage and use of potentially hazardous substances, especially those which are toxic, persistent and bio-accumulative.<sup>44</sup> As for nuclear plants and the handling and processing of radioactive substances, it was recommended that specific regulations should be adopted which should include appropriate provisions for the protection of underground waters from contamination.

25. In order to regulate and distribute the water resources in an efficient and efficacious manner, the United Nations Water Conference recommended that:

studies should explore the potential of groundwater basins, the use of aquifers as storage and distribution systems and the conjunctive use of surface and subsurface resources to maximize efficacy and efficiency.<sup>45</sup>

<sup>41</sup> Report of the United Nations Water Conference (see footnote 37 above), para. 39.

<sup>42</sup> Charter on groundwater management (see note 14 above), p. 1.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid., p. 7.

<sup>45</sup> Report of the United Nations Water Conference (see footnote 37 above), para. 10 (b).

26. In connection with drought loss management, it was recommended that countries should:

Study the potential role of integration of surface and underground phases of water basins utilizing the stocks of water stored in ground-water formations in order to maintain a minimum supply under drought conditions.<sup>46</sup>

27. States were also recommended to promote research concerning, *inter alia*, artificial recharge of aquifers and contamination of underground waters.<sup>47</sup>

28. The United Nations Conference on Desertification stressed the need for "wise and efficient management of shared water resources for national use", and for "developing and strengthening regional activities concerning the assessment of surface and groundwater resources".<sup>48</sup>

29. The Charter on groundwater management also places great emphasis on the management of transboundary groundwater resources. It recommends that:

concerted endeavours to strengthen international cooperation for harmonious development, equitable use and joint conservation of groundwater resources located beneath national boundaries should be intensified. To this end, existing or new bilateral or multilateral agreements or other legally binding arrangements should be supplemented, if necessary, or concluded in order to place on a firmer basis cooperative efforts among countries for the protection of those groundwater resources which can be affected by neighbouring countries through exploitation or pollution. In order to implement such cooperation, joint commissions or other intergovernmental bodies should be established. The work of other international organizations, particularly on data harmonization, should be taken into account.<sup>49</sup>

30. The International Conference on Water and the Environment emphasized the need to have reliable information on the condition and trend of a country's water resources—surface water, water in the unsaturated zone and groundwater, its quantity and quality. This information, it was stated, would be required for a number of purposes, such as: assessing the resource and its potential for supplying current and foreseeable demand; protecting people and property against water-related hazards; planning, designing and operating water projects.<sup>50</sup>

31. With regard to protection of groundwater from contamination, the Conference pointed out that:

the extent and severity of contamination of unsaturated zones and aquifers has long been underestimated due to the relative inaccessibility of aquifers and the lack of reliable information on aquifer systems. A strategy for the protection of groundwater must be aimed at protecting aquifers from becoming contaminated and preventive efforts should be directed first at land-use activities and point and non-point sources that pose a high risk of causing pollution. Care must be exercised to avoid groundwater development that leads to the degradation of groundwater quality or the depletion of groundwater supplies. By the year 2000 assessments of known aquifers and their vulnerability to contamination should have commenced in all countries, while potential sources of groundwater pollution should be identified and plans for their control developed. These activities should be matched to the capacities, avail-

able resources and needs of countries and undertaken with the help of external support agencies, as appropriate.<sup>51</sup>

32. The United Nations Conference on Environment and Development also considered the question of fresh water. It recognized the widespread scarcity, gradual destruction and aggravated pollution of freshwater resources in many world regions, along with the progressive encroachment of incompatible activities. These factors, according to the Conference, demanded integrated water resources planning and management, and such integration must cover all types of interrelated freshwater bodies, including both surface water and groundwater.<sup>52</sup> The Conference also encouraged conjunctive use of surface and groundwaters, including monitoring and carrying out of water-balance studies.<sup>53</sup>

### Movement of groundwater

33. Concerning the movement of water, experts have pointed out that the water that eventually forms underground lakes and streams follows a certain pattern:

... a certain amount of water lying in pools or lakes or flowing in rivers will seep into the earth and percolate slowly down until it reaches the water table, the natural level of free groundwater. This water, prevented from percolating still lower by a watertight geological layer, will now tend to flow horizontally through the subsoil until it reaches land at a lower altitude, where it may reappear as a spring or artesian well, or flow from below the surface into a lake or even into the sea. Where groundwater appears above the surface, new streams are formed and the water resumes its journey overland to the sea.<sup>54</sup>

34. Certain groundwater is in constant motion, moving from the higher levels to lower elevations of the Earth. As observed by experts:

Water does not usually remain stationary in the aquifers but flows from the changing areas either to areas of natural discharge, such as springs, swamps, ponds and lakes, or to wells ... Water has been known to move 300 miles (480 km) or more in these underground strata, although the usual distances range from 5 to 100 miles (8 to 160 km).<sup>55</sup>

35. In the light of the above facts, a previous Special Rapporteur was thus led to sum up the question of groundwater, and in particular its contribution to watercourses, as follows:

Despite problems in collecting data regarding groundwater under varying hydrologic and geologic conditions, there can be no doubt that groundwater is an integral and vital part of the unbroken cycle of movement through which the supply of fresh water is continually replenished. If, in some manner, the movement of groundwater were to come to a halt, the quantity of water in watercourses would be reduced dras-

<sup>51</sup> Ibid., para. 4.12.

<sup>52</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (vol. I and vol. I/Corr.1, vol. II, vol. III and vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigendum), vol. I, *Resolutions adopted by the Conference*, resolution 1, annex II (Action 21), para. 18.3 (b). See also paragraph 18.12 (k).

<sup>53</sup> Ibid., para. 18.76 (c) (iii).

<sup>54</sup> M. Overman, *Water: Solutions to a Problem of Supply and Demand* (Doubleday, Garden City, N.Y., 1969), p. 33-34. See also *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/320, p. 147, para. 12.

<sup>55</sup> J. H. Hirschleifer, J. C. DeHaven and J. W. Milliman, *Water Supply* (University of Chicago Press, Chicago, Ill., 1960), p. 10. See also *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/320, p. 148, para. 19.

<sup>46</sup> Ibid., para. 68 (n).

<sup>47</sup> Ibid., para. 82 (g).

<sup>48</sup> *Report of the United Nations Conference on Desertification, Nairobi, 29 August to 9 September 1977* (A/CONF.74/36), para. 33.

<sup>49</sup> *Charter on groundwater management* (see footnote 14 above), p. 29.

<sup>50</sup> *Report of the International Conference on Water and the Environment: Development issues for the 21st century, Dublin, 26-31 January 1992* (A/CONF.151/PC/112, annex II), para. 3.9.

tically. Many perennial surface streams would become intermittent, or even dry up altogether. Accordingly, the contribution of groundwater to watercourses must be taken into account in framing principles to govern the uses made of watercourses. At an elementary level, the amount of groundwater moving into an international watercourse has to be included in calculating the total volume of flow of the watercourse. At the level of water resources management, it is necessary, in forming principles regarding the use of water, to give consideration to the effects of a contribution of groundwater to a watercourse. It is necessary to consider as well the effects of the existence of available reserves of groundwater, and of the contribution of water flowing in watercourses to the quantity of groundwater.<sup>56</sup>

### Conclusion

36. The foregoing review has demonstrated the vital importance of groundwater, whether confined or not, as a source of fresh water for both human consumption and for industrial and agricultural use. It has also shown the concerns expressed in various forums and the important steps that are required to be taken to prevent its depletion, pollution and contamination. Moreover, it has been repeatedly stated that the only viable way for achieving optimum utilization and conservation of water is through integration of both surface water and groundwater resources.

37. It is to be observed that in the treatment of this subject the tendency has been not to distinguish between transboundary confined groundwaters and related

groundwaters, i.e. those that contribute water to a system flowing into a common terminus.

38. The Special Rapporteur is of the view that it is important for the draft on the law of the non-navigational uses of international watercourses to include provisions on "unrelated" confined groundwaters, in order to encourage their management in a rational manner and prevent their depletion and pollution. As the commentary to article 1 of the Rules on International Groundwaters adopted by the International Law Association at its sixty-second Conference states:

There is . . . a need to treat in these rules those cases where a shared aquifer is an independent water resource body, not contributing water to a "common terminus" via a river system, or receiving significant amounts of water from any extant surface water body. A shared aquifer, isolated from perennial streams or lakes, can readily be conceptualized as a kind of international "drainage basin", underground; the hydrogeologist is inclined to employ "groundwater basin", "groundwater reservoir" and "aquifer" interchangeably.<sup>57</sup>

39. While the international trend calls for the management of all freshwater resources including groundwater in an integrated manner, the Special Rapporteur hopes that the Commission would be willing at least to include transboundary groundwaters in the scope of the topic. If "unrelated" confined groundwaters are excluded from the scope of the present draft articles, it would leave a lacuna or a vacuum in the management of transboundary water resources. Moreover, such an omission would ignore international trends and developments in this field.

<sup>56</sup> First report on the law of the non-navigational uses of international watercourses by Mr. Stephen M. Schwebel, Special Rapporteur, *Yearbook . . . 1979*, vol. II (Part One), document A/CN.4/320, p. 149, para. 21.

<sup>57</sup> ILA, *Report of the Sixty-second Conference* (see footnote 1 above), p. 256.

# INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

[Agenda item 6]

DOCUMENT A/CN.4/459

**Tenth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur**

[Original: English/French/Spanish]  
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	Source
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Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) and Protocol additional thereto (Paris, 28 January 1964)	<i>Ibid.</i> , vol. 956, p. 251.
Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962)	<i>Ibid.</i> , p. 325.
Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963)	IAEA, <i>International Conventions on Civil Liability for Nuclear Damage</i> , Legal Series, No. 4, rev. ed. (Vienna, 1976), p. 34.
Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Brussels, 27 September 1968)	United Nations, <i>Treaty Series</i> , vol. 961, p. 187.
Convention on International Liability for Damage Caused by Space Objects (London, Moscow, Washington, 29 March 1972)	<i>Official Journal of the European Communities</i> , No. L 299, 31 December 1972, and No. L 304, 30 October 1978.
Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 1 May 1977)	United Nations, <i>Treaty Series</i> , vol. 961, p. 187.
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Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989)	<i>Official Journal of the European Communities</i> , No. L 319, 25 November 1988.
Convention on Civil Liability for Damage Caused Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (Geneva, 10 October 1989)	UNEP, <i>Selected Multilateral Treaties in the Field of the Environment</i> , Cambridge (United Kingdom), 1991, vol. 2, p. 449.
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## Source

Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)

Document E/ECE/1250, 1991.

Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)

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Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)

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## Introduction

### A. Prevention

1. In the most recent discussion of the treatment of prevention, in the ninth report,<sup>1</sup> a dual observation was made at the forty-fifth session of the International Law Commission. On the one hand, it was said that an overall picture of the obligation of prevention was not provided, which meant that two extremes were called for:

#### (a) The enunciation of some principles:

starting with the obligation of prevention linked to liability as a result of the risks involved in the activities envisaged. That would mean combining articles 3 (first para.), 6 and 8, including the provisions of article 2 (a) and (b), already referred to the Drafting Committee in that part of the draft.<sup>2</sup>

and (b) The explicit statement of another basic general principle, namely, that,

if the State in whose territory the activity involving risk took place did not fulfil its obligations of prevention, its liability for failure to do so would be incurred.<sup>3</sup>

2. The Special Rapporteur believes that the comment set out in subparagraph (a) above should be taken into account by the Drafting Committee when considering the provisions in question: the material exists and the comment did not indicate that anything of importance was missing. The view expressed in subparagraph (b) above is dealt with in chapter II of the present report since this type of liability arises from the failure to fulfil obligations of prevention.

