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

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1994, vol. II(1)

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 4]

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

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[*18 and 28 February, 11, 24 and 25 March, 11, 13 and 17 May, 24 June and 10 August 1994*]

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

NOTE

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

Multilateral instruments cited in the present document

	Source
Human rights	
Convention for the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, p. 277.
European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) (Rome, 4 November 1950)	Ibid., vol. 213, p. 221.
European Convention on Extradition (Paris, 13 October 1957)	Ibid., vol. 359, p. 273.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	Ibid., vol. 660, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968)	Ibid., vol. 754, p. 73.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	Ibid., vol. 1015, p. 243.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 51*, resolution 39/46, annex.
Model Treaty on Mutual Assistance in Criminal Matters (New York, 14 December 1990)	Ibid., *Forty-fifth Session, Supplement No. 49*, resolution 45/117, annex.
Privileges and immunities, diplomatic relations	
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, *Treaty Series*, vol. 500, p. 95.
Law applicable in armed conflict	
Convention respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)	J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition (New York, Oxford University Press, 1918), p. 100.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, pp. 31 et seq.
Protocols additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of armed conflicts (Protocols I and II) (Geneva, 8 June 1977)	Ibid., vol. 1125, pp. 3 et seq.
Law of treaties	
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., *Treaty Series*, vol. 1155, p. 331.

	Source
Narcotics and psychotropic substances	
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	Document E/CONF.82/15 and Corr.1 and 2.
Civil aviation	
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)	United Nations, *Treaty Series*, vol. 974, p. 177.
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 24 February, 1988)	ICAO, document 9518.

Introduction

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

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

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

["*The General Assembly,*]

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

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

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

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

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

[2] Ibid., para. 100.

I. Observations received from Member States

Algeria

[*Original: French*]
[*14 February 1994*]

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

A. Context in which the question is being considered

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

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

4. Hence, the fact that the International Law Commission was given a mandate, in paragraph 6 of General Assembly resolution 47/33, of 25 November 1992, to undertake the project for the elaboration of a draft statute for an international criminal court does not in any way mean that work on the draft Code of Crimes against the Peace and Security of Mankind should be dropped or even slowed down. As the draft Code has been adopted by the Commission on first reading,[1] it would be highly desirable for the Commission to resume consideration of it in accordance with its usual working methods, for this draft remains the foundation on which an international criminal jurisdiction would be built. A twofold operation is called for, and both aspects of the question should be worked on concurrently, with the same degree of interest and diligence. The ripeness of the topic and the present concerns of the international community provide conditions conducive to substantial and fairly rapid progress in both directions.

[1] For the text, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94-97.

B. Comments on the draft articles

1. The nature of the future court

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

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

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

2. The competence of the future court

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

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

3. Applicable law

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

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

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

4. Relationship to the United Nations

12. The question of the relationship between the future court and the United Nations has not received as much attention as it deserves, despite the fundamental importance attached to it in the report of the International Law Commission on the work of its forty-fifth session. The Algerian Government believes that it is important for the court to be a United Nations body, not only in order to confer on it the moral authority of the Organization and to ensure its universal recognition, but also to give material expression to the indivisibility of international law and order. This would not in any way affect the court's independence and autonomy. The Statute of the International Court of Justice provides a cogent example with regard to the method of election of judges, their status, the automatic acceptance of the Statute of the Court by every Member of the United Nations, and the means by which cases are brought before the Court.

Australia

[*Original: English*]
[*16 February 1994*]

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

Part 1: Establishment and composition of the Tribunal

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

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

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

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

Article 4 (Status of the Tribunal)

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

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

Article 5 (Organs of the Tribunal)

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

Article 9 (Independence of judges)

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

Article 11 (Disqualification of judges)

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

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

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

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

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

Article 15 (Loss of office)

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

Article 19 (Rules of the Tribunal)

Article 20 (Internal rules of the Court)

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

Article 21 (Review of the Statute)

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

PART 2: JURISDICTION AND APPLICABLE LAW

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

[2] S/25704 and Corr.1, annex.

