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Comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction

Topic:

Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

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Comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction

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[10 and 25 May, 20 July and 7 September 1993]

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

Multilateral instruments cited in the present document

	Source
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	Ibid., vol. 75, pp. 31 et seq.

	Source
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)	Ibid., vol. 1125, pp. 3 et seq.
Conventions for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	Ibid., vol. 213, p. 221.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)	Ibid., vol. 860, p. 105.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	Ibid., vol. 1015, p. 243.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973)	Ibid., vol. 1035, p. 167.
International Convention against the Taking of Hostages (New York, 17 December 1979)	Ibid., vol. 1316, p. 205.
Convention on Conciliation and Arbitration with the Conference on Security and Cooperation in Europe	*Revue générale de droit international public*, Paris, vol. XCVII, 1993, p. 213.

Introduction

1. At its forty-seventh session, in 1992, the General Assembly adopted resolution 47/33 of 25 November 1992 concerning the report of the International Law Commission on the work of its forty-fourth session.

2. Paragraphs 4, 5 and 6 of the resolution read as follows:

[The General Assembly,]

4. *Takes note with appreciation* of chapter II of the report of the International Law Commission, entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction;

5. *Invites* States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction;[1]

6. *Requests* the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

3. Pursuant to the General Assembly's request in paragraph 5 of that resolution, the Secretary-General addressed a circular letter to Governments dated 1 December 1992 inviting them to submit their written comments, if possible before the forty-fifth session of the Commission.

4. As of 23 July 1993, the Secretary-General had received eight replies, the texts of which appear in the present document; a ninth reply received after the close of the session is also reproduced below.[2] **

[1] *Yearbook . . . 1992*, vol. II (Part Two), document A/48/10, annex.

** The paragraphs of the report of the Working Group which are the subject of commentary by Member States appear in parentheses.

[2] References to the question of an international criminal jurisdiction are also to be found in document A/CN.4/448 and Add.1 (reproduced in the present volume) containing the comments and observations received from Governments on the draft Code of Crimes against the Peace and Security of Mankind adopted on first reading by the Commission at its forty-third session.

Comments received from Member States

Australia

[*Original: English*]
[*3 May 1993*]

1. Australia supported the granting of a mandate to the Commission to prepare a draft statute for an international criminal court and it hopes that its comments will assist the Commission in this task. Australia reserves its position however on the draft statute that will ultimately be prepared by the Commission. The structure of the following comments closely follows that of the report of the Working Group.

General comments

2. In its statement during the debate on this issue in the Sixth Committee on 28 October 1992, Australia assessed the general approach of the Working Group and noted the importance of the following elements of that approach:

(*a*) The detachment of the statute of an international criminal court from the Code of Crimes against the Peace and Security of Mankind;

(*b*) The confinement of the jurisdiction of an international criminal court, at least in the first phase of its operation, to individuals and not States;

(*c*) The establishment of an essentially voluntary jurisdiction for such a court, which would be concurrent with that of national courts;

(*d*) The establishment of such a court, at least in the first phase of its operations, as a facility to be called upon when needed, rather than a standing full-time body.[1]

3. In underlining the importance of these elements, Australia asks the Commission to give them due weight in its work on a draft statute.

Specific comments

1. Structural and jurisdictional issues

(a) *Method by which the court is to be established*

4. Australia agrees with the conclusion expressed by the Working Group (para. 45) that an international criminal court should be established under its own statute in treaty form.

(b) *Composition of the court*

5. Australia has already noted the importance of the Working Group's view (para. 46), that the court, at least in the first phase of its operations, should not be a full-time body but constituted on each occasion when it was required to act. This position reflects an understanding of the limited workload that the court would face, at least in its early years of operation, and the costs that would be incurred in establishing and maintaining the court on a full-time basis with a full complement of judges and a supporting administrative structure. Its workload would also clearly be more limited if it exercised concurrent, rather than exclusive, jurisdiction with national courts.

6. The Working Group rightly points out (para. 48) that judges of the court should be independent and impartial and possess appropriate qualifications and experience. Similar requirements are laid down for the ICJ judges in Article 2 of its Statute. There should also be a requirement (akin to Article 9 of the ICJ Statute) that the judges chosen to sit on the court should represent the "principal legal systems of the world".

7. The Working Group sets out (paras. 50 and 51) one possible arrangement for nominating judges to serve on the court and constituting it when required. Although this arrangement has merit, the Commission should canvass other possible mechanisms to ensure that all relevant issues are fully considered. Such an arrangement should not be cumbersome but built on a simple framework which provides guarantees for the nomination of qualified judges and the speedy convening of a panel of suitable judges to try a given case.

(c) *Ways by which a State might accept the jurisdiction of the court*

8. The report restates the Working Group's view (para. 52) that the court should not have compulsory jurisdiction. Australia has noted the importance of this view. The establishment of a voluntary jurisdiction for the court would require a mechanism by which States could accept this jurisdiction. As outlined in that paragraph, a State becoming a party to the statute would accept "certain administrative obligations". The acceptance of the court's jurisdiction by a State would be done by separate act. As noted by the Working Group, this act could be analagous to acceptance of the Optional Clause of the Statute of ICJ.

9. Any mechanism for accepting the jurisdiction of the court would have to allow States flexibility in nominating the terms upon which they would accept that jurisdiction. The report suggests various approaches (para. 54) to handling this question. In drafting the provisions of the statute on jurisdiction, the Commission should precisely define the terms on which a State may accept the jurisdiction of the court. Such provisions would need to contain a list of specific offences in relation to which a State could accept the court's jurisdiction. The Commission will also need to bear in mind that many States would no doubt have to reconcile national constitutional requirements with the acceptance of the jurisdiction of the court. These requirements may cover trial format, trial procedures and procedural safeguards.

10. The Working Group considers (para. 56) the question of access to the court by States which are not parties to its statute. The Working Group favours access to the court being available to States not parties to the statute on an ad hoc basis. Australia considers that this approach should be encouraged as it would enhance acceptance of the court's role. Article 35 of the ICJ Statute envisages the Court being

[1] *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 22nd meeting, paras. 30-38, in particular para. 31.

open on a conditional basis to States which are not parties to the Statute. Appropriate conditions akin to those suggested by the Working Group would have to be imposed on States which were not parties to the court's statute.

(d) *Jurisdiction* ratione materiae *of the court*

11. In its statement during debate on this issue in the Sixth Committee at the forty-seventh session of the General Assembly, Australia noted its general support for the Working Group's approach in dealing with the jurisdiction *ratione materiae* of the court. Australia continues to support this as a basic approach which would see the court's jurisdiction based on "specified existing international treaties defining crimes of an international character"(para. 57), including the Code of Crimes against the Peace and Security of Mankind, subject to its adoption and entry into force. The treaties themselves would obviously not be picked up in their entirety by the statute. It would be a matter of selecting the relevant crimes established by the treaties over which the court would exercise jurisdiction. Such crimes would have to be carefully defined.

12. The establishment of such a jurisdiction, however, is not without its difficulties. The existing treaties, apart from the Convention on the Prevention and Punishment of the Crime of Genocide (especially art. VI), which would form the basis of the jurisdiction, contain no reference to States parties being given the option to submit cases to a court of the type under discussion. A mechanism will need to be found to resolve this problem.

13. A further difficulty would arise where a party to the statute was not also a party to all the treaties forming the basis of the court's jurisdiction. This difficulty would be resolved if there was sufficient flexibility for States to accept the jurisdiction of the court only in relation to those treaties to which they were parties. This issue also arises in deciding whether States which have not accepted the court's jurisdiction in relation to offences established by treaties to which they are not parties should be able to initiate complaints relating to breaches of those offences.

14. In considering the treatment of offences under the statute, attention should also be given to the relationship between existing treaties and the draft Code. Australia noted in its comments on the draft Code[2] that, as currently drafted, the Code overlaps with and replicates definitions of offences already dealt with under existing conventions. More particularly, in a number of cases, the Code either omits elements of an existing crime or reduces its scope. If substantive differences between the Code and existing treaties remain unresolved, the jurisdiction *ratione materiae* of the court would not function properly. The general question of the definition of crimes in the statute is dealt with in paragraphs 30 et seq. below.

15. The Working Group notes (para. 58) that in the case of some conventions it may be necessary to limit the range of offences which fall within the court's jurisdiction *ratione materiae*, so as to avoid the court being overwhelmed by less serious cases. The example given concerned offences under conventions dealing with illicit trafficking in narcotic drugs. In addressing this issue in its statement to the Sixth Committee, Australia suggested that the court should have sufficiently flexible discretion in determining whether to hear a particular case. The issue would also arise at the time when a State elected to accept the jurisdiction of the court for particular offences. Having accepted the jurisdiction of the court in this manner, that State would no doubt want to be certain of access to that court for the trial of those alleged to have committed offences of that kind. To provide this certainty, offences listed in the statute would need to specify clearly the degree of seriousness attached to them (thus justifying their falling within the court's jurisdiction).

16. Australia accepts the view expressed by the Working Group in its report (para. 59) that, at the first stage of the establishment of the court, its jurisdiction should be limited to those crimes defined by treaties in force and should not be extended to crimes against general international law which have not been "incorporated into or defined by treaties in force".

(e) *Jurisdiction* ratione personae *of the court*

17. The assertion of the jurisdiction *ratione personae* of the court is a complex task, as the Working Group acknowledges in its report. It is a matter that requires detailed consideration.