3. One issue outstanding was what was referred to as prevention *ex post*, which will be dealt with in chapter I of the present report.

<sup>1</sup> *Yearbook* . . . 1993, vol. II (Part One), p. 187, document A/CN.4/450.

<sup>2</sup> *Ibid.*, vol. II (Part Two), para. 130.

<sup>3</sup> *Ibid.*, para. 131.

### B. Liability

4. The ILC adopted at its forty-fourth session a number of decisions on the scope of the topic.<sup>4</sup> The ILC, after stating that "attention should be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm", stated that:

The articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it will then decide on the next stage of the work.<sup>5</sup>

5. Once consideration of the issue of prevention has been completed, by means of a discussion of the response measures proposed in chapter I of the present report (as I attempt to demonstrate the measures in question, whatever they are called, will not under any circumstances be measures to *repair* transboundary harm), the two types of liability to which our articles would give rise must be considered: State liability for the failure to fulfil obligations of prevention, which constitutes liability for a wrongful act, and the liability in principle of the private operator.

6. Then the relationship between the two types of liability must be considered, as well as the provisions common to them. Lastly, the present report will consider the issue of the available procedural means of enforcing liability, but without proposing articles as yet, and will explore colleagues' positions on the main approaches that could be taken.

<sup>4</sup> *Yearbook* . . . 1992, vol. I, 2282nd meeting.

<sup>5</sup> *Ibid.*, vol. II (Part Two), para. 346.

## CHAPTER I

## Response measures

A. Prevention *ex post*

7. In the discussion at its forty-fifth session of ILC, some members expressed strong opposition to the idea of including in the chapter on prevention proper what was referred to as prevention *ex post*, namely measures to be adopted *after* an incident has occurred, to reduce or control its effects and thus avoid greater harm, or even—as we shall see—completely avoid the transboundary harm that would occur if such measures were not taken. The Drafting Committee opted for the approach taken by these members—hence the text proposed for article 14, which deals only with prevention *ex ante*, or measures to prevent incidents.

8. Although only measures taken prior to the incident can be referred to as “prevention”, the Special Rapporteur believes that what we have identified as prevention *ex post* is none the less still not reparation and that we therefore cannot include it in the chapter on reparation without making a methodological error.

9. Close examination reveals that incidents such as the ones dealt with under our topic are actually at the beginning of a cause-and-effect chain, which ends with the harm. An incident has certain effects on the natural world, which in turn produce further effects: all these effects fall within the sphere of natural causality. In a given link in this causal chain, however, some effects are regarded as legally relevant: they constitute harm and must be repaired. Harm is a legal concept, but it represents actual events.

10. By way of illustration: an incident that occurs as a result of an industrial activity leads to pollution of the waters of an international river. The pollution does not as yet represent transboundary harm. The activity-pollution causal chain is still manageable; so transboundary harm is avoided if the pollution does not reach the frontier or is reduced, or controlled, and as a result of such steps the pollution is dealt with within the territory of the country in question. Such steps are preventive because their purpose is to prevent, either completely or partly, harm that has as yet not occurred, even though the incident itself has already occurred. Thus, measures that could even be regarded as rehabilitative in the State of origin can be of a preventive nature in the context of transboundary harm, since they prevent or reduce the scale of such harm. And the focus of our topic is *transboundary* harm.

11. It is thus clear that the concept of prevention is strictly applicable both to activities to avoid incidents that can lead to transboundary harm and to activities to prevent the effects of the incident from reaching their full potential. Prevention of incidents, or prevention *ex ante*, is just one aspect of prevention in general, which would include prevention *ex post*, because the fewer incidents there are, the less harm there will be. It is thus not possible, methodologically, to include in the chapter on reparation actions *ex post* to prevent harm.

12. International instruments dealing with such measures always refer to them as preventive, and instruments dealing only with *liability* view them in the context of the *compensation* to be paid for the cost of taking them.

## B. Further review of international practice

13. Having rapidly reviewed such instruments, we note that the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, of the Council of Europe (hereinafter called the Lugano Convention), states in article 2, paragraph 9: “Preventive measures” means “any reasonable measures taken by any person *after an incident has occurred*\* to prevent or minimize loss or damage as referred to in paragraph 7, subparagraphs (a) to (c), of article 2”. The subparagraphs referred to deal with the three items into which the concept of “damage” is divided in the Convention. As it happens, paragraph 7 (d) of article 2 includes in the concept of “damage” subject to compensation “the costs of preventive measures”, and the costs in question can only be costs incurred *after the incident*, because they are covered by the reference made in paragraph 9.

14. The proposed amendment to the Convention on Third Party Liability in the Field of Nuclear Energy (hereinafter called the Paris Convention) and the Vienna Convention on Civil Liability for Nuclear Damage (hereinafter called the Vienna Convention), prepared by the drafting committee of the standing committee of the IAEA on liability for nuclear damage, identified as attachment II.A, suggests the following subparagraph (m):

“Preventive measures” means any reasonable measures taken by any person after a nuclear incident has occurred to prevent and minimize damage referred to in subparagraphs (k) (i) to (iv) above.

Moreover, the draft adds to article I, paragraph 1 (k) a subparagraph (v) which includes, under the meaning of “nuclear damage”, “the costs of preventive measures” defined earlier. And in the draft identified as attachment II.B (“Pool” draft), article 3 contains a paragraph 2, enclosed in square brackets, reading:

the damage referred to in paragraph 1 above includes the cost of preventive measures, wherever taken, to prevent or minimize such damage and further loss or damage caused by such measures.

15. The Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources states, in article 1, paragraph 6:

“Pollution damage” means loss or damage outside the installation caused by contamination resulting from the escape or discharge of oil from the installation and includes the cost of preventive measures.

And paragraph 7 reads:

"Preventive measures" means any reasonable measures taken by any person in relation to a *particular incident*\* to prevent or minimize pollution damage . . .

16. The Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) uses a similar formulation in article 1, paragraph 10, dealing with the concept of damage (para. 10 (d)), which includes the costs of preventive measures defined exactly as in the earlier cases ("reasonable measures taken by any person *after an incident has occurred*\* to prevent or minimize damage").

17. Instruments dealing mainly with prevention of transboundary harm also cover not only prevention of incidents but also prevention of harm, and tend to use such wording as "prevent, reduce and control" in referring to prevention in the broad sense. The United Nations Convention on the Law of the Sea uses such wording so frequently in part XII (Protection and preservation of the marine environment), that it is superfluous to quote the relevant passages. Such wording is clearly used in order to describe the equivalent of the "preventive measures" dealt with in the above-mentioned instruments on liability, and it does not by any means cover responsibility and liability, which the Convention on the Law of the Sea deals with in a separate article (art. 235).

18. The Convention on Environmental Impact Assessment in a Transboundary Context—which, as we saw in the ninth report, deals only with prevention and not with liability<sup>6</sup>—refers to the parties' obligation to take appropriate and effective measures to prevent, mitigate and monitor significant adverse environmental impact. Lastly, the Convention on the Transboundary Effects of Industrial Accidents, despite having as its chief goal the prevention of industrial accidents, gives us an idea of how relative the concept of prevention is, since it indicates in article 3, paragraph 1, that the purpose of the Convention is

. . . to protect human beings and the environment against industrial accidents by *preventing such accidents as far as possible*,\* by reducing their frequency and severity and by *mitigating their effects*.\* To this end, preventive, preparedness and *response measures*,\* including restoration measures, shall be applied.

### C. "Response" measures

19. Such terms as "response measures", used in the article just quoted, are used in other conventions—for example, the Convention on the Regulation of Antarctic Mineral Resource Activities, which in referring to such measures in article 8, paragraph 1, states that

an Operator undertaking any Antarctic mineral resource activity shall take necessary and timely response action, including prevention, containment, clean up and removal measures, if the activity results in or threatens to result in damage to the Antarctic environment or dependent or associated ecosystems.

Clearly, the word "prevention" is used here in the sense of "prevention *ex post*", but some types of measures that do not constitute prevention *ex post* are regarded as response

action, as in the case of clean-up and removal whose purpose is not to limit or minimize transboundary harm.

20. If, in order to refer to these measures *ex post*, we are to continue to use a term that *differs from the term used in all the relevant conventions (preventive measures)*, while accepting that the measures in question do not fall within the sphere of reparation, we must find a different term. One option is to include such measures under the concept of *response measures*—a concept that must be defined in article 2 of our draft (Use of terms)<sup>7</sup> as covering only what we have referred to as *prevention ex post*—to confine that concept to measures taken in response to an incident with a view to limiting or minimizing its adverse effects and the resulting transboundary harm. We have already provided a number of examples, but it should be added that response measures include a number of measures that would be strictly of a preventive nature—such as felling trees in, and clearing, a strip of woodland in order to prevent fire from spreading to a neighbouring country—and other measures that could constitute restoration in the case of the State of origin but prevention in the case of the affected State: for example, in the case of an international river, the conditions that prevailed prior to an incident are re-established, thus preventing the river current from continuing to carry to the neighbouring country the rest of the resulting pollution. It would suffice to clarify that the purpose of this concept is to limit or minimize transboundary harm after the incident has occurred.

21. Such measures may be taken by the State itself in some circumstances, or by private parties. If necessary, in some cases the State will use firefighters or the army to deal with consequences of an incident that threaten to spread to a neighbouring country, as in the case of a forest fire resulting from an industrial accident, or massive pollution of a river also resulting from an accident while an activity under article 1 of the draft (Scope of the present articles)<sup>8</sup> is being carried out. Possibly, however, the affected State will take identical measures in its own territory and thus manage to avoid greater damage, or private parties in either State will take such measures on their own initiative. In such cases the party that is ultimately liable and must pay the corresponding compensation must also bear the cost of such measures—which we would refer to as "response" measures—provided that it was reasonable to adopt the measures.

### D. Proposed text

22. In the light of the foregoing, the Special Rapporteur proposes to add to article 2 the following two paragraphs:

"Response measures" means any reasonable measures taken by any person in relation to a particular incident to prevent or minimize transboundary harm.

The harm referred to in subparagraph . . . includes the cost of preventive measures wherever taken, as well as any further harm that such measures may have caused."

<sup>7</sup> For the text of the draft articles submitted by the Special Rapporteur at the fortieth session of the ILC, see *Yearbook . . . 1988*, vol. II (Part Two), p. 9.

<sup>8</sup> Ibid.

<sup>6</sup> Document A/CN.4/450 (footnote 1 above), paras. 2 and 22 to 24.

## CHAPTER II

## State liability

## A. Liability in general

23. We have thus completed the section on prevention, both of whose aspects we have considered: prevention of incidents, and preventive response measures taken after an incident has occurred, in order to minimize or prevent the harm resulting from the incident. The content of the liability itself will take shape once the concept of harm is completed in our articles. In the area of harm to the environment, which is the most novel and fluid harm category, there can be other "remedial measures",<sup>9</sup> a term that conveys well the idea that there can be remedial measures other than monetary compensation, as in the case of certain measures to restore the environment that are being worked on currently in a variety of forums. However, for the time being the chapters on liability deal only with its attribution, whatever its content may be, in the event of failure to fulfil obligations of prevention (the subject of the present section) and where there are incidents caused by an activity under article 1 (the subject of chapter III).