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

Article 22 (List of crimes defined by treaties)

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

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

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

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

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

19. One point remains unclear in relation to this draft article. This is whether it is intended that the court can have jurisdiction over the list of offences contained in the draft article on the basis that these are "international crimes" as defined by the various conventions (in which case the court's jurisdiction would not depend on a State's being a party to the relevant treaty), or whether it is intended that the court will only have jurisdiction in the event that jurisdiction is conferred upon it by a State which is a party to a particular convention. Article 23 suggests that the former is the proper interpretation, but article 24 suggests that the latter is the proper interpretation. Moreover, the interrelationship between articles 22, 23 and 24 is crucial, but not clear as currently drafted. Unless clarified, the precise jurisdiction of the court will remain difficult to ascertain and may well lead to challenges to the jurisdictional competence of the court in individual cases.

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

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

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

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

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

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

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

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

[3] See footnote 1 above.

[4] *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee*, 20th meeting, para. 56.

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

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

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

PART 3: INVESTIGATION AND COMMENCEMENT OF PROSECUTION

Article 29 (Complaint)

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

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

Article 30 (Investigation and preparation of the indictment)

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

Article 31 (Commencement of prosecution)

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

Article 33 (Notification of the indictment)

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

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

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

PART 4: THE TRIAL

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

Article 36 (Place of trial)

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

Article 38 (Disputes as to jurisdiction)

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

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

[5] See footnote 1 above.

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

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

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

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

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

Article 44 (Rights of the accused)

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

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

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

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

Article 47 (Powers of the Court)

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

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

Article 51 (Judgement)

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

Article 53 (Applicable penalties)

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

Part 5: Appeal and review

Article 55 (Appeal against judgement or sentence)

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

Article 56 (Proceedings on appeal)

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

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

Part 6: International cooperation and judicial assistance

Article 58 (International cooperation and judicial assistance)

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

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

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

Article 61 (Communications and contents of documentation)

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

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

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

Article 64 (Rule of speciality)

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

PART 7: ENFORCEMENT OF SENTENCES

Article 66 (Enforcement of sentences)

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

[6] General Assembly resolution 45/117 of 14 December 1990, annex.

Austria

[*Original: English*]
[*20 June 1994*]

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

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

Article 4 (Status of the Tribunal)

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

Article 5 (Organs of the Tribunal)

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

Article 7 (Election of judges)

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

Article 9 (Independence of judges)

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

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

Article 11 (Disqualification of judges)

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

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

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

Article 15 (Loss of office)

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

Article 16 (Privileges and immunities)

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

Article 19 (Rules of the Tribunal)

Article 20 (Internal rules of the Court)

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

Article 21 (Review of the Statute)

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

Article 22 (List of crimes defined by treaties)

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

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

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

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

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

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

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

Article 28 (Applicable law)

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

Article 29 (Complaint)

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

Article 30 (Investigation and preparation of the indictment)

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

Article 31 (Commencement of prosecution)

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

Article 32 (The indictment)

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

Article 33 (Notification of the indictment)

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

Article 37 (Establishment of Chambers)

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

Article 38 (Disputes as to jurisdiction)

23. Austria believes that only States with an objective interest in a case should have the right to challenge the court's jurisdiction. Both the State concerned as well as the accused person should possess the right to challenge the jurisdiction of the court. To exercise this right should be permitted before or at the commencement of the trial. It could also be considered to grant the accused the right to challenge the jurisdiction immediately after the notification of the indictment. By such provision the principal procedural rights of the accused are seen not to be affected since the accused is to be informed and provided with all the documents according to article 33, paragraph 1, in time to enable him to decide upon a possible challenge of jurisdiction even before the commencement of the trial. Austria suggests reconsideration as to whether the challenge should rest with the proposed indictment chamber (see commentary on article 29).

Article 39 (Duty of the Chamber)

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

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

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

Article 44 (Rights of the accused)

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

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

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

Article 47 (Powers of the Court)

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

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

Article 48 (Evidence)

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

Article 51 (Judgement)

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

Article 52 (Sentencing)

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

Article 53 (Applicable penalties)

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

Article 55 (Appeal against judgement or sentence)

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

Article 56 (Proceedings on appeal)

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

Article 58 (International cooperation and judicial assistance)

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

[1] General Assembly resolution 45/117 of 14 December 1990, annex.