18. An initial hurdle is the diversity of bases for jurisdiction *ratione personae* to be found in the domestic criminal law regimes of States. Those States intending to become parties to the statute would no doubt wish to reconcile to the greatest possible extent the jurisdiction *ratione personae* of the court with the equivalent jurisdiction in their domestic criminal law.

19. A further hurdle to be overcome is the definition of the relationship between the court's jurisdiction *ratione personae* and the jurisdiction bestowed on States which are parties to existing treaties to deal with those who have committed offences established by those treaties. This is a further aspect of the broader task of settling the relationship between the statute and existing treaties.

20. Australia notes that the concept of "ceded jurisdiction" advanced by the Working Group (para. 64) offers only a partial solution to resolving possible conflicts between a State's jurisdiction *ratione personae* under an existing treaty and its acceptance of the court's jurisdiction. As the Working Group notes, the device of "ceded jurisdiction" would not be effective where a large number of States have a jurisdictional claim under a treaty which establishes universal jurisdiction over a particular crime. This case would be further complicated where some States claiming jurisdiction were not parties to the statute of the court. Such States might well consider that a State which ceded jurisdiction to an international criminal court rather than making the offender available to one of them for trial was in breach of its treaty obligations to them.

21. The Working Group considers (para. 66) the position of the State of nationality in relation to the jurisdiction *ratione personae* of the court. Australia does not consider as a matter of principle that the consent of the State of nationality should be necessary in every case before the court could exercise its jurisdiction to hear a case. There is merit in the alternative proposal made by the

[2] Reproduced in document A/CN.4/448 and Add.1 in the present volume (see p. 62).

Working Group in that paragraph that a State of nationality should only be able to prevent the court from exercising its jurisdiction if it is prepared to prosecute the accused before its own courts. This approach presupposes that a State of nationality could prosecute an accused person under its domestic law. Where it could not, that State should not be allowed to prevent an accused from being tried before an international court.

22. In determining the role of the State of nationality, the Commission will have to give careful consideration to the handling of offenders with dual nationality. There is a potential for conflict between the State of residence which had granted that person citizenship and the State of prior residence which still regarded him or her as holding its citizenship. The case could also arise where a person was born in a State and accordingly acquired its citizenship but on account of the citizenship of his or her parents or grandparents was regarded by another State as also holding its citizenship. The rights of respective States in such cases would need to be determined.

23. Australia believes that finding a solution to the problems highlighted by the Working Group in its consideration of the jurisdiction *ratione personae* of the court represents one of the greatest challenges in the drafting of the statute. Any solution will need to allow parties to the statute to take account of the jurisdictional claims of other States.

(f) *The relationship between the court and the Code of Crimes against the Peace and Security of Mankind*

24. Australia supports the use of separate instruments to embody the statute of the court and the Code of Crimes against the Peace and Security of Mankind. The arguments in favour of this approach are cogently set out in the Working Group's report.

(g) *Possible arrangements for the administration of the court*

25. The administrative arrangements for the court will be dictated by its structure, location and workload. If, as has been suggested, the court would not be constituted as a full-time body, at least in the first phase of its operation, there would be a reduced administrative burden which would, in turn, require fewer staff and resources than would be needed to support a full-time body.

26. The Working Group touches briefly (para. 78) on the question of where the court should sit and expresses the view that, where possible, the court should sit in the State where the alleged offence was committed. Australia notes that, if the court is intended to provide States parties to the statute with a forum which can deal with cases quickly and at arm's length in order to remove potential problems from trials, then such States may well be reluctant to have the court sit in their territory.

27. The Working Group has outlined some of the main issues which would arise in the administration of the court. The bulk of these issues do not require detailed consideration at this time. Some attention should, however, be paid to the nature of the court's relationship with the United Nations.

2. An international criminal trial mechanism other than a court

28. While noting the useful exposition in the Working Group's report (paras. 81 to 95) of the arguments in favour of establishing such a mechanism, Australia agrees, however, with the view of the majority of the Working Group that these alternative mechanisms do not address the major concerns which underlie calls for an international criminal jurisdiction.

3. Applicable law, penalties and due process

29. In considering questions of applicable law and due process, proper attention will need to be paid to ensuring that the resulting provisions of the statute accord with the relevant principles of human rights instruments and United Nations standards in the field of criminal justice.

(a) *The applicable law*

(i) Definition of crimes

30. Aspects of the question of the jurisdiction *ratione materiae* of the court have been addressed in paragraphs 11 to 16 above.

31. As the Working Group notes (para. 101), article 15, paragraph 1, of the International Covenant on Civil and Political Rights (hereinafter "the Covenant") embodies the principle of *nullum crimen sine lege*. That provision requires that

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

The requirement of legal certainty and clarity in the definition of criminal offences, including defences and penalties, is fundamental to legality in penal matters. Australia supports the Working Group's commitment to upholding this fundamental rule of criminal law.

32. To observe the requirements of article 15, paragraph 1, of the Covenant, the Working Group argues (para. 101) that the jurisdiction of an international criminal court should be limited to specified crimes of an international character defined by treaties in force. Australia's support for this basic approach was reiterated in paragraph 11 above. It is of the greatest importance that the elements of the crimes selected should be carefully defined so that the prosecutor is required to prove that the conduct of an accused person encompasses the elements of a given crime.

33. Australia believes that, if the jurisdiction of the court is to include international crimes provided for in existing multilateral conventions, the following issues will need to be dealt with:

(*a*) The inadequacy of the definition of international crimes in existing conventions (including the lack of reference to defences, exculpatory factors and penalties);

(*b*) The relationship between the draft Code and the existing conventions;

(*c*) Typology of offences: determining which offences are the most serious and should therefore fall within the court's jurisdiction;

(*d*) The manner in which the statute would confer jurisdiction over serious crimes with an international character.

a. Specificity

34. While existing international conventions are the most reliable source of international law from which specific penal norms can be identified, existing treaties establish "criminal offences" in a number of different ways.

35. Some conventions proscribe the conduct and impose binding obligations on States to criminalize and punish that conduct at a national level; others refer more generally to an issue of international concern and create obligations to take measures deemed appropriate by respective States; and some simply create a duty to punish or extradite an alleged offender or to cooperate in the prosecution and punishment of certain conduct.

36. Consideration will need to be given to the manner in which specific offences that constitute serious crimes of an international character are to be deduced from the wide range of penal norms established by existing conventions. The criteria for bringing certain conduct defined in existing conventions within the jurisdiction of the court will need to be identified.

37. In general, it is Australian legal practice at both federal and state levels to identify specifically the constituent elements of a criminal offence, as well as defences, exculpatory factors and penalties. Australia is of the view that, despite reliance on existing conventions which define penal norms, the vagueness characterizing some provisions could lead to difficulties in meeting the requirements of article 15, paragraph 1, of the Covenant.

b. Relationship between the Code of Crimes against the Peace and Security of Mankind and existing multilateral conventions

38. As noted in paragraph 14 above, Australia expressed concern in its comments on the draft Code that the Code overlaps and replicates definitions of offences already dealt with under other multilateral conventions, and in some cases either omits elements of existing crimes or reduces their scope.

39. If the court is to derive jurisdiction from multilateral conventions other than the Code, the relationship between these conventions and the Code must be clarified.

c. Typology of offences

40. Australia agrees with the Working Group's recommendation that an international criminal court should be confined to dealing with crimes which are genuinely international in character, but the question arises as to what criteria should be used to determine which offences are to be regarded as: (*a*) genuinely international in character; and (*b*) serious enough to warrant inclusion in the jurisdiction of the court.

41. Is the identification of a crime as "genuinely international in character" sufficient for its inclusion? Should jurisdiction ultimately depend on the gravity of the offence committed? Some crimes, such as terrorism, must be regarded as inherently serious. Australia is of the view that these questions need clarification to ensure that objective criteria are used to determine which offences should fall within the court's jurisdiction.

42. Australia also notes that treaties establishing international crimes have various ways of dealing with the definition of such crimes. These variations can make it difficult to attribute a particular weight to an offence or to give an indication as to its seriousness, based on the way in which such conduct is defined in a given instrument.

d. Provision conferring jurisdiction

43. The question of specificity overlaps with the question of how the statute is to confer jurisdiction on the court. The statute will require a provision or provisions which confer jurisdiction over international crimes. Such a provision or provisions will have an important role to play in ensuring that the statute meets the requirements of article 15, paragraph 1, of the Covenant.

(ii) The general rules of criminal law

44. The Working Group notes (para. 103) that most treaties are silent about defences and extenuating circumstances and that no rules of international criminal law on these matters have evolved. The Working Group suggests (para. 104) that the court could refer to national law. As the Working Group notes, however, national law is in principle only a question of fact at the international level. Two options for dealing with this problem are explored. The first is to refer directly to applicable domestic law where appropriate. The second is to require dual criminality (by place of residence or place where the act was committed) and thereby refer to national law indirectly.

45. Australia appreciates that the main concern of the Working Group was to identify sources of applicable law. If the jurisdiction of the court is to run concurrently with that of national courts (as opposed to exclusively), there is a certain preliminary logic in filling the gaps of international criminal law by recourse to domestic law. Australia believes, however, that on balance this approach will inevitably lead to inconsistencies in treatment from case to case and thus create more problems than it solves. Defences and mitigating circumstances available will depend on the nationality of the accused and/or the place where a crime is committed. Such inconsistency is undesirable and may undermine the legitimacy of the court. The application of the domestic laws of different countries from case to case would also impose a major burden on the judges of the court, who could not be expected to have a detailed knowledge of all such laws.