## B. Relationship between State liability and civil liability

## 1. EXPLANATORY COMMENTS

24. In order to be able to establish the liability of the State in our articles, we must begin by drawing attention to the fact that in the articles State liability for a wrongful act (breach of obligations of prevention) coexists with civil liability on the part of a private individual or private individuals (compensation for transboundary harm), or strict liability, which does not require failure to fulfil an obligation in order to be applicable.

25. There are other conventions in which both types of liability occur, but two very different kinds of situations regarding State liability must be identified:

(a) *Situations where there is no State liability for a wrongful act.* In general, the conventions dealing with liability for harm caused by dangerous activities do not cover obligations of prevention of the type covered by our articles; the State therefore either does not bear any liability, as in the case of the Lugano Convention, or it bears strict, sole liability as in the case of the Convention on International Liability for Damage Caused by Space Objects, or it bears residual liability in the context of the liability of the private party, with respect to the payment of compensation in connection with accidents resulting from the activities in question. This is so in the case of the Vienna Convention and the Paris Convention, under which, in our view, the liability of the State is both residual and strict;

(b) *Situations where there is State liability for a wrongful act.* The relevant instruments impose certain obligations on the State, and its liability is subsidiary to the civil (strict) liability of the private operator, but only in the event of an *indirect* causal link between the State's failure to fulfil its obligation and the occurrence of the harm.

26. Let us take a closer look at the foregoing:

(a) *Situations where there is no State liability for a wrongful act.* Many conventions on civil liability for dangerous activities differ from our draft in that they do not cover State obligations of prevention. State liability for failure to fulfil an obligation does not arise. The conventions in question also do not cover State liability subsidiary to the operator's liability for the payment of compensation in certain circumstances: the State is not involved. This is so in the case of the Lugano Convention;

(b) *Situations where the State bears both strict liability and liability for a wrongful act.* This situation applies in the case of the Convention on International Liability for Damage Caused by Space Objects. In the Convention liability for a wrongful act and strict liability exist side by side, but both involve the launching State, whose conduct will be subject to one or the other regime depending on where the harm occurs: if the damage is caused on the surface of the earth or to aircraft in flight, liability will be "absolute";<sup>10</sup> but if the damage is caused to a space object of another launching State liability for fault will arise (see articles II, III and IV of the Convention);

(c) *Situations where there is strict liability on the part of the State but it is subsidiary to the operator's civil (also strict) liability for the payment of compensation in respect of incidents resulting from the dangerous activity.* There is no State liability for a wrongful act. The Paris Convention, the Vienna Convention and the Convention on the Liability of Operators of Nuclear Ships, which also do not impose obligations of prevention on States, do in certain cases impose on States liability subsidiary to the operator's liability with respect to the payment of compensation for nuclear incidents. The private operator bears primary liability, but the State is liable in respect of the portion of the compensation not covered by the operator's insurance. We believe that this is *strict* liability on the part of the State, since the amounts for which the State is liable arise from strict liability on the part of the operator who has not met his obligations in that connection: the State does not have any special defence; it is in the position of the party originally liable, but residually;

(d) *Situations where there is State liability for a wrongful act, but such liability is subsidiary to the operator's civil liability for harm caused by the dangerous activity.* In article 8, paragraph 2, the Convention on the Regulation of Antarctic Mineral Resource Activities

<sup>9</sup> This is what such measures were called in the decision adopted by the ILC (see footnote 4 above) on 8 July 1992, when it decided to consider the topic in stages (see *Yearbook . . . 1992*, vol. II (Part Two)), para. 345.

<sup>10</sup> The Spanish term "*responsabilidad absoluta*" is a literal translation from English, and is not normally used in Spanish. Absolute liability is very strict liability, with very few or no exceptions.

specifies certain types of damage in respect of which the operator bears strict liability. Paragraph 3 (a), however, states that:

(a) Damage of the kind referred to in paragraph 2 above . . . which would not have occurred or continued if the Sponsoring State had carried out its obligations under this Convention with respect to its Operator shall, in accordance with international law, entail liability of that Sponsoring State. Such liability shall be limited to that portion of liability not satisfied by the Operator or otherwise.

Such liability is based on a "substantial and genuine link" between the operator and its sponsoring State as established in article 1, paragraph 12, and described in paragraphs 11 and 12. Moreover, the sponsoring State's obligations are towards its operator. Also, in the draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,<sup>11</sup> both strict liability on the part of the private party liable or of the International Fund, and State liability for a wrongful act, are involved in the payment of compensation, even though the State's obligations are not necessarily towards its operator but rather constitute general obligations. There are two preconditions for residual State liability: first, that the State has failed to fulfil one of its obligations and that, had it not been for this failure, the damage would not have occurred (indirect causality)<sup>12</sup> and, second, that full compensation cannot be paid by the operator or his insurance (or the compensation fund scheme, if there is one).

27. The situations covered by paragraph 26 (a) above are not relevant to our draft, which covers obligations of prevention. The situations covered by subparagraph (b), which holds the State fully liable, is only justified in such instruments as the Convention on International Liability for Damage Caused by Space Objects, which imposes all the liability for any such activity on States. The situations covered by subparagraph (c), that is, strict but residual State liability, is consistent with the kind of liability that must be assumed in connection with activities involving risk and which might be necessary where there is a potential for disastrous transboundary harm and insurance is not sufficient to cover the enormous compensation required but which might encounter resistance from those who refuse to assign to the State a kind of liability, which, in their view, is not well-established in international law. There might also be other possibilities for residuality: a standing committee now in the process of amending the

<sup>11</sup> UNEP/CHW.1/WG.1/1/5, annex.

<sup>12</sup> Paragraph 5 of the note by the Secretariat (UNEP/CHW.1/WG.1/1/3) states:

"Taking into account the fact that the aims as well as the obligations of the Basel Convention are addressed to the States Parties which exercise decisive control over all transboundary movements of hazardous wastes and their disposal, it is proposed that States should be deemed to incur liability for damage, but only to the extent that such damage is causally related to the State's failure to comply with its obligations under the Basel Convention. Therefore, contrary to the proposed system of civil liability, state liability should be fault-based and not based on strict liability."

Paragraph 7 proposes complementing article 9 on State liability as follows:

"(a) Damage which would not have occurred if the exporting State had carried out its obligations under the Convention with respect to the transboundary movement and disposal of hazardous wastes shall entail the liability of the exporting State. Such liability shall be limited to that portion of damage not satisfied under the civil liability or the fund provisions of the protocol."

Vienna and Paris Conventions<sup>13</sup> is working out promising solutions, e.g. bringing in, at certain levels, a consortium of *all member States* or a consortium of *all liable private parties from all member States*. This form of *socialization* of the harm is in keeping with the basic philosophy underlying all dangerous activities which, after the advantages are weighed against the disadvantages, are authorized because they are useful to society (national or international society, as the case may be). No one, not even the operator, should have to shoulder the costs associated with the harm caused by accidents inherent in the activity; such costs should be borne by society as a whole, which benefits from the activity. The advantage of channelling liability towards the operator—which is recognized by authors who have written on these topics—is that the operator is in the best position to offset the cost of the risk involved by factoring it into the price of his goods or services.

28. With regard to situations covered by paragraph (d), which introduces residual State liability for a wrongful act, the question arises as to whether this category of liability for supplementing the compensation paid in order to provide fuller restitution for the harm would to some extent run counter to its own purposes, namely, the establishment of a comprehensive regime which would not leave innocent victims unprotected. Indeed, liability for a wrongful act requires a certain amount of proof which it would not be easy for the victims to obtain. It is for this very reason that traditionally domestic law and, more recently, international practice have preferred reparation by the liable party or by his insurance. If the aim is to help the victim secure reparation, why place the obstacle of *onus probandi* in his path?<sup>14</sup>

29. None of the foregoing situations, then, seems to be entirely suited to our purposes, although subparagraph (d) could be considered. It would be simplest, however, not to impose any form of strict liability on the State and to draw the sharpest possible distinction between its liability for its failure to fulfil its obligations (liability for wrongful acts) and strict liability for harm caused by incidents resulting from the risk involved in the activity in question. Liability would be incurred in any case by the liable private party and, possibly—if the ideas are accepted—by a group of liable parties.<sup>15</sup> The advantage of this system would be to simplify the relationship between State liability and the liability of private parties and, perhaps, to

<sup>13</sup> See paragraph 14 above.

<sup>14</sup> There are interrelated concepts which might warrant consideration in one of the Special Rapporteur's next reports: the establishment of a compensation fund which would also include a consortium of liable private parties. It is difficult to make such institutions work in a comprehensive system which covers all dangerous activities, and any attempt to do so might be futile. A permanent body to promote the adoption of protocols and oversee the application of the articles could be contemplated. The Lugano Convention introduces a standing committee to consider questions of a general nature concerning interpretation or implementation of the Convention and propose amendments to it, including its annexes. This is the current trend in environmental protection conventions; while our draft is not concerned *exclusively* with environmental protection, the concept of liability for environmental harm was welcomed by the Commission and by the General Assembly and necessarily moves us right into the area of environmental protection, whether we want to or not.

<sup>15</sup> See especially paragraph 4 of the commentary on article 23 adopted by the Commission at its thirtieth session (*Yearbook . . . 1978*, vol. II (Part Two), p. 82).

make the draft more acceptable to States. It would also simplify the procedural aspects, as will be seen in section VI, since only domestic courts would be competent and such thorny issues as that of a State's appearing before a court in a case involving a private party, particularly if it had to do so in the domestic courts of another State, would not arise.

## 2. PROPOSED TEXT (alternatives A and B)

30. We therefore submit to the Commission an alternative which is somewhere in between the two systems by formulating the article as follows:

*"Article 21. Residual liability for a breach by the State*

### *Alternative A*

Harm which would not have occurred if the State of origin had fulfilled its obligations of prevention in respect of the activities referred to in article 1 shall entail the liability of the State of origin. Such liability shall be limited to that portion of the compensation which cannot be satisfied by applying the provisions on civil liability set forth herein.

### *Alternative B*

The State of origin shall in no case be liable for compensation in respect of harm caused by incidents arising from the activities referred to in article 1."

## C. State liability for wrongful acts

### 1. EXPLANATORY COMMENTS

31. Having established the State's obligations of prevention in the ninth report,<sup>16</sup> we must now consider the potential consequences of its failure to fulfil those obligations. Normally, they would be the consequences laid down for a breach in part two of the draft articles on State responsibility, provisionally adopted by the Commission at its forty-fifth session: cessation, restitution in kind or equivalent compensation, satisfaction and guarantees of non-repetition.<sup>17</sup>

32. It should be recalled that, in our articles, the relationships which arise from the failure to fulfil obligations of prevention are between States. Individuals do not enter into the picture here; we are operating at the international level. We should draw a clear-cut conceptual distinction between this type of liability and liability arising as the result of an incident occurring in the course of an activity under article 1, which has caused transboundary harm and for which civil liability or liability on the part of a private party would be incurred.

33. In the first place, the State of origin will be under an obligation to cease the conduct constituting a wrongful act having a continuous character. This continuous act would generally consist in the State's failure to take the measures required by our draft,<sup>18</sup> and its cessation would be in keeping with one view expressed during the debate that a dangerous activity performed without the appropriate precautionary measures being taken ceases to be a lawful activity under international law. It is understood that the wrongful act in question must be duly proved to be such and that a lawful activity of the State of origin cannot therefore be vetoed by the affected State.