Article 61 (Communication and contents of documentation)

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

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

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

Article 62 (Provisional measures)

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

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

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

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

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

Article 67 (Pardon, parole and commutation of sentences)

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

Belarus

[*Original: Russian*]
[*18 February 1994*]

GENERAL COMMENTS

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

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

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

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

Specific observations

3. As to the establishment and composition of the court (part 1 of the draft statute), it is necessary to pause to consider the question of the relationship between the court and the United Nations. As pointed out earlier in our observations on the Working Group's 1992 report, close interaction between the international criminal court and the United Nations is a precondition for the court's effectiveness. In view of the fact that the basic channel for that interaction will be between the court and the Security Council (the appropriate changes being made in the character of the court), the interaction between the United Nations and the International Atomic Energy Agency could serve as a model for the relationship. This presupposes that the court will have close ties to the United Nations, without being a United Nations organ.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chile

[*Original: Spanish*]
[*22 March 1994*]

General comments

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

I. Creation of the tribunal

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

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

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

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

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

II. Competence of the tribunal

7. The competence of the tribunal with which we are concerned should be subsidiary to that exercised by national courts. International criminal jurisdiction should, therefore, as a general rule, come into play only in the absence of national jurisdiction.

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

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

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

11. The jurisdictional body should be created by a treaty within the framework of the United Nations. This is another of the approaches previously put forward by our country. Chile shares the view, which has also been expressed by other States, that it would be desirable for there to be at least some relationship between the tribunal and the United Nations, not only on account of the authority and permanence that would confer on the tribunal but also because the competence of the court might depend in part on decisions of the Security Council. For this reason the Government of Chile tends to favour a solution involving the conclusion of a treaty of cooperation similar to those concluded between the United Nations and its specialized agencies, which would set out the obligations and functions of the organs of the United Nations in relation to the satisfactory and normal development of the functions of a tribunal.

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

13. With respect to the structure of the tribunal, Chile agrees with the draft to the extent that it seeks a solution characterized by flexibility and economy by creating not a standing full-time body, but a mechanism which would enable the judges to meet without delay for the cases for which they are convened. Thus, the draft statute envisages a pre-existing mechanism which comes into operation only when needed and whose composition, in each specific situation, would be determined by objective criteria ensuring the impartiality of the members of the tribunal.

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

15. The tribunal with which we are concerned should have mandatory jurisdiction with respect to the most serious and far-reaching crimes in which humanity as a whole

may be regarded as being a victim as in the case of genocide. In other cases, jurisdiction should be optional.

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

17. Without prejudice to the foregoing, in the case of the most serious and far-reaching crimes in which humanity as a whole may be regarded as being the victim, as in the case of genocide and crimes of war and aggression, the jurisdiction of the tribunal should be mandatory, subject to the determination of the Security Council. From this point of view, Chile inclines towards alternative B of article 23 (Acceptance by States of jurisdiction over crimes listed in article 22), with the appropriate amendments in relation to mandatory jurisdiction.

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

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

III. Applicable law

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

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

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

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

24. The draft is consistent with the Chilean position in referring only to offences committed by individuals; it does not extend the jurisdiction of the tribunal to States, notwithstanding the fact that such individuals may be agents of the State. As our Government has already indicated, to bring States to justice would raise the most serious difficulties and, in any case, there are other mechanisms in force in international law to penalize illegal conduct by States. In this respect, we reaffirm the opinion of Chile that, in order to counterbalance the lack of jurisdiction of the international tribunal in respect of offences committed by States, the role of the Security Council, that of the International Court of Justice and, in particular, the mechanisms for the protection of human rights should be strengthened.

IV. Judgement and sentencing

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

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

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

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

subject to the exclusive authority of the international tribunal.

CONCLUSION

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

Cuba

[*Original: Spanish*]
[*7 February 1994*]

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

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

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

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

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

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

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

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

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

Cyprus

[*Original: English*]
[*28 April 1994*]

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

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

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

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

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

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

Czech Republic

[*Original: English*]
[*13 May 1994*]

Status of the tribunal and the relationship with the United Nations

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

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

Jurisdiction of the tribunal *ratione materiae*

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

4. The Czech Republic agrees with this concept. However article 26 deals with two different questions at the same time: the jurisdiction *ratione materiae* in the case of crimes under general international law and the way of acceptance of this jurisdiction. There is no reason why the question of jurisdiction *ratione materiae* could not be fully and comprehensively dealt with in a single article of the statute article 22. It would be preferable to insert the idea of article 26, paragraph 2 (*a*) in article 22 as its second paragraph.