(iii) Applicable procedure

46. Australia agrees with the view expressed by the Working Group (para. 108) that the statute of the court, or rules thereunder, should specify to the greatest extent possible the procedural rules for trials. The Working Group also indicates that it may be necessary for the court to regulate its own procedure, in cases not covered by the statute or rules, by drawing on the principles common to the codes of procedure of the States parties.

47. While Australia agrees that the principle of *nullum crimen sine lege* does not prevent such a course of action, because that principle is concerned with substantive, as opposed to procedural, law, the application of different procedural rules again raises the issue of inconsistency.

48. To overcome the potential problem of inconsistency, a unified set of rules would need to be applied whatever the national origin of the accused. Questions of procedure and, in particular, rules of evidence are not just technical matters but are central to ensuring a fair trial, as the United Kingdom pointed out in the Sixth Committee at the forty-seventh session of the General Assembly.[3] These issues vary across legal systems and in Australia's opinion require detailed analysis.

(b) *The penalties to be imposed*

49. Australia notes that few conventions define penalties. The Working Group suggested (para. 110) that the statute will need a penalties provision, otherwise the court would have to base the penalty on national law or on "principles common to all nations". As stated in paragraph 31 above, Australia believes that the starting point in considering the question of penalties must be article 15, paragraph 1, of the Covenant, which embodies the principle of *nulla poena sine lege*. This requires "clarity and certainty" in penalty provisions. Australia agrees with the view of the Working Group that recourse to national law or "principles common to all nations" may well not meet the requirements of clarity and certainty. It would, therefore, appear necessary to develop penalty provisions for the statute.

50. The Working Group recommended the inclusion of a residual provision in the statute to deal with penalties in the event that no penalty is specified in the applicable law, or where a specified penalty fell outside the range of penalties which the statute allowed the international court to impose. Australia is also of the opinion that the inclusion of a residual penalty provision which is not sufficiently detailed would not necessarily cure the problem and discharge the obligation under article 15, paragraph 1, of the Covenant. If, however, the statute contains penalty provisions, no residual provision would be required.

(c) *Ensuring due process*

51. The Working Group refers (para. 111) to article 14 of the Covenant as the primary source of international law on the question of due process without further elaboration. Australia believes, however, that there are a number of issues which need to be considered.

(i) Review/appeal

52. Article 14, paragraph 5, of the Covenant provides that

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

This suggests that in the statute of the court there would need to be provision for the review of conviction and sentence by an appellate tribunal, for example, a full bench of the court. The appellate bench should have the discretion to grant or refuse leave to appeal.

(ii) Trial by jury

53. As in other common-law countries, trial by jury is a fundamental element of Australia's legal system. Section 80 of the Constitution of the Commonwealth of Australia guarantees a right for a person charged with an indictable offence under any law of the Commonwealth to be tried by a jury. Australia is not advocating that the statute should make provision for trial by jury. It wishes, however, to draw the attention of the Commission to the possible constitutional difficulties Australia and other countries may need to address if they are to accept the jurisdiction of an international court.

54. The problem is highlighted where international instruments create a binding obligation on States parties to criminalize certain conduct under domestic law as a serious (indictable) offence. For example, article 2 of the Convention for the Suppression of Unlawful Seizure of Aircraft requires each State party to make the offence "punishable by severe penalties". The Crimes (Aviation) Act 1991 implements Australia's obligations under the hijacking conventions. Section 13 of the Act defines hijacking, within the meaning of the above-cited Convention, as an indictable offence. A person charged with that offence, therefore, would have the right to trial by jury.

4. Prosecution and related matters

(a) *The system of prosecution*

55. The Working Group recommends (para. 117) an ad hoc independent prosecutorial system. Australia agrees that such a system is preferable to complainant States conducting the prosecution. Ensuring independence and impartiality in the prosecutorial system is an essential underpinning to the credibility and legitimacy of the court.

56. The Working Group's suggestion that the court should appoint the prosecutor after consultation with the States concerned is sensible in that it would preserve the independence of the prosecutorial system while giving the States concerned an opportunity to be involved. It will be necessary, however, to identify precisely which States parties should be involved in the process of consultation with the court. The exact standing of the States parties in the process of selection and appointment of the prosecutor would have to be made clear.

(b) *The initiation of a case*

57. In paragraph 120 of the report, the Working Group suggests that adopting the system of appointing an independent prosecutor would obviate the need for a preliminary hearing to test the evidence, as the court could dismiss "frivolous or unsubstantiated charges". An additional consideration is that preliminary hearings before the court could well be regarded as unnecessarily time-consuming and expensive.

58. Australia believes that the role, function and duties of a prosecutor should be regulated. Questions of ethics; a prosecutor's duty to the court; and obligations towards the defence are the types of issues that need to be addressed. The exercise of prosecutorial discretion and the criteria for the prosecution's decisions also need to be regulated. Australia agrees with the Working Group's suggestion (para. 119) that there should be scope for appeal against a prosecutor's decision not to prosecute.

59. In the absence of a permanent independent prosecutorial office, a case could only be brought before the court on complaint from a State party or the Security Council.

[3] See *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 21st meeting.

Australia agrees with the view expressed by the Working Group (para. 122) that the power of complaint should extend to any State party which has accepted the court's jurisdiction with respect to the offence in question. A difficulty would arise where a State party which wished to initiate a complaint in relation to a number of offences had not accepted the jurisdiction of the court in relation to all those offences. This situation will need to be addressed.

(c) *Bringing defendants before the court*

60. The devising of arrangements to bring defendants before the court presents many difficulties which must be resolved if the court is to operate effectively. The Working Group has explored a number of these difficulties in its report. The differing constitutional requirements of States will be one of the major hurdles to be overcome.

61. Australia agrees with the view expressed by the Working Group (para. 133) in its report that the statute of the court would have to establish minimum requirements for the transfer of alleged offenders which would have to be observed by States parties. In drafting these requirements, the Working Group should draw upon existing extradition arrangements between States. The use of these arrangements as a foundation should result in a set of draft provisions that are more recognizable to States. Conceptual problems may arise, however, over the need for an alleged offender to be extradited to the court rather than to a State.

62. The Working Group (para. 135) deals with what it would regard as some of the basic elements of a request for transfer, including the existence of evidence which would have to be "prima facie sufficient to justify putting the accused on trial". Australia believes there would be difficulties in this approach. The reference to prima facie evidence would mean different things to different States. Moreover, it is not a universal standard in extradition treaties, many of which adopt a "no evidence" approach whereby the requesting State is only required to provide the requested State with a statement of the acts or omissions which are alleged against the person whose extradition is sought.

63. As well as considering how the accused should be brought before the court, Australia believes that attention should also be given to the conditions in which the accused would be held prior to trial. In this regard, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[4] should be used as the basic standard.

64. To the extent that offenders may be juveniles, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)[5] and articles 37 and 40 of the Convention on the Rights of the Child[6] should be used as the minimum standard.

(d) *International judicial assistance in relation to proceedings before the court*

65. Paragraphs 136 to 153 of the report usefully explore the issues relating to assistance from States in support of the prosecution of alleged offenders before an international court. Such assistance could well be crucial to their successful prosecution. In complex cases assistance would no doubt be required from a number of countries.

66. The Working Group notes (para. 136) that assistance would be " 'one-way' assistance to the court rather than reciprocal assistance". The Working Group is right to point out that assistance would be "one-way". The question arises, however, whether such assistance should be directed to the court. Where mutual assistance agreements and arrangements are established between States, the purpose of the assistance sought is for the most part directed towards preparation of the prosecution case against an alleged offender. Requests for assistance, therefore, are generated by the prosecuting authorities of a requesting State. By the same token, it would be the independent prosecutor who would most likely need to call for the assistance of States in the preparation of cases to be brought before the court. A court which is to hear a case should not be involved nor seem to be involved in the preparation of the prosecution case. To maintain this separation, assistance from States should be provided directly to the prosecutor.

67. The Commission will need to consider what assistance should be provided to the legal representatives of an alleged offender to enable them to prepare a proper defence. The question of financial assistance to defendants unable to fund their defence also needs to be considered. The lack of financial means in such cases could deny a defendant proper representation. The minimum guarantees in relation to the right to legal assistance are set down in article 14, paragraph 3 (*d*), of the Covenant.

68. The Working Group suggests (para. 139) that there are three options in relation to international judicial assistance. Based on its assessment, the Working Group suggests that the best option for assistance, at least in the first phase of the court's operation, would be a general provision in the statute supplemented by a non-exclusive list of the types of assistance which may be sought from States parties. The possibility of a mutual assistance treaty between States parties could then be addressed at a later time. Australia accepts the reasoning behind this assessment. It would stress, however, the fundamental requirement of establishing an effective assistance regime if successful prosecutions are to take place.

(e) *Implementation of sentences*

69. Australia regards the implementation of sentences as one of the most difficult questions to be addressed. There are a number of issues to be taken into consideration.

(i) Humanitarian considerations

70. First, a term of imprisonment should not be served under conditions less favourable than those provided in the United Nations Standard Minimum Rules for the Treatment of Prisoners.[7] Secondly, even where the imprisonment of an offender is implemented in a State

[4] General Assembly resolution 43/173, annex.

[5] General Assembly resolution 40/33, annex.