34. The State injured by the breach can request that all appropriate forms of reparation be made, as provided for in the current formulation of articles 7, 8, 10 and 10 *bis* of part two of the draft articles on State responsibility.<sup>19</sup> In addition, however, the injured State would be able to take the appropriate steps following a breach of an obligation, that is, it would have the right to take any appropriate countermeasures under the same general conditions of lawfulness to which countermeasures are subject under international law.

35. We must remember that the obligations of prevention we have imposed on States in the relevant chapter are not obligations of result; we are merely requiring States to *attempt* to prevent accidents and harm. Violation of these obligations is therefore distinct from the actual occurrence of harm as a result of an incident which occurs during the performance of the activity in question. Should such harm occur, strict liability—liability on the part of a private party in the case of our articles—should immediately begin to operate.

36. For example, if the State of origin allows an activity under article 1 to be carried out without prior authorization—that is, where the operator has not applied for authorization and, in order to obtain it, described the features of the activity or conducted the risk assessment required under article 12<sup>20</sup>—it would not be complying with that obligation. The occurrence of an incident would automatically impose strict liability on the operator, but the State would remain liable for the breach itself. This means that the affected State could make diplomatic representations and take such steps—for example, countermeasures—as are necessary to make the State of origin fulfil the requirement in question by ceasing the wrongful act, on penalty of the possibility of the activity's being declared unlawful.

37. And if neither the incident nor the transboundary harm occurs, the affected State can make the same representations and take the same steps, with the same results.

<sup>18</sup> The author wishes to place on record his own doubts as to whether an omission can constitute a continuous breach of an obligation; once an obligation to take action has been breached, that primary obligation is immediately replaced by a secondary obligation which is similar but not necessarily identical in content. It can, for example, also include an obligation to pay interest or in some other way compensate for the damage caused by the breach within the time period established for the fulfilment of the primary obligation or, possibly, *lucrum cessans*. In its discussion of the topic of State responsibility, however, the Commission has acknowledged that omissions could give rise to continuing breaches.

<sup>19</sup> See footnote 17 above.

<sup>20</sup> *Yearbook . . . 1993*, vol. II (Part Two), paras. 142 to 147.

<sup>16</sup> See footnote 1 above.

<sup>17</sup> *Yearbook . . . 1993*, vol. II (Part Two), para. 335.

38. Here let us digress briefly in order to justify the above assertion more fully. In the ninth report, we said that obligations of prevention are obligations of *due diligence*<sup>21</sup> and that this has its consequences. We should, first and foremost, distinguish obligations of prevention from obligations of result under article 23 of part one of the draft articles on State responsibility,<sup>22</sup> that is, from *obligations concerning the prevention of a given event*, with which they might be confused.

39. In the case of obligations concerning the prevention of a given event, only the occurrence of an event which there was an obligation to prevent would constitute a violation; its occurrence is a necessary condition. Here is what the commentary on article 23 concludes:

The State bound by an obligation of this kind cannot claim to have achieved the required result by seeking to prove that it has set up a perfect system of prevention if, in practice, this system proves ineffective and permits the event to occur. Conversely, the State having an interest in the fulfilment of the obligation cannot claim that the latter has been breached solely because the system of prevention set up by the obligated State seems to it to be clearly insufficient or ineffective, so long as the occurrence the system was supposed to prevent has not taken place.<sup>23</sup>

The Commission also notes that:

[...] obligations requiring the prevention of given events *are therefore not the same as those which are commonly referred to by the blanket term "obligations of vigilance".*\* The commission of a breach of the latter obligations often consists of an action or omission by the State and is *not necessarily affected by whether an external event does or does not take place.*<sup>24</sup>

It should be explained that "*vigilancia*" is the Spanish translation of "due diligence" in the English text. This seems to be the primary difference between obligations of result and obligations of due diligence in the system laid down in part one of the draft articles on State responsibility; in the case of obligations of result, for there to be a breach, the result—positive or negative—must not have been achieved, whereas in the case of obligations of due diligence, this requirement is not necessary and the means employed are considered directly in order to determine whether or not they are those which should reasonably

have been used in order to achieve the result required by the obligation.

40. It is even conceivable that the State could be liable for some form of compensation to the State of origin where no incident has occurred and there is no strict liability on the part of the private party responsible. Supposing that the failure of the State of origin to require the taking of certain preventive measures by operators carrying out a dangerous activity in its territory has compelled the exposed State or the persons residing therein to take certain measures in the latter State's territory to prevent or minimize the harm that an incident occurring as a result of that activity might cause them. This is perfectly possible and would mean that the exposed State has had to incur certain costs owing to the indirect causality constituted by the omission on the part of the State of origin. The compensation for which that State would be liable would be an example of equivalent compensation.

## 2. PROPOSED TEXT

41. The foregoing could be expressed in an article which would follow the last article on prevention, currently under review by the Drafting Committee. Its text could simply refer to the applicable international law even though such a reference might seem unnecessary to some; there is no need for a contractual provision in order to ensure the implementation of rules of customary law relating to the consequences of such breaches. We thus prefer either to make no mention at all of the consequences of the breach of the provisions of the article or simply to defer to international law; if we were to reproduce the applicable articles on State responsibility in our draft, even with appropriate drafting changes, we would be adopting texts which are not final and are subject to change both on the second reading of the draft in the Commission and during any codification conference which is convened. Should the Commission therefore opt simply to refer to international law, the following might be an acceptable text:

### "Article X. International State liability

The consequences of a breach by the State of origin of the obligations of prevention laid down in these articles shall be those consequences established by international law for the breach of international obligations."

<sup>21</sup> Ibid., vol. II (Part One), p. 189, document A/CN.4/450, para. 7.

<sup>22</sup> For the text of article 23 and the commentary adopted by the Commission at its thirtieth session, see *Yearbook* . . . 1978, vol. II (Part Two), p. 82.

<sup>23</sup> Ibid., p. 82, para. 4 of the commentary.

<sup>24</sup> Ibid., footnote 397.



## CHAPTER III

## Civil liability

## A. Strict liability

42. Activities involving risk call for the strict liability that has become widespread in national legislation for reasons which are well known, including the need for an expeditious process that dispenses with the need for demonstration of a breach of an obligation or fault. In international law, the same arguments have been used to establish the civil liability of the private party in conventions on which we have provided frequent comments throughout our reports. Even though it was elaborated several years ago, paragraph 4 of the draft directive of the Commission of the European Communities on civil liability for damage caused by wastes<sup>25</sup> makes convincing arguments in favour of strict liability:

*No-fault or strict liability*

As this principle implies automatic liability, it will ensure that victims receive compensation, the environment will recover and economic agents are held liable in keeping with the objectives of the directive.

The concept of no-fault or strict liability for environmental risks is everywhere gaining ground. In the related (and comparable) field of defective products, Council Directive 85/374/EEC of 25 July 1985 adopts this principle, and it can also be found in a growing number of international conventions, e.g. on nuclear energy and oil pollution of the seas. The draft convention prepared by UNIDROIT on compensation for damage caused by the carriage of dangerous goods by rail, road or inland waterway, currently being negotiated within the United Nations Economic Commission for Europe, is also based on the same principle.

In the same spirit, the final communiqué of the 8th Conference of Ministers on the Protection of the Rhine against Pollution in Strasbourg on 1 October 1987, which was also attended by the Commission, calls for harmonization of legislation on civil liability for damage caused by dangerous substances on the basis of the principle of strict liability.

The same trend is becoming increasingly established in national legislation. Germany and Belgium have already introduced the principle of no-fault liability. In France, it is well established by case law. Case law in the Netherlands is moving in the same direction and a law is being drafted to introduce the principle in the new Civil Code. In Spain, strict liability has been introduced in the waste management sector.

The end result of the draft international instruments mentioned in these paragraphs was that strict liability was adopted.

## B. General characteristics of the regime

43. A number of features common to civil liability conventions emerge from a review of international practice in this field. Some of them are summarized in the Code of Conduct on Accidental Pollution of Transboundary Inland Waters.<sup>26</sup> This Code of Conduct is of interest to us because, like our draft, it concerns activities involving

risk which may accidentally cause transboundary damage (in this case through pollution). Article XV, paragraph 4 of the Code aptly summarizes the proper course of action in this regard:

4. In order to ensure prompt and adequate compensation in respect of all damage caused by accidental pollution of transboundary inland waters, countries should in accordance with their national legal systems provide for the identification of the physical or legal person or persons liable for damage resulting from hazardous activities.\* Unless otherwise provided, the operator should be considered liable; and where more than one organization or person is liable, such liability should be joint and several.\*

Paragraph 5 reads:

Countries should provide *strict liability* \* for pollution damage caused by accidents involving hazardous activities . . .

And paragraph 6 reads: "where the incident from which the damage resulted cannot be identified . . . countries should, *inter alia*, consider the establishment of *compensation funds*.\*"

44. Liability is thus strict where the operator must be identified in the convention or in internal law, and is joint and several where a number of operators are involved. Where possible, compensation funds should be established. In addition, however: (a) the operator is invariably obliged to take out insurance or to provide some other financial guarantee to cover either a sum equal to the maximum compensation—where there is a fixed limit—or another sum to be determined by the national authority; (b) in order for this system to function, the principle of non-discrimination must be respected; in other words, the State of origin should treat in the same manner in its courts both residents in its territory and non-residents; (c) States parties should ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of transboundary damage caused, as provided in article 235 of the United Nations Convention on the Law of the Sea; (d) in all matters not directly governed by the Convention the national law of the competent jurisdiction is to be applied, provided that such law is consistent with the provisions of the Convention; (e) judgements which are enforceable in one jurisdiction are to be equally enforceable in all jurisdictions, except where otherwise provided; (f) there must be unrestricted transfer of the amounts of money awarded in a judgement rendered in one of the States to any other State party in the currency desired by the beneficiary of the award.

45. Limitations in the form of exceptions and prescription must apply to both State and civil liability.

<sup>25</sup> Document COM (89) 282 final-SYN 217, 15 September 1989.

<sup>26</sup> United Nations publication, Sales No. E.90.II.E.28.



## C. Liable parties: "channelling" of liability

### 1. EXPLANATORY COMMENTS

46. As we have seen, it is important to establish who is to be liable in principle, within the State of origin, for the transboundary harm, in order thereby to facilitate action by the victims. This procedure is followed in all conventions on civil liability in which liability is "channelled" or "directed" towards certain persons; the victims must direct their action against the operator who is liable or against his insurer or financial guarantor, but not against other persons. Normally, the operator has the recourse of initiating in turn a claim against whomsoever he may be entitled so to do (for example, against a supplier who sold him defective material which caused the accident), with the exception of the Paris Convention, the Vienna Convention, the Convention on the Liability of Operators of Nuclear Ships, as well as the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, in which, perhaps owing to the magnitude of the risks and corresponding insurance premiums, the operator is deprived of this possibility and thus remains the only party who needs to be insured.

47. Normally, the party which has control over the activity at the time at which the incident occurs is liable. The party which has control is the operator. Some conventions provide for a presumption: the party which has control is the one which appears in the public register of the State of origin as the owner of the installation, or of the vessel, etc., and where such registers do not exist the owner is presumed to have direct control (Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome, 1952, art. 2, paras. 1 to 3; Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels—Explanatory Report (CRTD), art. 1, para. 8).

48. A number of instruments also provide for cases in which damage is caused by a continuous situation or by a series of incidents of the same origin (Lugano Convention, art. 6, paras. 1-4; Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, art. 3).

49. Undoubtedly, the instrument that is most helpful in determining liability is the Lugano Convention, elaborated by the Council of Europe, since it seeks to cover all dangerous activities, as our draft does.