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

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

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

Acceptance of the jurisdiction of the tribunal

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

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

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

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

Security Council

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

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

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

Denmark

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

Finland

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

Germany

[*Original: English*]
[*24 March 1994*]

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

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

3. This development has undoubtedly and lastingly inspired the work of the International Law Commission on a statute for an international criminal court. In the work of that court it will be crucial to apply the practical experience which the international community will gain from the International Criminal Tribunal for the Former Yugoslavia. The draft convincingly shows that it should be possible to establish an international criminal court if the legal and technical problems can be solved. In response to the Secretary-General's note of 4 January 1994, the German Government submits the following comments on fundamental provisions of the statute:

Legal character of the court

4. A major question is that of the court's legal character. The answer will inevitably affect the substance of a number of the draft's provisions. Neither the commentary on article 2[1] by the ILC's 1993 Working Group nor the discussion on this point in the Sixth Committee during the forty-eighth session of the General Assembly indicates any clear preference.

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

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

Jurisdiction of the court

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

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

[1] See especially paragraph 4 of the commentary.

[2] S/25704 and Corr.1, annex.

to the adoption of a statute for the international criminal court. Nonetheless it should automatically fall within the jurisdiction of the court as soon as it enters into force.

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

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

11. As already mentioned, the activity of the international criminal court should be based upon a comprehensive jurisdiction. It would therefore be meaningful for that jurisdiction to have universal acceptance in the community of nations. In this context the "opting-out" system in alternative B of article 23 (Acceptance by States of jurisdiction over crimes listed in article 22) would seem the most appropriate basis for a broadly accepted jurisdiction.

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

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

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

15. Articles 19 (Rules of the Tribunal) and 20 (Internal rules of the Court) vest the international criminal court with the right to determine its own rules and procedures. There are no objections to the court's establishing rules that have no external implications. Germany shares the view of a number of countries, however, that the provisions governing investigation and trial procedures should be subject to approval by the parties to the statute. At least the core provisions in this regard should be made integral parts of the statute. It is also felt that there is good reason, partly with a view to article 40 (Fair trial), to specify in the statute the interests of victims and witnesses, and especially their need for protection. On the other hand, the rights of the accused would appear adequately provided for in article 44.

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

17. The German Government has already expressed its rejection of proceedings *in absentia* in connection with the elaboration of the statute for the International Criminal Tribunal for crimes in the Former Yugoslavia. This view received substantial support during the discussion of the present draft statute in the Sixth Committee at the forty-eighth session of the General Assembly. Should the

possibility of proceedings *in absentia* meet with the approval of the majority, further provisions would have to be incorporated in the statute which would fully clarify all questions arising in this connection.

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

Hungary

[*Original: English*]
[*20 June 1994*]

General comments

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

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

3. The decision of the Constitutional Court speaks separately in Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993, which serve as a basis for an ad hoc international criminal tribunal. In the opinion of the Constitutional Court, the statute of the tribunal determines and contains, in detail, international material law, the rules of which are, beyond a shadow of a doubt, integral parts of international customary law; thus the problem of the fact that not all the States are parties to certain treaties does not create a legal obstacle. The applicable law is, therefore, independent of the domestic laws of individual States. In keeping with this is the fact that the tribunal, in its authority to punish crimes, stands above the national courts.

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

Comments on specific articles

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

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

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

Article 5 (Organs of the Tribunal)

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

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

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

Article 6 (Qualifications of judges)

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

Article 8 (Judicial vacancies)

11. Article 8 deals with the filling of vacated judicial seats. It is Hungary's position that it would be a bit tedious to repeat the procedure outlined in article 7 (Election of judges) in the event of a seat's being vacated. It would, in our opinion, serve the goal better to establish a system of alternative judges. The alternative judges would be selected simultaneously with the ordinary judges of the tribunal and would automatically step in to fill a vacated seat. We would note that the establishment of the previously mentioned committee (para. 7) would, in and of itself, be a factor simplifying the procedure which would need to be followed in the event of a seat's becoming vacant.

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

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

Article 11 (Disqualification of judges)

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

Article 12 (Election and functions of the Registrar)

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

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

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

Article 15 (Loss of office)

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

Article 21 (Review of the Statute)

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

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

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

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

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

19. It can easily be seen that in the three criteria listed above, several principles, including such classical criminal law principles such as *nullum crimen sine lege* or *nulla poena sine lege* are also included.

Article 22 (List of crimes defined by treaties)

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

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

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

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

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

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

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

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

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

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

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

28. We have grave doubts as to the provisions of paragraph 2 (*b*). It is our opinion that, while dealing in narcotics is a serious crime, it cannot fall into the same category as the international crimes listed in article 22 of the statute or as aggression.