[6] General Assembly resolution 44/25, annex.

[7] See United Nations, *First United Nations Congress on the Prevention of Crime and Treatment of Offenders, Geneva, 22 August-3 September 1955: Report prepared by the Secretariat* (Sales No. 1956.IV.4), annex I, pp. 67-73.

which complies with those standards, the differences in language, climate and culture may still contribute to difficult conditions of imprisonment.

(ii) States

71. There needs to be flexibility in determining which State is to take responsibility for carrying out the sentence. The extent of this responsibility will need to be established, including such matters as the cost of imprisonment.

(iii) Transfer of prisoner to State of nationality

72. A number of countries have concluded mutual repatriation agreements in relation to citizens of one party convicted and sentenced in the courts of the other. Australia suggests that consideration should be given to including a provision in the draft statute allowing the State of which a convicted offender is a national to implement the sentence, if it so wishes. There are two qualifications to that view. First, the court should be satisfied that the State has a facility which meets the United Nations Standard Minimum Rules for the Treatment of Prisoners. Secondly, consideration needs to be given to whether the consent of the prisoner should be a prerequisite to granting custody to the State of which he or she is a national.

73. If transfer of prisoners is to be permitted, there needs to be provisions dealing with proceedings to determine applications for transfers; lawful custody of a prisoner in transit; transfer in the custody of an escort; and so on. Guidance on the handling of the transfer of prisoners might be obtained from the Model Agreement on the Transfer of Prisoners[8] and the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released.[9]

(iv) Review of sentences

74. Australia agrees with the view expressed by the Working Group (para. 154) that consideration should be given to providing for applications to adjust the penalty. A system of parole, reduction of sentences and remission would need to be considered.

(f) *Relationship of the court to the existing extradition system*

75. The Working Group correctly raises the issue of the relationship between treaties which adopt the *aut dedere aut judicare* approach and the jurisdiction of an international court (para. 160).

76. It is possible that a State party to the statute which elects to have recourse to the jurisdiction of an international court may be regarded as being in breach of its obligation to prosecute under another treaty, where a State to whom extradition has been refused under that treaty does not recognize the jurisdiction of an international court.

77. Australia supports the suggestion (para. 161) that the system for handing over the accused should be complementary to the existing "try-or-extradite" regime. To achieve maximum flexibility and facilitate the widest possible support for the court, States parties which have accepted the jurisdiction of the court in respect of a given offence should have the option of surrendering the accused to an international court as a third alternative. Imposing on States that are willing to accept the jurisdiction of the court an obligation to hand over the accused for trial may deter some States from becoming parties to the statute.

78. In the light of the particular problems arising from the existence of entirely separate treaty regimes, Australia believes that the issue of a State party to the statute receiving multiple requests for the extradition of an alleged offender needs detailed consideration.

[8] General Assembly resolution 45/116, annex.

[9] General Assembly resolution 45/119, annex.

Belarus

[*Original: Russian*]
[*19 May 1993*]

General comments

1. The competent bodies of the Republic of Belarus look upon the idea of the establishment of an international criminal court as an extremely promising one.

2. Based on an analysis of the various categories of crimes and of the various components of such crimes, the competent bodies of the Republic of Belarus support the view that different models of international criminal jurisdiction are needed for different purposes. In their opinion, the need for an international criminal court may vary depending on the situation; specifically, it may be either the only possible means or merely an additional means of conducting a criminal trial. They consider that the international criminal court should be established mainly to administer justice in respect of crimes of an international character.

3. In view of the fact that a highly developed body of substantive international criminal law is already in existence, the establishment of an international criminal court ought not to be closely bound up with the adoption of the draft Code of Crimes against the Peace and Security of Mankind, should that be a protracted process. In such a case, the crimes within the competence of the court might initially be those defined by international treaties in force. Once adopted, the Code could become one of the international instruments defining crimes within the competence of the international criminal court. It would be logical to link participation in the Code strictly with participation in the statute of the international criminal court. The converse might initially not be so strict, although it is to be hoped that the international community will arrive in the long term at the position of regarding the Code as mandatory for all States without exception.

4. In the opinion of the Republic of Belarus the international criminal court should initially have mixed competence in relation to international crimes. The crimes within the exclusive competence of the international criminal court should initially include aggression, the threat of aggression, systematic and mass violations of human rights, genocide and apartheid. Being a party to the statute of the court should automatically entail recognition of its exclusive competence in relation to these international crimes. In addition, provision could be made for

individual States to widen the scope of the exclusive competence of the court by means of declarations or agreements with the court. Other international crimes could temporarily fall under the competing competence of the international criminal court and national courts. They would not thereby lose their characteristics as international crimes, although once the court had been in existence for a sufficient time the categorization of an act as an international crime could be linked to its inclusion within the exclusive competence of the international criminal court. With respect to crimes of an international character (general criminal offences with an international element which have serious consequences for international relations) only optional jurisdiction might be established. In that case the international criminal court might merely be an alternative to the existing system of universal jurisdiction.

5. The jurisdiction *ratione personae* of the international criminal court would have to be universal, that is to say it would have to extend to the whole range of persons with respect to whom its jurisdiction could be legally established (for the transfer of such persons by a State party to the statute, their extradition by a State that is not a party, and their arrest as a result of measures to maintain international peace and security taken in accordance with the Charter of the United Nations). Accordingly, no agreement to accept the jurisdiction of the court would be required. This should apply to crimes within the exclusive competence of the international criminal court. In relation to crimes that are not within the compulsory jurisdiction of the court, there should be an optional element, that is to say jurisdiction should depend on the agreement of the State (or several States) competent by virtue of existing national and international law. Failure to comply with the provisions on the compulsory jurisdiction of the international criminal court should be regarded as a threat to international peace and security and should entail the adoption by the United Nations Security Council of appropriate measures following the submission to it of the report of the international investigative body.

6. Organization of the other links in international criminal justice, in the first instance an international investigatory body, is of great importance to the establishment of an international criminal court. It should be emphasized that the need for such a body is long overdue—not only in connection with the establishment of the court. The Republic of Belarus is of the opinion that the establishment of an independent prosecutorial body would be inappropriate in the initial phase of operation of the international criminal court, but what could be discussed would be an independent prosecutor designated by the court for each specific case from a previously compiled list of candidates. The prosecutor's functions should not include the investigation, collection and production of evidence to the court, as that is the role of the investigatory body. The prosecutor should prepare the formal accusation and appear as the prosecutor at the trial, relying in the first instance on the information gathered by the investigatory body. Only the court has the power to dismiss unsubstantiated charges in the course of the hearing.

7. The view that the statute of the international criminal court should take the form of an international treaty is worthy of support. The United Nations could actively assist with its preparation and adoption. Close interaction with the United Nations, which will require fairly broad participation of States in the statute of the court, could have a bearing on the effectiveness of the international criminal court. Obviously, the basic interaction between the international criminal court and the United Nations will take the form of contact between the Security Council and the court on matters concerning the transfer to the latter of cases involving aggression or the threat of aggression, implementation of the court's decisions concerning the appearance of the accused, and the execution of judgements. The link between the court and the United Nations, in particular the Security Council, might initially be an informal one of an ad hoc nature, and matters of an administrative and budgetary order could be settled on the basis of a special agreement between them.

8. In the opinion of the Republic of Belarus, the circle of those entitled to appeal to the court would have to be fairly broad from its very inception and be continuously extended. States not parties to the statute of the court should be allowed to appeal to it in cases where the accused is under their jurisdiction, provided that they recognize the statute to be mandatory for the case in question. The United Nations Security Council should certainly also have the right to appeal to the court.

9. The international criminal court would have to be a permanent body, which presupposes the existence of established machinery and a permanent membership. What might be discussed would be a system whereby each State party to the statute of the court would nominate, for a prescribed term, a qualified specialist to act as a judge. The judges would, in turn, elect the president of the court and, possibly, the "bureau" of the court. When the court was required to act, the "bureau" would choose five to seven judges to constitute the court taking into account the prescribed criteria. It is to be hoped that, as the number of cases increased, the court would in fact be converted into a permanently functioning international body.

10. As regards the law applicable to the international criminal court, the applicable procedural law (standards concerning the rights of the accused and procedure) should be established along with the court itself, while the applicable substantive law would require the inclusion of an exhaustive list of specific international treaties defining the crimes subject to the court's jurisdiction. The general rules of applicable law should necessarily include a reference to the principal sources (treaty-based and customary) and could also refer to secondary sources, which include national law, the application of which by the court should be sanctioned by an international legal standard.

Specific comments

11. Ways of solving the question of the regime of jurisdiction *ratione personae* with respect to crimes within the optional competence of the international criminal court would obviously have to be worked out before the adoption of the Code. The options (see paragraph 66) should be based on provisions concerning the jurisdiction of existing international treaties. Belarus has doubts regarding the use (para. 109) of the term "secondary law" in relation to resolutions of organs of international organizations. The basis for their inclusion in applicable law should be

that they are additional sources of international law facilitating the application of international treaties and custom. The proposal (para. 110) concerning the definition of the penalties to be imposed may be regarded as a temporary solution pending the adoption of the draft Code of Crimes against the Peace and Security of Mankind. It must be emphasized that, in relation to crimes within the competence of the international criminal court (paras. 129 to 135), the handing over of the accused should be made mandatory.