50. It begins by announcing in its preamble the regime of strict liability "taking into account the 'polluter pays' principle and recalling Principle 13 of the Rio Declaration on Environment and Development:

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage; they shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.<sup>27</sup>

<sup>27</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1) (United Nations publication, Sales No. E.93.1.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I, p. 4.

51. Article 2 of the Lugano Convention (Definitions) states that "operator" means the person who exercises the control of a dangerous activity. In article 6 (Liability in respect of substances, organisms and certain waste installations or sites), the first three paragraphs are of particular interest. They read as follows:

1. The operator in respect of a dangerous activity mentioned under Article 2, paragraph 1, subparagraphs (a) to (c) shall be liable for the damage caused by the activity as a result of incidents at the time or during the period when he was exercising the control of that activity.

2. If an incident consists of a continuous occurrence, all operators successively exercising the control of the dangerous activity during that occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence during the period when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.

3. If an incident consists of a series of occurrences having the same origin, the operators at the time of any such occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence at the time when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.

52. Paragraph 4 is applicable to a dangerous activity which has definitively ceased in a given installation or on a given site. In such a case, where damage results from the activity, the last operator of this activity shall be liable for that damage unless he or the person who suffered damage proves that all or part of the damage resulted from an incident which occurred at a time before he became the operator. If it be so proved, the provisions of paragraphs 1 to 3 shall apply.

53. Moreover, article 7 refers to the liability of the operator of a site for the permanent deposit of waste. The last two points are supported by the Council of Europe Convention, since the definition of "activities dangerous to the environment" in article 2 explicitly includes in paragraph 1 (c): "the operation of an installation or site for the incineration, treatment, handling or recycling of waste" and in paragraph 1 (d) "the operation of a site for the permanent deposit of waste". In our case, since we have still not completed the task of more precisely identifying the activities covered by the draft articles (we have merely established a threshold of "significant risk"), consideration of the concept contained in those two points will have to be deferred.

54. Article 7, paragraph 4 is also relevant. It reads:

Nothing in this Convention shall prejudice any right of recourse of the operator against any third party.

This makes it clear that it is national law which must provide for the recourse in question and also that the authors of this Convention did not choose to follow the model of the conventions on nuclear damage, in which the operator or his insurer must absorb the damage.

### 2. PROPOSED TEXTS

55. In the light of the foregoing, the Special Rapporteur wishes to propose the following texts.

56. In article 2 (Use of terms), a paragraph should be inserted as follows:

“‘Operator’ means the person who exercises the control of an activity referred to in article 1.”

57. The following articles numbered in accordance with the determination of the final text by the Drafting Committee should then be added:

*“Article A. Liability of the operator*

The operator of an activity referred to in article 1 shall be liable for all significant transboundary harm caused by such activity during the periods in which he exercises control of such activity.

(a) In the case of continuous occurrences, or a series of occurrences having the same origin, operators liable under the paragraph above shall be held jointly and severally liable.

(b) Where the operator proves that during the period of the commission of the continuous occurrence in respect of which he is liable only a part of the damage was caused, he shall be liable for that part.

(c) Where the operator proves that the occurrence in a series of occurrences having the same origin for which he is liable has caused only a part of the damage, he shall be held liable for that part.

*Article B. Recourse against third parties*

No provision of these articles shall restrict the right of recourse which the law of the competent jurisdiction grants to the operator against any third party.”

**D. Obligation to purchase insurance**

1. EXPLANATORY COMMENTS

58. As we have seen before, in all civil liability agreements, the operator is required to take out insurance to pay compensation. Some agreements establish the amount of insurance coverage in relation to the limits on the compensation which, in certain cases, the national authorities may reduce, depending on their assessment of the danger posed by the activity in question. It would be difficult to establish such limits in an instrument such as ours, which is attempting to cover all dangerous activities, since they will vary from one activity to another. The Lugano Convention, which, as we have seen, is also of a general nature, does not do so.

59. Moreover, national authorities should be left free to fix the minimum amount of the insurance coverage or financial guarantee, on the basis of the result of their assessment of the risk inherent in the dangerous activities, as provided for in draft article 12.<sup>28</sup>

60. The commentary on article 12 of the Lugano Convention,<sup>29</sup> which appears in the explanatory report on the Convention, reads as follows:

<sup>28</sup> See footnote 20 above.

<sup>29</sup> See supplement to CDCJ (92) 50, para. 67.

The Convention requires the Parties, where appropriate, to ensure under internal law that operators have financial security to cover the liability under the Convention and to determine its scope, conditions and form. In particular, the financial security may be subject to a certain limit.

The provision invites the Parties to take into account, in determining which activities should be subject to the requirement of financial security, the risks of the activity.

When implementing this article the following considerations can be taken into account. Firstly, the fact that certain activities in themselves involve an increased risk of damage. Secondly, that some firms may not have the financial capacity to pay compensation awarded to persons who have suffered damage in the absence of insurance or financial security, and thirdly, to avoid any failure to apply the requirement arising out of the impossibility to foresee the risk and to establish a financial guarantee to cover that risk.

A financial security scheme or financial guarantees mentioned in this article can exist in many different forms, e.g. an insurance contract, or a financial cooperation of operators who deal with a specific kind of dangerous activity, in order to cover the risks involved in these activities. Such financial schemes would have the function of guaranteeing compensation for the damage caused by a dangerous activity performed by one of those operators.

It would also be possible to cover the risks involved by an insurance contract. Another possibility could be that an operator has sufficiently large financial resources himself to cover the risks involved in the dangerous activities carried out by him.

It is likely that, after the entry into force of the Convention, the insurance market in the field of environmental damage will develop further since the risks and liability for pollution will become better known, and the financial security schemes can gradually be replaced by insurance contracts.

2. PROPOSED TEXTS

61. In the light of the foregoing, the Special Rapporteur proposes the following articles:

*“Article C. Financial securities or insurance*

In order to cover the liability provided for in these articles, States of origin shall, where appropriate, require operators engaged in dangerous activities in their territory or otherwise under their jurisdiction or control to participate in a financial security scheme or to provide other financial guarantees within such limits as shall be determined by the authorities of such States, in accordance with the assessment of the risk involved in the activity in question and the conditions established in their internal law.

*Article D. Action brought directly against an insurer or financial guarantor*

An action for compensation may be brought directly against the insurer or another person who has provided the financial security referred to in the article above.”

## E. Competent court

### 1. EXPLANATORY COMMENTS

62. Existing conventions differ in the choice of jurisdiction they offer the injured party. The Paris Convention (art. 13) and Vienna Convention (art. XI) limit the choice to the competent court of the State where the nuclear installation is situated. The draft protocol on liability and compensation for damages resulting from transboundary movements and the elimination of dangerous wastes<sup>30</sup> of the ad hoc Working Group of legal and technical experts appointed by the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal in article 10 establishes three bases for jurisdiction: (a) where the damage was sustained; (b) where the damage has its origin; and (c) where the person alleged to be liable resides, is domiciled or has his principal place of business. The draft protocol also requires each contracting party to ensure that its courts possess the competence to entertain the claims for compensation in question. Article 19 of the Lugano Convention sets forth practically the same bases for jurisdiction as the draft protocol, except that it limits paragraph (c) to the place where the defendant has his "habitual residence". Article 19 of the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD), establishes four bases for jurisdiction: (a) where the damage was sustained; (b) where the incident occurred; (c) where preventive measures were taken to prevent or minimize damage (what we call "response measures"); and (d) where the carrier has his habitual residence. Since the place where the damage has its origin (basis (b) in the draft protocol) is usually the place where the incident occurred (basis (b) in CRTD), and since the carrier in the latter case corresponds to the "person alleged to be liable" in the draft protocol, the new element CRTD has introduced is the jurisdiction of the court of the place where preventive measures were taken. Article 20 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface mentions only the courts of the State where the damage occurred, unless otherwise agreed. Article 11 of the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources indicates that the competent courts are (a) the courts of any State party where damage was suffered as a result of the incident; or (b) the courts of the controlling State, defined in article 1, paragraph 4, as the State party which exercises sovereign rights for the purpose of exploring for and exploiting the resources of the seabed and its subsoil in the area in or above which the installation is situated. The "controlling State" in this formulation, being the State where the installation carrying out the polluting activity is situated, would appear to correspond to the "State of origin" in our draft.

63. The claimant should be allowed to choose between several jurisdictions, depending on which advantage is most important: (a) the courts of the State of origin, where it may be easier for the injured party to obtain evidence about the original incident; (b) the affected State, where it

may be easier to assemble evidence of the harm, and where the injured parties are presumably more familiar with the relevant procedure, if they do in fact reside there. The claimant should find it easier to pursue his claim if he is not obliged to take proceedings far from his place of residence, with all the costs and uncertainties that entails. A third possibility might be the courts of the place where the claimant has his habitual residence, is domiciled, or has his principal place of business, for the reasons just mentioned in connection with the previous alternative. On the other hand, there would seem to be no good reason for allowing as a fourth option the courts of the place where response measures are taken, since everything would indicate that in the great majority of cases they would be taken in the territory either of the State of origin or of the affected State, and it is not worthwhile to allow for the somewhat remote possibility that they might be adopted in a third country.

### 2. PROPOSED TEXT

64. In the light of the foregoing, the Special Rapporteur proposes the following article:

#### *"Article E. Competent court"*

Actions for compensation of damages attaching to the civil liability of the operator may be brought only in the competent courts of a State party that is either the affected State, the State of origin or the State where the liable operator has his domicile or residence or principal place of business."

## F. Application of domestic law without discrimination

### 1. EXPLANATORY COMMENTS

65. National law should be applied to complement the draft articles in questions not dealt with by such articles, naturally in a way that is faithful to both the letter and the spirit and intent of the draft articles. By national law we mean here the law applied by the competent court in hearing such a case.

66. The non-discrimination principle proposed in draft article 10<sup>31</sup> reads:

States parties shall treat the effects of an activity that arise in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. *In particular, they shall apply the provisions of these articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by the activities referred to in article 1.\**

The second sentence would seem to be fully applicable to the chapter on civil liability and finds a precedent, *inter alia*, in article 14 (c) of the Paris Convention, which states that "the law and legislation shall be applied without any discrimination based on nationality, domicile or resi-

<sup>30</sup> See footnote 11 above.

<sup>31</sup> Article 10 was submitted by the Special Rapporteur in his sixth report (*Yearbook* . . . 1990, vol. II (Part One), pp. 83 et seq., document A/CN.4/428 and Add.1, especially paras. 96, 97 and 113).

dence". In the sixth report, in article 30 on the application of national law, we introduced a paragraph following the Paris Convention wording, to the effect that both the draft articles and national law and legislation should be applied without any discrimination based on nationality, domicile or residence. We acknowledge, however, that if article 10 is accepted in the form proposed, it will be unnecessary to repeat the second half of it in the chapter on liability.

## 2. PROPOSED TEXTS

67. In the light of the foregoing, the Special Rapporteur proposes the following articles:

### *"Article F. Domestic remedies"*

The Parties shall provide in their domestic law for judicial remedies that allow for prompt and adequate compensation or other relief for the harm caused by the activities referred to in article 1.

### *Article G. Application of national law*

The competent courts shall apply their national law in all matters of substance or procedure not specifically dealt with in these articles."