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

Article 27 (Charges of aggresssion)

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

Article 28 (Applicable law)

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

Article 29 (Complaint)

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

Article 30 (Investigation and preparation of the indictment)

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

Article 31 (Commencement of prosecution)

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

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

Article 32 (Indictment)

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

Article 33 (Notification of the indictment)

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

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

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

Article 37 (Composition of the Chambers)

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

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

Article 38 (Challenge to jurisdiction)

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

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

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

Article 40 (Fair trial)

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

Article 42 (Equality before the Tribunal)

Article 43 (Presumption of innocence)

Article 44 (Rights of the accused)

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

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

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

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

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

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

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

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

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

Article 48 (Evidence)

50. Hungary agrees entirely with the provisions contained in article 48, which deal with the evaluation of evidence. Hungarian law also states that evidence gained by way of illegal means is not admissible in court. However, no provisions in the statute would regulate who can and cannot be a witness and who can deny testimony. It is our opinion that in certain cases the witness can be rejected, for instance if he is to accuse himself or a member of his family with a crime. In such a case, testimony cannot be forced. A problem is also caused by the fact that the consequences of perjury are not set out.

Article 53 (Applicable penalties)

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

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

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

Article 55 (Appeal against judgement or sentence)

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

PART 6 (INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE)

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

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

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

Conclusions

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

Iceland

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

Japan

[Original: English]
[13 May 1994]

General comments

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

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

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

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

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

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

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

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

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

Comments on specific articles

Article 2

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

[1] *Yearbook . . . 1992*, vol. II (Part Two), p. 59, annex.

Articles 6 to 13

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

Article 15

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

Article 19

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

Articles 22 to 26 and 29

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

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

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

ACCEPTANCE OF JURISDICTION BY STATES IN CASES OF CRIMES COVERED BY INTERNATIONAL CONVENTIONS

Article I. List of crimes defined by treaties

(Art. 22)

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

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

(*b*) Grave breaches of:

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

Article I'

(Art. 24)

1. JURISDICTION OF THE COURT IN RELATION TO ARTICLE I

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

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

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

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

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

(Art. 23)

Alternative A

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

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

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

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

or may be of general application.

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

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

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

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

Article II

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

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

Article II'

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

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

Article III

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

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

Article III'

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

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

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

(Art. 25)

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

Article Y. Complaint

(Art. 29)

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

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

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

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

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

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

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

Article I (Art. 22)

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

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

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

Article I', paragraph 1 (Art. 24)

20. Paragraph 1 (*a*) refers to "any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts", a notion which requires explanation. Among treaties listed in article I (art. 22), there are some treaties, for example the Convention Against the Taking of Hostages, which, depending on the situation, confer three types of jurisdiction: (*a*) in which establishment of some types of jurisdiction is discretional to States parties (art. 5, para. 1 (*d*)); (*b*) the primary jurisdiction (art. 5, para. 1 (*a*) and (*c*)); and (*c*) the secondary or complementary jurisdiction which should arise when a State in which the suspect is present does not extradite him/her to a State having the primary jurisdiction (art. 5, para. 2). Under these circumstances, it is appropriate to interpret that "a State which has jurisdiction under the relevant treaty to try the suspect" should mean a State under whose jurisdiction, which was established by its domestic laws or other means in conformity with the treaty provisions, the crime concerned falls. It would be desirable that the ILC indicate a clear interpretation of the phrase such as the one referred to above.

Article I', paragraph 2 (Art. 23)

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

Article 24, paragraph 2

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

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

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

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

Article X (Art. 25)

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

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

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

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

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

Article 28

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

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

Article 41

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

Article 45

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

Article 53

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

Article 58

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

Article 63

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

Kuwait

[*Original: Arabic*]
[*3 August 1994*]

COMMENTS ON SPECIFIC ARTICLES

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

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

Article 9 (Independence of judges)

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

Article 11 (Disqualification of judges)

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

4. The disqualification of judges in any case in which they have previously been involved in any capacity whatsoever, or in which suspicion of partiality might arise on any ground, apparent or potential, as worded, extends of course to all previous expressions of opinion on the case of whatever kind, e.g. acting as prosecutor or deputy prosecutor, participating in the investigation of the case in any way or in any capacity or appearing with the accused as defence lawyer in any pre-trial investigation.