12. Consideration may be given to the question of a reservation concerning non-use of the death penalty in the case of the handing over of the accused by a State which totally rejects the use of such a punishment. Mention may be made (para. 139) that the court's statute could include a general provision supplemented by a non-exclusive list of matters with respect to which judicial assistance could be sought, with an indication of the procedure for executing requests for assistance. In the long term a full-scale treaty on judicial assistance could be drafted as an annex to the statute of the international criminal court. How the implementation of sentences is organized will be largely dependent on the number of convictions handed down by the court. In the first phase, provision will evidently have to be made for the sentence to be served in the complainant State, and this must be subject to monitoring by the court (by a representative of the "bureau").

13. The Republic of Belarus finds the international criminal court, as outlined in the report, to be a "minimalist", rather flexible concept. Understatement of the characteristics of international criminal jurisprudence envisaged in the report may lead to the establishment of an ineffective mechanism, whereas what the international community needs, as practice shows, is, on the contrary, a really effective mechanism.

Bulgaria

[*Original: English*]
[*25 August 1993*]

1. The Government of the Republic of Bulgaria supports the proposal for the establishment of an international criminal tribunal with jurisdiction over the most serious violations of international humanitarian law and shares the view of the Working Group that the establishment of such a court is feasible in practice.

2. The Bulgarian Government is of the opinion that it is highly pertinent for the international criminal tribunal to be established under the auspices of the United Nations by the conclusion of a multilateral international treaty, open to international intergovernmental organizations as well.

3. With a view to giving a universal character to such a court and for making it available to States at any time, as well as for the purpose of enhancing the authority of this legal institution and the continuity of its jurisprudence, the Republic of Bulgaria would prefer the international criminal tribunal to function on a permanent basis. However, bearing in mind current realities, Bulgaria would support the less ambitious kind of judicial body, set up ad hoc, as long as an effective mechanism is devised for referring a matter to the court and convening it in a reasonably short period of time whenever the need arises.

4. It is the view of the Bulgarian Government that it would be best if the jurisdiction of an international court competent to prosecute those responsible for serious violations of international humanitarian law (first and foremost against the peace and security of mankind) was made compulsory for all States Members of the United Nations, or at least for the States parties to the court's statute. Before deciding finally on optional jurisdiction, everything possible should be done, even at the price of adopting compromise approaches, to find a solution based on some form of compulsory jurisdiction. The following could be considered as examples of such approaches:

(a) *"Selective" jurisdiction*: States acceding to the statute are obliged to recognize the jurisdiction of the court with respect to at least one of the categories of violations of international humanitarian law for which it makes provision;

(b) *"Delayed" jurisdiction*: States are obliged to recognize the jurisdiction of the court within a certain period of time (three years, five years, or other) from the entry into force of the statute in their respect;

(c) *Optional jurisdiction under the "contract-out" system*: States on acceding to the statute may make a declaration that they do not recognize the jurisdiction of the court with respect to all or some of the categories of violations.

The above approaches could also be used in combination.

5. The parallel drawn with ICJ is not very felicitous, since the Statute of the latter is part of the Charter of the United Nations, and on becoming a Member of the United Nations each State becomes a party to the Statute of ICJ, whether it wishes to or not. In the case of the international criminal tribunal, however, accession to its constituent instrument is a matter of absolutely free sovereign will and is not dependent on such vital State interests as may be relevant to membership in the United Nations.

6. Moreover, ICJ already represents an earlier stage in the development of the international legal process, and it is hardly necessary to replicate its experience after the positive experience with the system of the Convention on the Protection of Human Rights and Fundamental Freedoms, and other regional systems for the protection of human rights.

7. The idea of this proposed legal institution becoming some sort of court of appeal which will review sentences imposed by a national court is controversial. From the point of view of the effectiveness of the court, as well as of the sovereign interests of States, concurrent jurisdiction is the most acceptable. It will enable the States which are not parties to its statute to recognize its jurisdiction.

8. The Republic of Bulgaria shares the view that the Code of Crimes against the Peace and Security of Mankind should be considered separately from the proposal for the establishment of an international criminal tribunal. This would make it possible for States which do not wish to accede to the Code to join the statute of the court, and

vice versa, and this would eventually lead to the strengthening of the international rule of law. At the same time, certain categories of international violations which are not included in the Code should be defined again in the statute of the court so that it could deal with them. In this way the principle of *nullum crimen sine lege* will effectively be observed, since not all States are parties to the same international conventions and therefore it will not be possible to apply the same legal standards as far as they or their nationals are concerned, because that would be a departure from the principle of equality in criminal proceedings.

9. For the same reason the domestic laws of States should not serve even indirectly as a basis for jurisdiction *ratione materiae*, since the crimes and their respective penalties have been defined in a different way in those laws; this would again be a serious violation of the principle of equality of all before the court and the law, regardless of the nationality of the defendants. For the principle of equality to be guaranteed during the trial the respective penalties must be defined accurately and clearly in the statute, otherwise the principle of *nulla poena sine lege* will not be observed. In this case too there can be no reference to the domestic laws of States, since there are considerable differences in this respect as well.

10. The mechanism proposed for the establishment of the court needs some improvement, for the following reasons:

(*a*) On one hand, it does not seem right for a given State which is a litigant in a trial to appoint the prosecutor in the respective case, because that State is not impartial and this would affect the prosecutor's independence of judgement. However, in view of the fact that the prosecutor should act as an independent organ, as should the court itself, the idea of the court appointing the prosecutor in a given case is not a very good one either, since it would not be possible to lodge an effective appeal against the prosecutor's actions. The possibility of establishing an independent office of the prosecutor, which would appoint the prosecutor in a given case in accordance with a set procedure, could be provided for under the court's statute. This will allow for appeals against the actions of the prosecutor before a panel of the court which will not thereafter have the right to try the case;

(*b*) The States concerned should be entitled to have their "own" national judges on the panel which will hear the case. In this connection the Commission could usefully draw upon the experience of the Convention on the Protection of Human Rights and Fundamental Freedoms, as well as on the practice of ICJ. Thus, the interests of the State would be guaranteed with maximum objectivity and impartiality on the part of the panel.

11. As far as the financial aspects of the establishment of the court are concerned, the Bulgarian Government believes that, in view of the universal importance of the functions which this court is supposed to perform, its financing should be provided by the United Nations, be it constituted ad hoc or as a permanent court, and established by international treaty or by any other means.

Denmark

[*See Nordic countries*]

Finland

[*See Nordic countries*]

Iceland

[*See Nordic countries*]

Italy

[*Original: English*]
[*3 May 1993*]

1. In the opinion of the Italian Government, the court should have general jurisdiction and be universal in character. In fact, as in any domestic legal system, the criminal jurisdiction would not be credible if it was not applicable to all citizens; likewise, the jurisdiction of an international court would lose credibility if its application differed according to the region or some other type of grouping. Italy, therefore, is not in favour of the establishment of various regional tribunals, which would be unsuited to guaranteeing observance of the fundamental principle of equality of treatment of the accused before the court.

2. As for the selection of judges, due account should be taken, in each case, of the characteristics of the crimes to be judged, in order to ensure that the specific circumstances associated with the facts relevant to the proceedings are better understood. The panel of judges should therefore include persons who are in the position to understand and evaluate such characteristics.

3. The convention establishing the court should grant all States (including, as the case may be, non-contracting States) the right to designate judges with the requisite qualifications of competence and impartiality to sit on the court for the various cases to be examined. Moreover, the general assembly of the designated judges (or the assembly of contracting States) should elect the president of the court and the "bureau", who will select the judges to constitute the court from the general list of names drawn up in accordance with the principles described above, and bearing in mind the model provided by the Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe (CSCE). At the same time, the seat of the judicial body must be located in a place which gives the widest possible guarantees of independence and freedom of judgement. This location could be different from the official seat of the court, which could best be established at one of the seats of the United Nations, in order to facilitate as far as possible the activity of the new institution in relation to the rules on privileges and immunities.

4. The statute of the court should be independent from the Code of Crimes against the Peace and Security of Mankind, whose provisions may in fact include crimes that are not subject to the jurisdiction of the international court. The Code must certainly be defined in the most appropriate form (either as a convention or another type of instrument) and, once defined, it will provide substantial

guidance for the court. The statute of the court must none the less remain independent from the Code.

5. The structure of the court must include, first, a prosecuting authority competent to examine each case on the basis of the evidence collected following the *notitiae criminis* or any other elements that may be given to the court; secondly, a body to judge the case; and, thirdly, an appeal body.

6. On the jurisdiction of the court, it is the view of the Italian Government that such jurisdiction must be extended to all crimes listed in conventions of a universal character. For example, the war crimes, crimes against peace or crimes against mankind considered by the Geneva Conventions for the protection of war victims and Protocols thereto, the Convention on the Prevention and Punishment of the Crime of Genocide, the conventions of the United Nations and of the specialized agencies against terrorism, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the International Convention against the Taking of Hostages, and the like. The list should remain open in order to allow reference to other conventions as they gradually become more universally accepted. When doubts arise in this respect, the court should be authorized to issue a "preliminary ruling" which could be linked to the acceptance of jurisdiction. In any event, the intervention of the Security Council should be excluded.

7. Aggression is a different case. Here it would be impossible to preclude the intervention of the Security Council for the purpose of establishing whether or not an act of aggression had taken place in a given situation. But, once that had been established, the exercise of the court's jurisdiction must be kept free from any political influence.