## G. Causality

### 1. EXPLANATORY COMMENTS

68. Article 10 of the Lugano Convention contains a provision which reads as follows:

When considering evidence of the causal link between the incident and the damage or, in the context of a dangerous activity as defined in Article 2, paragraph 1, subparagraph (d), between the activity and the damage, the court shall take due account of the increased danger of causing such damage inherent in the proposed activity.

This is similar to that found in the domestic law of some countries. The accompanying explanatory report states:

This Article encourages the Court, when it considers the evidence concerning the causal link between the incident and the damage or, in the context of a site for permanent deposit of waste, between the activity and the damage, to take account of the increased risk of damage from a specific dangerous activity. In order to assist the person suffering damage to obtain compensation, account is taken of the specific risks created by certain dangerous activities of causing a given type of damage. The Convention does not create a true presumption of a causal link. The provision operates as a complement to the system of strict liability. It therefore forms part of all the rules which are designed to assist the person who has suffered damage to prove the causal link, which may, in practice, be difficult.<sup>32</sup>

69. In the green paper on remedying environmental damage sent from the Commission of the European Communities to the Council and Parliament of Europe and the Economic and Social Committee, one provision on problems of proving causation states:

To obtain compensation for damage, the injured party must prove that the damage was caused by an act of the liable party, or by an incident for which the liable party was responsible. Special problems arise in the case of environmental damage. As discussed in the section on chronic pollution, establishing a causal connection may not be possible

if the damage is the result of activities of many different parties. Difficulties also arise if the damage does not manifest [itself] until after a lapse of time. Finally, the state of science regarding the causal link between exposure to pollution and damage is highly uncertain. The liable party may try to refute the injured party's evidence of causality with alternative scientific explanations for the damage.<sup>33</sup>

## 2. PROPOSED TEXT

70. We feel that a similar provision could be proposed to the Commission as article H, since it would be in keeping with the spirit of our articles, which aim to make it easier for an innocent victim to bring action for compensation for the harm he has sustained. Since we have not yet decided whether or not an activity involving a site for permanent deposit of waste should or should not form a specific part of the definition of dangerous activities, for the time being the wording should not cover that possibility. It will be very important to emphasize, however, perhaps in the commentary, that such an article does not create a presumption of causality between incident and harm.

### *"Article H"*

When considering evidence of the causal link between the incident and the harm, the court shall take due account of the increased danger of causing such harm inherent in the dangerous activity."

## H. Enforceability of the judgement

### 1. EXPLANATORY COMMENTS

71. Conventions on civil liability normally include some type of provision on the enforceability of the judgement, and we feel that such a provision should also be included in our articles, since they are general (they attempt to cover all dangerous activities involving significant risk) and global (as opposed to regional) in nature. Indeed, these characteristics make it necessary to take into account considerable differences in the concept of public policy in the different countries to which the article would apply, and in the other possibilities covered in the article which we are proposing.

72. The Paris Convention (art. 13, para. (e)), states that:

Judgments entered by the competent court under this article after trial, or by default, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments.

73. For its part, the Vienna Convention states (art. XII):

1. A final judgement entered by a court having jurisdiction under article XI shall be recognized within the territory of any other Contracting Party, except:

(a) Where the judgement was obtained by fraud;

(b) Where the party against whom the judgement was pronounced was not given a fair opportunity to present his case; or

<sup>32</sup> See document CDCJ (92) 50 (footnote 29 above), para. 63.

<sup>33</sup> Document COM (93) 47 final (Brussels, 14 May 1993), p. 10, para. 2.1.8.

(c) Where the judgement is contrary to the public policy of the Contracting Party within the territory of which recognition is sought, or is not in accord with fundamental standards of justice.

2. A final judgement which is recognized shall, upon being presented for enforcement in accordance with the formalities required by the law of the Contracting Party where enforcement is sought, be enforceable as if it were a judgement of a court of that Contracting Party.

3. The merits of a claim on which the judgement has been given shall not be subject to further proceedings.

74. Likewise, CRTD (art. 20) provides that:

1. Any judgment given by a court with jurisdiction in accordance with article 19 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

(a) Where the judgment was obtained by fraud; or

(b) Where the defendant was not given reasonable notice and a fair opportunity to present his case; or

(c) Where the judgment is irreconcilable with an earlier judgment given in the State where the recognition is sought, or given in another State Party with jurisdiction in accordance with article 19 and already recognized in the State where the recognition is sought, involving the same cause of action and between the same parties.

2. A judgment recognized under paragraph 1 of this article shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened.

This text does not include the ground of public policy, but on the other hand includes in paragraph 1 (c) irreconcilability with an earlier contrary judgement if it was given in the State in which recognition is sought and involves the same cause of action and the same parties. The explanatory report on CRTD does not give a good reason for this change, except that an attempt was made to limit the number of grounds as far as possible.<sup>34</sup>

75. The Lugano Convention contains a similar provision (art. 23), which reinstates the ground of public policy, omits the ground of fraud and adds the ground of irreconcilability with an earlier "decision given in a dispute between the same parties in the Party in which recognition is sought" and also in another State when that "decision fulfils the conditions necessary for its recognition in the Party addressed". The explanatory report<sup>35</sup> indicates that the rules are based on the Brussels Convention (1968) and the Lugano Convention (1988) on jurisdiction and the enforcement of judgements in civil and commercial matters.

## 2. PROPOSED TEXT

76. In the light of the foregoing, the Special Rapporteur proposes the following article:

### "Article I. Enforceability of the judgement

1. Where the final judgements entered by the competent court are enforceable under the laws applied

<sup>34</sup> ECE, *Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels—Explanatory Report* (ECE/TRANS/84) (United Nations publication, Sales No. E.90.II.E.39), p. 52, para. 126.

<sup>35</sup> See footnote 29 above.

by such court, they shall be recognized in the territory of any other Contracting Party unless:

(a) The judgement was obtained by fraud;

(b) Reasonable advance notice of the claim to enable the defendant to present his case under appropriate conditions was not given;

(c) The judgement was contrary to the public policy of the State in which recognition is sought, or did not accord with the fundamental standards of justice;

(d) The judgement was irreconcilable with an earlier judgement given in the State in which recognition is sought on a claim on the same subject and between the same parties.

2. A judgement recognized under the paragraph above shall be enforced in any of the Member States as soon as the formalities required by the Member State in which enforcement is being sought have been met. No further review of the merits of the case shall be permitted."

## I. Exceptions to liability

### 1. EXPLANATORY COMMENTS

77. In the sixth report,<sup>36</sup> we said the following:

The existence of special cases in which there is no liability, or in which liability is not applicable to certain persons in certain circumstances, is common to most of the conventions on liability for harm resulting from specific activities, whether it is civil liability or State liability, even if the liability is absolute or strict. Thus, the 1972 Convention on International Liability for Damage Caused by Space Objects, which establishes the liability of the State for such damage, provides in article VI, paragraph 1, that

... exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of the claimant State or of natural or juridical persons it represents.

These are the only grounds for exoneration from liability envisaged in that Convention.

The other conventions incorporate more grounds for exoneration. They are based on the "channelling" of strict liability towards the operator, who is made solely responsible for the harm ... The 1963 Vienna Convention on Civil Liability for Nuclear Damage provides, in article IV, paragraph 2, for an exception similar to the one referred to above in cases involving "gross negligence" or "an act or omission" ... done with intent to cause damage on the part of the apparent victim but leaves it up to the court to grant this exception, provided that it is in keeping with the national law. On the other hand, the same Convention, under article IV, paragraph 3, allows an unrestricted exception in respect of nuclear damage caused by a nuclear incident directly due to (a) "an act of armed conflict, hostilities, civil war or insurrection" or (b) "a grave natural disaster of an exceptional character".

This is the case except insofar as national legislation may provide to the contrary.

78. The report continues as follows:

The 1988 Wellington Convention [on the regulation of Antarctic mineral resource activities] provides, in its article 8, paragraph 4, that:

<sup>36</sup> A/CN.4/428 and Add.1 (see footnote 31 above), paras. 56 to 59.

an Operator shall not be liable if it proves that the damage has been caused directly by, and to the extent that it has been caused directly by . . . :

(a) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character which could not reasonably have been foreseen; or

(b) armed conflict, should it occur notwithstanding the Antarctic Treaty, or an act of terrorism directed against the activities of the Operator, against which no reasonable precautionary measures could have been effective.

Under paragraph 6, the Convention adds:

If an Operator proves that damage has been caused totally or in part by an intentional or grossly negligent act or omission of the party seeking redress, that Operator may be relieved totally or in part from its obligation to pay compensation in respect of the damage suffered by such party.

Several important drafts under consideration in various forums also make similar exceptions. Mention has already been made of the draft rules of the Council of Europe on compensation for damage to the environment [prepared for the European Committee on Legal Cooperation by the Committee of Experts on Compensation for Damage to the Environment]. Rule 3, concerning the liability of the operator, states in paragraph 4 that:

No liability shall attach to the Operator if he proves that:

(a) the damage results exclusively from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable or irresistible character;

(b) the damage was exclusively caused by an act done with the intent to cause damage by a third party, despite safety measures appropriate to the type of dangerous activity in question;

(c) the damage was exclusively caused by an act performed in compliance with an express order or provision of a public authority.

79. Lastly, the report states that article 5, paragraphs 4 and 5 of the CRTD states that :

No liability shall attach to the carrier if he proves that:

(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; . . .

If the carrier proves that the damage resulted wholly or partially either from an act or omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the carrier may be exonerated wholly or partially from his liability to such person.

80. With regard to the two instruments mentioned in the sixth report, we should add that the Lugano Convention, cited many times in this report, in its final text includes these three grounds for exemption from liability, and adds two other grounds relating to when the damage: was caused by pollution at tolerable levels under local relevant circumstances (para. d); or was caused by a dangerous activity taken lawfully in the interests of the person who suffered the damage (para. e), whereby it was reasonable towards this person to expose him to the risks of the dan-

gerous activity. The CRTD, also referred to in this report, reproduces textually in paragraph 4 the grounds mentioned, and adds another ground, paragraph c, relevant to an instrument on transport:

[The Operator is not responsible if he proves that] the consignor or any other person failed to meet his obligation to inform him of the dangerous nature of the goods, and that neither he nor his servants or agents knew or ought to have known of their nature.

Paragraph 5 of article 5 remained unchanged.

81. The most recent attempts follow the same general lines as the conventions we have just discussed. The draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal<sup>37</sup> includes a paragraph 4 in its article 4 on liability which reads as follows:

There shall be no liability if the damage is:

(a) A result of an *unforeseeable*\* act of armed conflict, hostilities, civil war or insurrection;

(b) A result of an unforeseeable natural phenomenon of an exceptional, inevitable and irresistible character;

(c) A result of the wrongful intentional conduct of a third party which is the sole cause of damage taking into account that all reasonable safety measures have been taken, to prevent the consequences of such conduct;

(d) A result of compliance with a specific order or compulsory measure of a public authority.

And paragraph 5 reads as follows:

Compensation may be reduced [or disallowed] if the person who suffered damage or a person for whom he is responsible under national law has, by his own fault, contributed to [or is the sole cause of] the damage having regard to all circumstances.

As may be seen, the grounds for exemption from liability are defined a little more strictly in this draft, although it remains to be seen whether this tendency will be confirmed in the final text.

82. With regard to the liability of the State for compensation, if that liability derives from a wrongful act, the grounds for exemption from wrongfulness laid down in part I of the Commission's draft which are applicable would prevail.<sup>38</sup> If the regime of the nuclear conventions is followed, the liability of the State would be of the same nature as that of the private party from which it derives and then the same grounds for exemption would apply to the State as to the operator, and State liability for the amounts due would be treated in the same way as the liability of the operator. Lastly, if the third alternative put forward is preferred, that is to say, non-liability on the part of the State for incidents, the relationship would be between State and State, as we saw, and the grounds for exemption from wrongfulness in part I would be applicable.