8. The jurisdiction of the court must apply to individuals. The fact that an individual is vested with the power of a State organ must be declared irrelevant and it must be stated that the rules of immunity do not apply in such a case. On the contrary, the State as such must not be subject to the jurisdiction of the court. It may be admissible for the jurisdiction of the court *ratione loci* (i.e. relating to events which had occurred within the territory of a State) to be the subject of a possible declaration of acceptance. Conversely, no limits could be admissible as regards the jurisdiction *ratione personae* or *ratione materiae*, except those for which provision is made in the convention establishing the court. Furthermore, concurrent jurisdiction of the court with national jurisdiction, if the latter is in fact exercised, may be acceptable. However, the rules of the convention establishing the court should to a certain extent tilt in favour of the court's jurisdiction. The faculty must also be granted to the Security Council to disqualify a national jurisdiction, even if only temporarily, whenever it deems that that jurisdiction does not possess the impartiality which is universally considered necessary for the conduct of the proceedings.

9. All the internationally recognized provisions concerning the inapplicability of grounds for exceptions to criminal responsibility, such as acting on the order of a superior, lack of knowledge of the act by a subordinate, and so forth, must be reproduced in the statute. To this end, it is suggested that in drafting the statute of the court the content of part one of the draft Code, which considers the general principles of criminal responsibility and punishment, should largely be used as a model.

10. On the question of trials *in absentia*, Italy has some doubts about the need to accept proceedings of this type. In fact, while many arguments may be adduced both in favour of and against the admissibility of trials *in absentia*, Italy tends to share the view that their exclusion is more consistent with the idea of credible, rather than merely declamatory, justice. The statute of the court must also accurately specify the procedural guarantees provided in favour of the accused, on the basis of the existing rules of international law.

11. Finally, the court must impose penalties and determine where the sentences will be executed. At the same time, if the court is given authority to decide on compensation for the victims of crimes and the victim's right to compensation is recognized by the court, other mechanisms (resulting, for example, from the establishment of special funds) may also come into play to resolve issues such as the amount of compensation, the identification of the debtor and the implementation of the court's decision. The execution of the sentences of the court must take place under United Nations control in order to prevent the granting of undue amnesties or pardons.

Mexico

[*Original: Spanish*]
[*5 May 1993*]

1. The draft under consideration constitutes a distinctly novel initiative. The international community does not yet have experience in the establishment of permanent international criminal courts. The only existing precedents, the Tokyo and Nürnberg Tribunals, were the product of special circumstances, having been established by Powers which had emerged victorious from armed conflicts of great magnitude; they cannot, therefore, serve as a precedent for a notion such as the one presently under consideration.

2. In the light of recent experience with regard to the establishment of a war crimes tribunal for the former Yugoslavia, and the role which the United Nations plays in the maintenance of international peace and security, some countries have proposed the establishment of an international criminal court within the framework of, and closely linked to, the Organization. The absence of provisions in the Charter of the United Nations regarding the establishment of bodies of this type, and the fact that the Organization is based on the principles of the legal equality of States, self-determination of peoples and non-intervention in the internal affairs of States, prompts the suggestion that the establishment of an international criminal court is feasible only with the express consent of States, as embodied in an international treaty, and only to the extent to which States are willing to be bound by its provisions.

3. Until now, it has been an internationally accepted general rule that the criminal courts of States are the normal and natural bodies with jurisdiction to try individuals who commit crimes. The rendering and administration of

justice within its territory is a basic function of a State and an obligation from which it cannot escape. Transferring that obligation to a supranational body may not only have direct effects in the area of territorial sovereignty, but may also conflict with the constitutional basis of some States.

4. The tremendous differences that exist among the various penal systems constitute a further obstacle to the notion of an international jurisdiction. Not all systems agree, for example, on such concepts as capacity, penalties, legality, and so on, as is clear from the discussions held in the various forums in which the notion has been raised.

5. In its report, the Working Group, recognizing the obstacles confronting an initiative of such magnitude, has proposed the establishment, by a statute in the form of a treaty, of an ad hoc mechanism, having optional jurisdiction, in the first instance only, to be exercised in the first phase of its operations only over private persons (without prejudice to State responsibility, when appropriate).

6. Despite the flexibility of the mechanism proposed by the Working Group, the close link that exists between the proposed international criminal court and the draft Code of Crimes against the Peace and Security of Mankind—which, if adopted, will be applied and interpreted by that court—adds a number of difficulties to those that already exist; it requires the study of such questions as the principles of non-retroactivity and of legality of the crime, penalties, prescription of the public right of action, and so on, which in the terms proposed, conflict in almost every case with the principles on which the various penal systems in the world are based. For example, the draft Code seeks to establish the non-applicability of statutory limitations to international crimes, whereas the majority of national codes have so far provided for such limitations; it also envisages referring to other bodies of law in connection with such sensitive issues as penalties, when, in fact, penalties constitute an essential element of these types of norms.

7. Furthermore, some questions which play an important role in the decision to establish an international criminal court—questions relating to the establishment of an international prison system which can guarantee the implementation of the penalties imposed by the court or a similar mechanism; verification of the implementation of such penalties by the judicial body which imposes them; the handing over of alleged perpetrators of international crimes by the States which have custody of them; and the establishment of a prosecutorial organ responsible for instituting criminal proceedings—have yet to be clarified.

8. In the specific case of Mexico, acceptance of an international criminal jurisdiction would appear extremely doubtful in the light of its domestic legal system, under which imposition of penalties is the exclusive prerogative of the judicial authorities, and therefore of the Mexican courts (arts. 21, 103 and 104 of the Political Constitution).

9. While the State's monopoly on criminal proceedings could be compatible with the notion of optional and concurrent jurisdiction, the nature of the jurisdictional mechanism proposed could lead to its being connected with a special court; this would conflict with the provisions of articles 13 and 14 of the Constitution.

10. The exceptions envisaged by the draft to the principle *non bis in idem*, which permit double jeopardy in circumstances that are by no means clear, and the international nature of the court, which makes it necessary to rely on general principles of law and to consider referring to other bodies of legislation in respect of situations not provided for in the statute (as the Working Group acknowledges in its report), conflict with the guarantees of legal safeguards afforded by Mexico's system of law, especially criminal law, in which norms are strictly applied and analogies are tightly restricted.

11. Moreover, the fact that a number of international instruments do not envisage the penalties to be imposed for crimes of an international character, but simply provide that States have an obligation to prevent and suppress them, indicates that the norms have not been properly incorporated. In order for a penal norm to meet constitutional requirements, it must consist of a rule (a description of the offence) and must envisage a punishment. According to the principle *nullum crimen sine lege, nulla poena sine lege*, which is the basis of Mexico's legal system, absence of a punishment constitutes an impediment to the application of the norm (no agreement has been reached on the penalties to be included in the draft Code, although it has been decided that their inclusion is absolutely necessary).

12. In its report, the Working Group supports the view that the court should have jurisdiction over crimes committed prior to its establishment, provided that the offences in question are crimes of an international character defined by treaties in force at the time when they were committed. That argument, in the Group's opinion, is rooted in the notion that a retrospective change in proceedings in no way affects the principle of non-retroactivity. Mexico considers such an approach to be unreasonable. Aside from the fact that article 14 of the Constitution provides that no person shall be deprived of rights without a trial held before a pre-existing court, in accordance with laws enacted prior to the commission of the offence, the existence of an international treaty which envisages some crime of this type is not in itself sufficient to confer on the court automatic jurisdiction to try and punish the crime, especially if such an instrument recognizes that the national courts of States have the power and the obligation to suppress such offences.

13. One of the more sensitive issues relates to the handing over of alleged perpetrators to the international court. Under the assumption that an international court is not a foreign court, the Working Group favours the immediate handing over of the accused, without need for an extradition proceeding, which is questionable. While it is true that an international court would not be a foreign court, it would not be a domestic court, either; for purposes of handing over an accused person, it would have to be equated with a foreign court and, accordingly, it would be necessary for the competent national authorities in an extradition proceeding to guarantee that the accused was able fully to exercise his right.

14. New difficulties emerge in this connection. In the first place, in accordance with practice, the handing over of citizens is subject to the discretion of the federal executive authorities; secondly, the Mexican Act on International Extradition (which would be the applicable law, initially at least), establishes specific requirements for ac-

ceding to an extradition request (*inter alia* arts. 7-10), which conflict with the principles on which an international court would be based, one example being the rule that, where the right of action in respect of the offence in question is time-barred under Mexican criminal law, the extradition request is inadmissible.

15. There are still a number of ambiguities in the report of the Working Group which would benefit from more thorough analysis, *inter alia*, those relating to the establishment of a prosecutor's office and to the prison system. However, since the Working Group has given them only preliminary consideration, Mexico will refrain from commenting on them until such time as further information is available.