<sup>37</sup> See footnote 11 above.

<sup>38</sup> For the text of the relevant article of Part I of the draft on State responsibility, see *Yearbook . . . 1980*, vol. II (Part Two), para. 34.

## 2. PROPOSED TEXT

83. In the light of the foregoing, the Special Rapporteur proposes the following article:

*"Article J. Exceptions*

## 1. The operator shall not be liable:

(a) If the harm were directly attributable to an act of war, hostilities, civil war, insurrection or a natural phe-

nomenon of an exceptional, inevitable and irresistible character; or

(b) If the harm were wholly caused by an act or omission done with the intent to cause harm by a third party.

2. If the operator proves that the harm resulted wholly or partially either from an act or omission by the person who suffered the harm, or from the negligence of that person, the operator may be exonerated wholly or partially from his liability to such person."

## CHAPTER IV

## Common provision on State liability and civil liability

## A. Explanatory comments

84. The limitation on proceedings in respect of liability should apply equally to liability arising from wrongful acts and to strict liability. In our sixth report<sup>39</sup> we said the following in order to provide a basis for article 27 as proposed in that report:

It is also common to set a time limit after which proceedings in respect of liability lapse. The conventions cited as a basis for the preceding article may also be invoked here. The 1972 Convention on International Liability for Damage Caused by Space Objects establishes time limits as follows in article X:

*Article X*

1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.

2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence.

...

The 1960 Paris Convention and the 1963 Vienna Convention concerning liability for nuclear damage establish, in articles 8 and VI respectively, a time limit of 10 years from the date of the nuclear incident which caused the damage. Rule 9 of the Council of Europe draft rules establishes a time limit of three to five years (still to be decided) from the date on which the affected party knew or ought reasonably to have known of the damage and of the identity of the operator; in no case can proceedings be brought after 30 years from the date of the accident. Article 18 of the 1989 CRTD convention sets a time limit of three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier.

<sup>39</sup> Document A/CN.4/428 and Add.1 (see footnote 31 above), paras. 60-61.

85. It should be added that the text cited as a draft is now the Lugano Convention. It takes up the issue in its article 17, whose first paragraph sets a limit of three years

from the date on which the claimant knew or ought reasonably to have known of the damage and of the identity of the operator. The laws of the Parties regulating suspension or interruption of limitation periods shall apply to the limitation period prescribed in this paragraph.

Paragraph 2 adds:

However, in no case shall actions be brought after thirty years from the date of the incident which caused the damage. Where the incident consists of a continuous occurrence the thirty years' period shall run from the end of that occurrence. Where the incident consists of a series of occurrences having the same origin the thirty years' period shall run from the date of the last of such occurrences.

CRTD sets the period during which action may be brought at three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier. The period may be extended if the parties so agree after the incident. In no case may an action be brought after 10 years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the periods run from the date of the last of such occurrences.

86. The commentary in the explanatory report<sup>40</sup> recognizes as precedents, among others, article 10, paragraph 2, of the 1985 European directive on product liability.

There was however some disagreement as to the establishment in paragraph 2 of a second limitation period, running from the date of the incident which caused the damage. While some support was expressed for imposing no limit, as is the case under the European directive referred to above, a majority of governmental delegations favoured the introduction of such a limit, ultimately agreed upon as ten years, which was considered to be long enough to provide adequate protection to victims, without creating the difficulties which would be faced by insurers if the period were to be too lengthy, as they would have to maintain the necessary reserves to meet their eventual liability, and by those responsible for the distribution of the limitation fund if claims could be brought too many years after the incident.

<sup>40</sup> ECE/TRANS/84 (see footnote 34 above), paras. 119-120.

The explanatory report indicates that the interruption or suspension of actions will be regulated by national law, as in the case of article 10, paragraph 2, of the above-mentioned European directive.

87. A limitation period of three years for the application of the "discovery rule" is reasonable. In the nuclear field, however, the period is 10 years because some of the damage caused by radiation, for example, takes a relatively long time to appear. As to the maximum limit for presentation of claims, 10 years may be appropriate for such instruments as CRTD but too short for situations that could arise in the case of other instruments, such as the nuclear conventions, which specify a time limit of 30 years. As we have seen, the Lugano Convention sets the same limit on all activities dangerous to the environment. This time limit appears to be appropriate for our articles, which also deal with dangerous activities in general.

## B. Proposed text

88. In the light of the foregoing, the Special Rapporteur proposes the following article:

### "Article K. Time limits

Proceedings in respect of liability under these articles shall lapse after a period of three years from the date on which the claimant learned, or could reasonably have been expected to have learned, of the harm and of the identity of the operator or of the State of origin in the case of State liability. No proceedings may be instituted once 30 years have elapsed since the date of the incident which caused the harm. Where the incident consisted of a continuous occurrence, the periods in question shall run from the date on which the incident began, and where it consisted of a series of occurrences having the same origin, the periods in question shall run from the date of the last occurrence."

## CHAPTER V

### Procedural channels

#### A. Introduction

89. Although the present report does not propose specific articles on procedures to enforce the liability dealt with in the draft articles, the Special Rapporteur believes it would be useful to consider the subject so that he can assess Commission members' reactions and thus be better prepared to formulate articles later on. The advantages and disadvantages of each of the possible procedural channels may play a crucial role in the acceptance by States of the liability regimes considered by us earlier. For example, the State's residual liability for a wrongful act, in the context of compensation for harm arising from incidents, as set forth in the draft protocol to the Basel Convention,<sup>41</sup> may present procedural difficulties that outweigh the advantages, because it places the State *vis-à-vis* private parties in the framework in question.

#### B. Consideration of procedural channels

90. We shall attempt to consider the various possibilities at hand.

##### 1. AFFECTED STATE VERSUS STATE OF ORIGIN

91. The State-to-State channel is one of two alternatives, whereby the State either functions as the exclusive party entitled to bring action, because it incurred direct harm, or acts for and on behalf of its nationals who have incurred direct harm. With regard to the latter case, opting

for the protection of individuals by their own States through the diplomatic channel presents drawbacks. Under international law, making a claim depends solely upon the State in question; here a troubling factor arises, since the State may not consider it expedient to make a claim, owing to the particular circumstances that apply or on foreign policy grounds. The diplomatic channel could thus deprive injured parties of the guarantees of due process before an ordinary court, and payment of compensation would depend on negotiations between States and possible compromises entered into for reasons that may be alien to the principle of *restitutio in integrum*.

92. Furthermore, diplomatic protection is granted when injured parties have no other recourse, because they are subject to the jurisdiction of the State in respect of which they are seeking protection and have exhausted domestic remedies. However, our draft is applicable at an earlier stage of the process in question, and opens up the main channel for action, enabling them to obtain compensation on the basis of civil liability. Let us therefore consider excluding at an initial stage from the regime laid down in the draft articles the principle whereby the State provides protection to its injured nationals. In short, in such an event the State-to-State channel would apply when the affected State is the party entitled to bring action and when the State of origin is the party directly liable. The first situation would obtain when the property or environment of the affected State is *directly* affected. The second situation would obtain in two cases: when the State is liable owing to failure to fulfil obligations of prevention; and when the State is residually liable, either through the commission of a wrongful act or in accordance with the principle of strict liability.

<sup>41</sup> See footnote 11 above.



93. Let us expand on the possibilities of the State-to-State channel:

(a) *Compensation for incidents resulting from dangerous activities*

94. Let us first hypothesize that a State has been *directly* affected through harm to its property, and, as the party so entitled, brings action against another State. This occurs, for instance, when the harm affects the environment *per se*.<sup>42</sup> This concept of harm to the environment calls for further comment. The State is deemed to be the party entitled to bring action because the environment does not belong to anyone in particular, but to everyone, to society, to the national community which the State embodies. In the proposal put forward by the Commission of the European Communities for a Council directive,<sup>43</sup> concerning civil liability for damage caused by wastes, item 6 indicates that: "the concept of liability introduced covers . . . damage to the environment; such damage should be put in a new category separate from the preceding ones; and damage to the environment affects society more than it does the individual. The French delegation, for its part, in an informal paper circulated in the IAEA working group on liability for nuclear damage, makes the following points: this is damage to things that cannot be appropriated, that are common property and belong to no one in particular, but can be used by all—such things as air, water and space; damage of this kind is not restricted to nuclear energy, but occurs frequently in industries that produce pollution through accidents, requiring funds for clean-up and restoration of the sites in question to their original state; *such measures are usually undertaken by public authorities, which intervene to protect people and property.*

95. If the harm under discussion is caused by private operators, the claimant State will have to contend only with the State of origin if the latter is residually liable in accordance with one of the two alternatives set forth above, either (a) directly, for the sums not covered by the operator or his insurance policy (principle adopted in the nuclear conventions), or (b) for the same sums, but only if the harm would not have occurred if the State of origin had not failed to fulfil its obligations (principle adopted in the draft protocol to the Basel Convention). The defendant-State hypothesis will of course not apply if the third alternative set forth above is accepted, according to which the State of origin would under no circumstances be liable for harm arising from incidents resulting from the activities of private individuals within its territory or otherwise under its jurisdiction or control.

96. In the case of alternative (a), it would seem that a judgement rendered by a court requiring a private operator to pay a certain sum could—once it has been demonstrated that that payment is not forthcoming—serve as a basis for the court to declare the debt payable by the State. In principle, the State's appearance, as a sovereign territo-

rial entity, before a domestic court should pose no difficulties; the system is comparable to that involving private parties *vis-à-vis* other private parties. Residual State liability for sums not covered by the liable operator or by his insurance is intrinsically the same as the liability of the private party that the State is assuming: the conventions establish no special exception or defence for the State. Since the proceedings instituted against the private party were in respect of strict liability, the issues of fault or breach of obligations do not arise. The judgement rendered by the court becomes applicable to the State, which must comply with the portion of the judgement that pertains to it, if such exists. The judgement cannot, of course, be judicially enforced against the liable State if the general parameters of the jurisdictional immunity of States are to be respected.

97. In the case of alternative (b), however, greater difficulties arise. As we mentioned earlier, the State is also residually liable for the sums in question, in the same way that it is under the Paris and Vienna Conventions, but only if the harm were not caused by State failure to fulfil obligations of prevention. This is liability for a wrongful act, and it is therefore necessary to prove in the proceedings both (a) that the State failed to fulfil certain obligations, and (b) that there is an *indirect causal link*, i.e. that the harm occurred because the State failed to fulfil its obligations.

98. But the State seems to have acted as a sovereign territorial entity, *jure imperii*, in several such cases, such as when it failed to enact a law requiring the operator to adopt measures to prevent the harm. As we have seen, States are reluctant to submit to domestic courts or, in any event, to waive their immunities, which poses a problem in this instance.<sup>44</sup>

99. Private parties or their property can suffer harm—such as injury to health or some other *damnum emergens*—as a result of harm to the environment; such injured parties would be the parties entitled to bring action since the harm in question is common harm as differentiated from harm to the environment—and the channel open to them would be before a court in the State of origin, against the operator liable. If the harm is caused by the State, acting as the operator in connection with the activity in question, the case should be equated with that of an affected State against private operators, because the operator State is acting *jure gestionis*.

(b) *Issues not related to compensation for harm caused by incidents*

100. The relevant chapter would cover the liability of the State of origin for failure to fulfil its obligations of prevention, apart from compensation owed as a result of incidents caused by activities involving risk. This might include, as we saw earlier (para. 40), compensation, such as compensation for reasonable precautionary measures that the exposed State had to take as a result of the risk created and of the failure of the State of origin to take the preventive measures required by the draft articles. The

<sup>42</sup> It is important to distinguish between harm to the environment *per se* and harm to private individuals or their property caused as a result of harm to the environment. The latter would cover, for instance, *damnum emergens* arising from the pollution of water that poisons people who drink it, or the *lucrum cessans* incurred by the owner of a hotel who has no guests because of polluted air in the region.

<sup>43</sup> See footnote 25 above.

<sup>44</sup> The standing committee for considering the amendment of the Paris and Vienna Conventions on nuclear damage encountered the same difficulty and reached the same conclusion.

obligations in question are those that the State of origin has assumed at an international level towards the other States participating in the regime laid down in our articles, and the corresponding action must therefore be taken by one State against another through diplomatic channels. Most such action might be intended, for example, to compel the State of origin to adopt appropriate laws requiring operators to take certain precautionary measures, or to enforce an existing law, or to carry out the impact assessment stipulated in article 12 on the risks entailed by a given activity, and the like. If international disputes should arise, they would be settled in the manner which will ultimately be proposed in the appropriate chapter of the articles.

## 2. PRIVATE INJURED PARTIES VERSUS STATE OF ORIGIN

101. If the State is liable because the incident that caused the harm resulted from an activity involving risk performed by the State itself acting *jure gestionis* or by a State enterprise, the situation would be analogous to that of a private party versus another private party.

102. A case where the State appeared as defendant against private injured parties would not arise if the system were to be adopted whereby the State of origin would in no instance be liable for harm caused by incidents resulting from activities within its territory or otherwise under its jurisdiction or control, because the State's liability arising from failure to fulfil its obligations of prevention, as we have seen, would be handled in a different manner, through diplomatic channels.

103. All that would remain, then, would be the State's residual liability in its two variants, liability for a wrongful act or strict liability.

104. The possibility of residual State liability for a wrongful act brings us back to the hypothesis that the State may appear as a party in domestic courts. If in such a situation the competent domestic courts were held to be the appropriate channel, it would be necessary to stipulate in the articles that the State could not plead jurisdictional immunity, for otherwise the system could not function. On the other hand, we have already seen that the concepts of the State's residual and strict liability do not raise the problem of judging the conduct of the State.

## 3. AFFECTED STATE VERSUS PRIVATE PARTIES

105. Only in instances where there was immediate harm to the State with respect to its property or environment might our articles direct the affected State to take proceedings against the private parties liable for the harm rather than against the State of origin. In such circumstances, the affected State might be obliged to take proceedings in domestic courts, possibly those of the State of origin. When a State is a party to proceedings, it makes it difficult to use domestic courts, although they function quite well when both claimant and defendant are private parties. The Lugano Convention for damage resulting from activities dangerous to the environment makes domestic courts competent to hear all cases involving action for compensation. It makes no distinction on the

basis of whether the claimant or defendant happens to be a private party or a State. It should be borne in mind, however, that this Convention applies within the framework of the European Community between States that are very similar politically and socially, making it feasible to assume an equal footing. However, when a similar issue arose in connection with nuclear matters (Paris Convention and Vienna Convention) and the Basel Convention, there were reservations about whether States would find a similar solution acceptable. As an additional argument against such a solution, it was pointed out that domestic courts might encounter difficulties in dealing with issues such as harm to the environment; for this reason, the draft protocol to the Basel Convention proposes that for assessment of clean-up and remedial action costs and evaluation of environmental damage, an internationalized approach should be considered, for example, domestic courts assisted by an international technical advisory body to be consulted on an optional or mandatory basis (art. X, para. 28 (a)).<sup>45</sup>

106. The Special Rapporteur sees two alternatives with regard to using the channel of the domestic courts in cases where the claimant is a State: (a) provision in the articles for the jurisdiction of domestic courts, assisted or not assisted in the manner described at the end of the paragraph above; or (b) establishment of a single forum for all disputes, whether between States, between private parties and States or between private parties, such as a claims commission along the lines of that proposed by the Netherlands in the IAEA standing committee. The Netherlands proposal considers various approaches to obtaining compensation for nuclear damage; it deals with the civil liability of the operator of a nuclear installation invoked by (a) private parties or States in respect of damage suffered or (b) a State acting on behalf of private parties or subrogated to the rights of private parties in respect of damage they have suffered. The advantages offered by a single forum consisting of a tribunal in the form of an international claims commission would be as follows:

(a) All claims would be recorded in one place, allowing for a general review of all of them;

(b) There would be consistency as regards the concepts of "incident" and "nuclear damage" for which compensation is being claimed;

(c) There would be consistency as regards the time limits within which claims for compensation must be filed;

(d) There would be consistency as regards grounds for exceptions;

(e) The same types of compensation would be paid by the same sources up to a certain ceiling within an equitable distribution system.

107. According to this proposal, which deals with liability for nuclear damage, the tribunal would be constituted only after an incident had occurred and would consist of a number of arbitrators chosen by the installation State, an equal number chosen by the claimant State or

<sup>45</sup> Ad hoc working group of legal and technical experts to develop elements which might be included in a protocol on liability and compensation for damage resulting from transboundary movements and disposal of hazardous and other wastes. (See footnote 11 above.)

States and a number of arbitrators chosen by agreement between the installation State and the claimant State or States. It would hear claims by private parties and/or States against the operator or claims by injured States against the installation State. The mechanism suggested would make it possible to apply both regimes: civil liability and strict liability of the State. States potentially liable could declare (at the time of signing or ratifying the pertinent international instrument, for example) that they recognized the jurisdiction of the tribunal over claims brought against a defendant State (but not against an operator), either by a claimant State (or claimant States) *only*, or by private parties as well. The *international and judicial* nature of the tribunal would ensure a fair and impartial settlement of claims (even between States).

108. Aware that the above-mentioned proposal met with some resistance from States members of the IAEA stand-

ing committee, because of the reluctance of States to be compelled to submit their disputes to such a forum, the working group considering a draft protocol on liability to the Basel Convention suggested borrowing the concept of a claims commission for its draft, but with one change: the State of origin—that is, the potential *defendant* State—would be given the option of requesting at the time an incident occurred that a claims commission with exclusive jurisdiction be established.

#### 4. PRIVATE INJURED PARTIES VERSUS PRIVATE LIABLE PARTIES

109. Such a situation involves civil liability, for which domestic courts are fully competent.



## CHECKLIST OF DOCUMENTS OF THE FORTY-SIXTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/455	Provisional agenda	Mimeographed. For the agenda as adopted, see <i>Yearbook . . . 1994</i> , vol. II (Part Two), chap. I, para. 14.
A/CN.4/456	Filling of casual vacancies: note by the Secretariat	Reproduced in the present volume.
A/CN.4/456/Add.1-3	<i>Idem</i> : addenda to the note by the secretariat: list of candidates and curricula vitae	Mimeographed.
A/CN.4/457	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-eighth session of the General Assembly	<i>Idem</i> .
A/CN.4/458 and Add.1-8	Observations of Governments on the report of the Working Group on the question of a draft statute for an international criminal court	Reproduced in the present volume.
A/CN.4/459	Tenth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Idem</i> .
A/CN.4/460 [and Corr. 1]	Twelfth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	<i>Idem</i> .
A/CN.4/461 and Add.1, Add.2 [and Add.2/Corr.1] and Add.3	Sixth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	<i>Idem</i> .
A/CN.4/462	Second report on the law of the non-navigational uses of international watercourses, by Mr. Robert Rosenstock, Special Rapporteur	<i>Idem</i> .
A/CN.4/L.491 and Rev.1 and 2 [and Rev.2/Corr.1] and Rev.2/Add.1-3	Report of the Working Group on the question of a draft statute for an international criminal court	Mimeographed.
A/CN.4/L.492 [and Corr.1 and 3]	Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts of the articles adopted by the Drafting Committee on second reading: articles 1-33	Text reproduced in <i>Yearbook . . . 1994</i> , vol. I, summary record of the 2353rd meeting (para. 46).
A/CN.4/L.492/Add.1	<i>Idem</i> : draft resolution adopted by the Drafting Committee	<i>Ibid.</i> , summary record of the 2356th meeting (para. 38).
A/CN.4/L.493 and Add.1 [and Add.1/Corr.1] and 2	The law of the non-navigational uses of international watercourses. Draft articles and and commentaries thereto adopted by the Drafting Committee on second reading: articles 1-33	Text reproduced in <i>Yearbook . . . 1994</i> , vol. II (Part Two), para. 222.
A/CN.4/L.494 [and Corr.1]	Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. Titles and texts adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission: articles 1, 2 (subparas. (a), (b) and (c)), 11-14 <i>bis</i> [20 <i>bis</i> ], 15-16 <i>bis</i> and 17-20	Text reproduced in <i>Yearbook . . . 1994</i> , vol. I, summary record of the 2362nd to 2365th meetings.
A/CN.4/L.495 and Rev.1	Draft report of the International Law Commission on the work of its forty-sixth session: chapter I (Organization of the session)	Mimeographed. For the text as adopted, see the <i>Official Records of the Forty-ninth Session, Supplement No. 10</i> (A/49/10). For the final text, see <i>Yearbook . . . 1994</i> , vol. II (Part Two).
A/CN.4/L.496 and Add.1	<i>Idem</i> : chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem</i> .
A/CN.4/L.497 and Add.1	<i>Idem</i> : chapter IV (State responsibility)	<i>Idem</i> .

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.498 and Add.1 and 2	<i>Idem</i> : chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> .
A/CN.4/L.499	[Symbol not used]	
A/CN.4/L.500	<i>Idem</i> : chapter III (The law of the non-navigational uses of international watercourses)	Mimeographed. For the text as adopted, see <i>Official Records of the Forty-ninth Session, Supplement No. 10</i> (A/49/10). For final text, see <i>Yearbook . . . 1994</i> , vol. II (Part Two).
A/CN.4/L.501	Draft articles on State responsibility. Titles and texts adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission	Text reproduced in <i>Yearbook . . . 1994</i> , vol. I, summary record of the 2366th meeting (para. 1).
A/CN.4/L.502	Report of the Planning Group: Programme, procedures and working methods of the Commission, and its documentation	Mimeographed.
A/CN.4/L.503 and Add.1 and 2	International liability for injurious consequences arising out of acts not prohibited by international law. Texts of draft articles with commentaries thereto, provisionally adopted by the Commission at its forty-sixth session: articles 1, 2 (subparas. (a), (b) and (c)), 11 to 14 <i>bis</i> [20 <i>bis</i> ], 15-16 <i>bis</i> and 17-20	Text reproduced in <i>Yearbook . . . 1994</i> , vol. II (Part Two).
A/CN.4/L.504	Draft report of the International Law Commission on the work of its forty-sixth session: chapter VI (Other decisions and recommendations of the Commission)	Mimeographed. For the text as adopted, see the <i>Official Records of the Forty-ninth Session, Supplement No. 10</i> (A/49/10). For the final text, see <i>Yearbook . . . 1994</i> , vol. II (Part Two).
A/CN.4/SR.2328-A/CN.4/SR.2377	Summary records of the 2328th to 2377th meetings	Mimeographed. The final text appears in <i>Yearbook . . . 1994</i> , vol. I.



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