16. Currently, the Mexican legal system is incompatible with the establishment of an international criminal jurisdiction. Nevertheless, it is suggested that, in the discussion of the topic, careful consideration should be given to the following:

(*a*) The nature of, and the close link between, the rendering of criminal justice and the exercise of State sovereignty. Whatever jurisdictional mechanism is finally adopted should reflect maximum respect for the territorial jurisdiction of the judicial organs of individual States, and should have the latter's express consent;

(*b*) The need to guarantee the total independence of the jurisdictional body, if and when it is established, and the impartiality of its judges. Several States have expressed support for a special agreement linking the court to the United Nations system. Although that proposal is logical, in view of the forum in which the concept has been developed, the types of crimes over which the court would have jurisdiction (aggression, threat of aggression, systematic human rights violations, and so on) make it especially vulnerable to political fluctuations. A court whose decisions in respect of specific crimes could be overruled by the Security Council might diminish confidence in the international community;

(*c*) The need to ensure that the statute which governs the functioning of the court is drafted in such a way as to envisage specifically each of the cases in which penal norms would be applied, so as to leave little or no room for referral and the application of other additional legislation;

(*d*) The fact that rules and punishments constitute basic elements of penal norms which is, moreover, expressed in the universally accepted principle *nullum crimen sine lege, nulla poena sine lege*, must be reflected in the statute of any court which applies the law. The characterization of the offence and the applicable penalty should not be omitted from either the international instruments which define crimes of that nature, or the statute of the court; in the latter case, the principle of legality of the crime requires their inclusion;

(*e*) The retroactive application of law, the question of whether statutory limitations should, in fact, apply to crimes deemed to be of an international character, as has been the case up to now under the legal systems of many countries, and the notion of permitting double jeopardy are some of the sensitive issues which must be clarified before further steps are taken towards the establishment of the court. A jurisdictional body should, in principle, try only offences committed following its establishment, and should apply the laws that were in force at the time when the offence was committed;

(*f*) The definition of the arrangements for the handing over of alleged perpetrators to the court. Respect for the right of all persons to a hearing, to due process and to legal safeguards requires the proper observance of extradition treaties and their recognition as the sole mechanism for handing over those accused of committing an offence to foreign courts.

17. Lastly, until such time as the international conditions required for the establishment of an international criminal jurisdiction are generated, and further progress is made in the progressive development of the law of nations, emphasis should be given to strengthening both national institutions and international judicial assistance to States, as the sole viable alternative means for States to combat crime.

Nordic countries

[*Original: English*]
[*27 April 1993*]

1. The Nordic countries welcome resolution 47/33, and believe that the Commission should consider the preparation of the draft statute as a matter of priority during its forthcoming session.

2. The ideal outcome would be for the Commission to draft a statute which could be submitted to the forty-eighth session of the General Assembly. In order to make this possible, it should consider whether certain questions of detail could be clarified at a later stage, for example, during the Commission's second reading of the draft statute. One such question, for example, would be the composition of the court. Another would be the implementation of sentences, which should be given closer consideration.

3. However, it may seem expedient and necessary for the Commission to devote more attention to procedural questions than to substantive matters such as describing offences and determining sentences. A number of detailed proposals for procedural provisions have already been forwarded to the Security Council under resolution 808 (1993) of 22 February 1993.

4. The Nordic countries would also emphasize that the question of an international criminal court must be viewed separately from that of a Code of Crimes against the Peace and Security of Mankind. Many basic international crimes have already been covered in existing and generally accepted treaty law, and the effective implementation, *inter alia*, through the establishment of an international criminal court should not await the finalization of the draft Code, a project that may take considerably more time than drafting a statute for the court.

5. Although the Nordic countries support the idea of establishing a permanent court through an international convention, they are at the same time of the view that the establishment of such a court should be based on an evolutionary approach. This implies, for example, that the court, at least in its initial phase and until a clear idea is gained of how much it would be used, should not be a full-

time body, but rather an established structure which can be called into operation when required.

6. The suggestion in the Working Group's report that by becoming a party to the statute a State would only accept certain administrative obligations is endorsed. The States parties should accept the court's jurisdiction by making a declaration to this effect, analogous to acceptance of the compulsory jurisdiction of ICJ. States that are not parties to the statute should, in conformity with the two-step process described in the report (para. 52), also be given an opportunity to declare their acceptance of the court's jurisdiction on an ad hoc basis.

7. As regards the jurisdiction *ratione materiae* of the court, this should be based on international conventions, such as the Geneva Conventions of 12 August 1949 and the Protocols thereto and a prospective code of crimes, rather than on national legislation. The use of national legislation could pose certain problems, particularly in a long-term perspective, for example, as regards which acts are defined as offences in the legislation of the various countries, descriptions of offences, determination of sentences, and the like.

8. The offences within the jurisdiction of the court should be limited to serious crimes against mankind, such as war crimes, be they committed by high military commanders or by soldiers on the battlefield. However, there is a great need for a more precise definition of war crimes, as well as of the concept of a "serious offence".

9. As regards the jurisdiction *ratione personae* of the court, the consent of the State of which the accused is a national should not be required. Nor should the consent of the State where the offence was committed be required unless the perpetrator is under the jurisdiction of that State. Generally speaking, the jurisdiction of the court should be very wide; if the consent of the various States involved is required, this could easily impair the effectiveness of such a court.

10. Reference should also be made to Norway's statement to the Sixth Committee on behalf of the Nordic countries during the forty-seventh session of the General Assembly.[1]

Norway

[*See* ***Nordic countries***]

Panama

[*Original: Spanish*]
[*14 July 1993*]

1. The Government of Panama would like to see a uniform and equitable system of justice in the world, which would be accessible to all States and would severely punish acts that constitute international crimes detrimental to the international community, as well as a mechanism permitting States to claim reparation for the consequences of such acts, in order to guarantee the continued existence of humankind and of civilization. The Government of Panama therefore supports the establishment of a permanent international criminal judicial body with compulsory and exclusive jurisdiction.

2. The legal framework on which the international criminal jurisdiction is based should take the form of a treaty which should be ratified by States wishing to submit to its jurisdiction. The court's jurisdiction should be compulsory, regardless of the nationality of the accused, with respect to all crimes defined in the Code of Crimes against the Peace and Security of Mankind and in other international agreements, in accordance with the principle *nullum crimen sine lege.*

3. The Government of Panama considers that one of the most serious offences which should be covered by the Code are attacks on staff members of the United Nations, Permanent Missions or their representatives, and troops or other personnel whom Member States place at the disposal of the Organization.

4. The procedure to be followed in such cases should be set forth in the treaty establishing the court, in order to guarantee the principle of due process, and the applicable penalties could be defined in the draft Code in order to safeguard the principle *nulla poena sine lege.*

5. The Government of Panama supports the establishment of an international detention centre for the detention of those found guilty of international crimes. The operation of this centre should be governed by the provisions of the treaty or of a special agreement on the matter. In many cases, States Members of the Organization lack adequate infrastructure and security mechanisms for the detention of such criminals.

6. Notwithstanding the foregoing, Panama considers that the question of the Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal court are closely linked and cannot be dealt with separately. It is therefore of the view that the adoption of a code without adequate means for its implementation would render it toothless. Similarly, a court without a code would be meaningless, since it would lack objective jurisdiction. The two projects are thus closely related.

7. The ratification by States of the treaty establishing the court should imply *ipso facto* acceptance of the Code, while leaving open the possibility that States parties to the treaty could apply any other relevant agreement or statute in force on the matter which is mentioned in the treaty.

Spain

[*Original: Spanish*]
[*19 May 1993*]

1. The Spanish Government is firmly in favour of the establishment of an international court with general jurisdiction to punish international crimes. It takes the view that such a court can make good the consequences of international crimes and also believes that its mere existence will unquestionably be an important deterrent. It therefore endorses the main ideas in the Working Group's report, and particularly the keynotes of prudence, flexibility and a gradual approach.

[1] *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 21st meeting, paras. 4-19.

2. The most appropriate legal basis for establishing the court is a treaty open to universal participation, negotiated and concluded in the framework of the United Nations. This would make the new court highly representative and impart to it the political and moral authority of the United Nations.

3. Initially, at least, the criminal court should not be a standing full-time body. It would seem preferable, in the beginning, for the statute simply to establish a straightforward, streamlined and inexpensive mechanism for the administration of justice in each specific case, as required. However, once the new court's activities have been assessed in the light of reality, a step could be taken towards making it a standing full-time body.

4. In the first phase, at least, the new court's jurisdiction should not be compulsory. This means that a State's acceptance of the jurisdiction of the court would depend on an ad hoc document, different and separate from that State's expression of consent to be bound by a treaty.

5. As to jurisdiction *ratione personae*, initially the court should only have jurisdiction to punish international crimes committed by individuals. Punishment for international crimes perpetrated by States involves highly complex legal and political problems and the question of assigning this function to the court should be left for later.

6. As to jurisdiction *ratione materiae*, the need to observe the principle *nullum crimen sine lege* means that the only international crimes that can be punished are those regarded as such by general international law at the time they are committed. The actual substance of international law in this matter would be determined by those conventions and treaties that unquestionably express the *opinio juris* of the international community.

Sweden

[*See* ***Nordic countries***]

United States of America

[*Original: English*]
[*13 May 1993*]

Introduction

1. The Government of the United States of America appreciates the opportunity to submit written comments on the report of the Working Group. Along with other States, it has made clear during the forty-seventh session of the General Assembly[1] that the request to begin work on the draft statute is not to be viewed as an endorsement of an international criminal court. Rather, in view of the significance of this matter and the importance of ensuring that such a proposal would best advance the important ideals and objectives which a permanent court might serve, the task ahead is further to consider, and find sound and effective solutions to, the difficult questions involved.

2. The following comments are accordingly not intended as a comprehensive commentary on the Working Group's report. Rather, they present the views of the United States on some of the more important initial questions which have so far been identified. These views are presented without prejudice to any further submissions on these and other aspects of the report which the United States may subsequently provide. Moreover, the United States wishes to emphasize that its silence on other aspects of the report should not be viewed as an endorsement.

General approach

3. In requesting the Commission to undertake this project, the General Assembly also requested it to

> ... [begin] with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee ... taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States ... and to submit a progress report to the General Assembly at its forty-eighth session.

It is noteworthy in this regard that the General Assembly requests the Commission to submit a progress report.

4. During consideration of this matter at the last session of the General Assembly, the United States indicated that it welcomed the report as a significant contribution to the discussion of this very important subject. In its view, the report provided very useful analysis of many of the complex issues associated with the proposal to establish an international criminal court. In particular, the basic approach advocated in the report (paras. 39-43), namely that the court should be a "flexible and supplementary facility" for States parties to its statute and that it should not have compulsory or exclusive jurisdiction, strikes a proper and realistic balance between the many competing interests at stake. The report helped focus the attention of Member States on these issues and others identified during the course of the discussions in the Sixth Committee.

5. The United States hopes that the Commission will reestablish its Working Group and continue its useful work by providing detailed analysis of the issues relating to the establishment of an international criminal court, including appropriate options. In this respect, it encourages the Commission to seek the views of the General Assembly in order to prepare draft articles for the establishment of a tribunal which will be capable of attracting the widest possible support.

6. It is noted that the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind has proposed in his eleventh report[2] a draft statute for an international criminal court, which it will be studying carefully before making any detailed comments. The United States welcomes the Special Rapporteur's proposal as a significant contribution to the process of identifying and analysing the various issues related to the establishment of an international criminal court. However, it believes that more analysis and further guidance from the General Assembly are required before the Commission can provide the General Assembly with a draft

[1] See *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 21st meeting.

[2] See document A/CN.4/449 reproduced in the present volume (p. 111).

statute capable of attracting the support necessary to make an international court a reality.

7. The United States believes that both the Commission and the General Assembly will want to take into account the developments regarding the establishment, under Security Council resolution 808 (1993) of 22 February 1993, of an ad hoc tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. While there are many important differences both in circumstances and objectives that in some respects will likely compel different approaches, the establishment of such an ad hoc tribunal may provide significant insight into the many issues associated with establishing an international criminal court. A number of comments and proposals were submitted to the Secretary-General in response to the Security Council decision to establish the tribunal.[3] There has also been considerable activity outside the United Nations, for example, the recent International Meeting of Experts on the Establishment of an International Criminal Tribunal, held at Vancouver, Canada, hosted by the International Centre for Criminal Law Reform and Criminal Justice Policy, which addressed in detail the issues relating to the establishment of both the ad hoc tribunal and the international criminal court.[4]

8. Consideration of the establishment of an international criminal court should be governed by three major principles: first, the development and implementation of such a tribunal should further, and not harm, international law enforcement efforts. This is of particular concern in the case of narco-traffickers and terrorists. Secondly, such a court should be fashioned so as to minimize the potential for politicization of any sort. Finally, and fundamentally, it is imperative to make sure that the tribunal is both fair and effective and that questions concerning such issues as scope of jurisdiction, applicable law, rules of procedure and evidence, and appeal are adequately addressed in a realistic, just and workable fashion.

The need to identify and consider fully the issues involved

9. As the Commission recognized, the report was not meant to be an exhaustive treatment of the many issues associated with such an undertaking and further examination is needed on a number of important matters. Thus, while the report is a helpful start, it is clear that further consideration is required on how best to resolve many of the difficult questions which it raises, such as the jurisdiction *ratione materiae* of the court; how matters are to be brought to the court; whether States must consent to the court's jurisdiction and, if so, which States must consent; and how the court will secure jurisdiction *ratione personae* over an offender. Other important issues were identified during discussion of this subject in the Sixth Committee. Additional issues have been identified in connection with proposals to establish the ad hoc war crimes tribunal for the former Yugoslavia. For example, the important requirement for a separate (and independent) appellate court, to which appeals can be taken on the basis of an error of law invalidating the decision or an error of fact that caused a manifest miscarriage of justice.

10. Still other issues have been identified in the consideration of these proposals outside the United Nations, for example, those relating to the rules of procedure and of evidence which were the subject of extensive discussion at the Vancouver meeting of experts. The United States believes that the approach adopted in regard to fundamental issues such as these may have implications for other aspects of any resulting regimes.

11. The Working Group acknowledges (para. 23) that in some cases it has done no more than outline a range of solutions without indicating a preference or an analytical basis for arriving at those solutions. However, as discussions among international experts, such as those that took place at the recent Vancouver meeting, demonstrate, many issues warrant fuller treatment. For example, with respect to six critical issues (the system of prosecution; the initiation of the case; bringing defendants before the court; international legal assistance; implementation of sentences; and the relationship of the court to the existing extradition system), the report acknowledges that

> ... in the time available the Working Group has not been able to discuss these issues in much detail, what follows is accordingly tentative and exploratory. The issues will need fuller examination if it is decided that the Commission should proceed to draft a statute for the court (para. 113).

In several instances, when addressing such questions as the jurisdiction of the court over offences and the acceptance of its jurisdiction by States, the regime of jurisdiction *ratione personae*, and the interplay between national and international law, the report contained statements to the effect that the precise details of such a system did not have to be worked out at that point (paras. 49, 53 and 57).

Jurisdiction ratione materiae *of the court*

12. One of the more fundamental preliminary questions, as the report recognizes, is the scope of jurisdiction *ratione materiae* of the court. The report notes at the outset that the idea of an international court originated as a forum for prosecuting State-sponsored war crimes and genocide that otherwise go unpunished (para. 27). The report expands this limited jurisdiction, however, to all crimes of an "international character". An analysis of the issues (such as those involving consent and how cases and defendants are brought before the court) may not be the same for the narrow class of State-sponsored war crimes as for narco-trafficking. These issues are characterized in the report as "details" to be worked out later.

13. These are, however, critical questions, which have important implications in the light of the proposed regime of consent rather than compulsory jurisdiction. As noted in paragraph 4 above, the United States agrees with the basic premise that the court should be conceived as a flexible, supplementary facility, based on consent. This has a bearing, however, on the scope of crimes involved. Who consents where the crime is one of an "international character"? What happens when the views of equally interested States are not in harmony? And how will a State be convinced to surrender its nationals to the international court if it is not willing to extradite its nationals to another forum?

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[3] See "Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)" (document S/25704 and Corr.1 and Add.1).

[4] Document S/25504, annex, contains the report of the meeting.

14. The United States has particular and major concerns about the report's approach to the proposed court's jurisdiction *ratione materiae* and the substantive definition of crimes. The report assumes that the draft Code of Crimes against the Peace and Security of Mankind will serve as a basis for the jurisdiction *ratione materiae* of the court (paras. 68-74). Although the report provides that States may not need to accept the Code in order to submit to the jurisdiction of the international court, it states explicitly that "[t]here are clearly important links between the two projects" (para. 68). Reference to this strong linkage between the two also appears elsewhere in the report (para. 57). The United States, like many other States, has expressed its serious reservations about the draft Code, which are detailed elsewhere in the present volume.[5] To the extent that the proposal to establish the court is tied to the Code, those reservations extend to the proposed court as well.

15. In addition, under the Working Group's proposal, the crimes assigned to the international criminal court potentially include all crimes that may be the subject of multilateral treaties. The Working Group explains that

> It is not necessary to reach agreement at this stage on the precise list of international criminal law treaties: they would certainly include serious war crimes, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the various conventions on hostage-taking, hijacking of ships and aircraft, and the like (para. 57).

However, most multilateral treaties dealing with criminal offences are clearly premised on, and are designed to facilitate, national prosecution. The proposed internationalization of crimes presently subject to multilateral treaties does not appear to take into account this underlying premise.

16. Moreover, the United States seriously questions whether an international criminal court is appropriate where the crime may be international or multinational but where an effective national forum for prosecution nonetheless exists. In particular, is it desirable to provide nations with a means of abdicating their responsibility where "the criminal justice system of a small State is overwhelmed by the magnitude of a particular offence" (para. 28 (*b*)) or prosecution is otherwise awkward?

17. The additional limitation proposed in the report that the court's jurisdiction should be restricted to the "most serious offences . . . which themselves have an international character" (para. 58) is also not particularly instructive. Many crimes have an "international character". The United States questions whether all categories of crimes that have an international character should potentially come within the jurisdiction of the criminal court. And, if only the most serious of these offences are to fall within the court's jurisdiction, how are they to be identified?

Surrender of defendants to the court

18. A matter that merits specific mention here is the report's novel proposal that the surrender of defendants to an international criminal court was not to be regarded as "extradition" (para. 127). As characterized in the report, this would enable the many States that have legislative or constitutional prohibitions against the extradition of their nationals nevertheless to surrender them to the international criminal court, on the theory that the international criminal court is, in effect, simply an extension of their own national courts. It is not at all clear that the United States could be party to a court constituted under this theory without running afoul of article III, section 1, of the United States Constitution, which requires that any court exercising the judicial power of the United States must apply United States law; be established by Congress; and be composed of judges who are assured of tenure during good behaviour and who are appointed by the President with the advice and consent of the Senate.

19. In addition, the United States believes that it is important for the Commission to conduct a survey of States to determine their willingness or ability to accept this theory. The answer to this question may turn out to be among the most important in determining the efficacy of the approach proposed in the report. The results of this survey should be included in the Commission's progress report to the General Assembly.

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[5] See document A/CN.4/448 and Add.1 (reproduced in the present volume, p. 59).