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

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

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

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

Article 15 (Loss of office)

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

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

Article 19 (Rules of the Tribunal)

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

Article 21 (Review of the Statute)

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

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

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

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

12. Kuwait agrees with the provisions of article 25. This would enable the Security Council to make use of the proposed court as an alternative to establishing special tribunals. The United Nations General Assembly should also have the power to refer cases to the court, particularly where the Security Council is unable to adopt a resolution because of the use of the veto by one of its five permanent members.

Article 31 (Commencement of prosecution)

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

Article 33 (Notification of the indictment)

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

Article 37 (Establishment of Chambers)

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

Article 38 (Challenges to jurisdiction)

16. Our views on article 38 are as follows:

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

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

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

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

17. Kuwait does not approve of the words "and its provisions had been made applicable in respect of the accused" that appear in square brackets in article 41 (*a*) in the light of the principle of the equal criminal responsibility of different individuals irrespective of national law or of whether or not a State party has met its commitment to criminalize in internal law the acts enumerated in international treaties.

Article 44 (Rights of the accused)

18. Kuwait is in favour of trial *in absentia* if the accused has been notified but chooses not to appear before the court or if the accused has been arrested but escapes. Kuwait therefore agrees with the formulation of situation (*c*) as given in the commentary to the article for the worthy reasons given there and in order to give the *in absentia* verdict a deterrent value for the international community, promote the achievement of justice and reaffirm the international rule of law by the punishment of whoever is proved to have committed an international crime. We support the view that judgements *in absentia* should be vacated if the accused is later apprehended and that he should be allowed to defend himself in the interests of justice.

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

19. Our views on article 45 are as follows:

(*a*) It is assumed that States parties will have approved the jurisdiction of the court and that they will therefore undertake to desist from instituting trial proceedings if the court should commence inquiries, so that the accused will not be brought to trial before two judicial organs at the same time. In this connection, the draft should address a number of questions concerning what States parties should do with regard to bringing the accused to trial before their national courts in the situation where the court has commenced investigations, and whether their hands are tied or they can continue with their proceedings;

(*b*) Paragraph 2 states that a person who has been tried by another court for acts constituting crimes referred to in articles 22 or 26 may be subsequently tried under the statute only if the act in question were characterized as an ordinary crime. The principle is that a person may not be tried again for the same criminal act even if it were characterized differently. Hence, if an act is characterized as aggravated assault a person cannot be retried for the same act characterized as torture or inhuman treatment. This does not preclude the possibility of bringing an accused person to trial if he has committed acts that constitute an international crime other than those for which he has been tried.

20. In another respect, paragraph 2 (*b*) of the article is sufficient to address this question because, whenever the trial is a "sham" proceeding, it is possible to try the accused before the court on the crime either as characterized in the trial under national law or however else characterized.

21. If, however, the accused can be tried for the same act when characterized as an international crime, then it must be stipulated that the international tribunal should take account of whatever penalty has been imposed by the national tribunal.

Article 50 (Quorum and majority for decisions)

22. Article 37 states that each of the chambers of the court shall consist of five judges. In our view, all of these judges should attend all of the trial proceedings, including the hearings, the deliberations and the rendering of the judgement, so that the number of members of the chamber is not less than that stipulated in article 37 and is not five for one case and four for another, thereby violating the principle of equal rights for the accused. Article 50, therefore, in stating that the presence of only four judges is sufficient, is in violation of the foregoing principles.

Article 53 (Applicable laws)

23. The determination of penalties should be part of international penal law and not of a procedural code, and a penalty should be established for each individual crime in conformity with the law concerning crimes and penalties.

Article 55 (Appeal)

24. Our views on article 55 are as follows:

(*a*) The article does not lay down any precise deadline for appeal against the judgement. This has the effect of allowing a judgement to be challenged at any time, thereby undermining the finality of the judgements of the tribunal;

(*b*) The Appeals Chamber should have more members than the court of first instance, preferably seven;

(*c*) It should be stipulated that a judge who has participated in the rendering of the initial judgement should not sit in the appeal proceedings, given that this is a basic guarantee in judicial proceedings.

25. In our view, no separate chamber should be established to consider appeals, both for reasons of economy and because the number of appeals may not be large enough to require the establishment of a separate chamber. It should rather be formed as needed by judges other than those who took part in the judgement contested.

26. Although most constitutions stipulate that citizens or nationals may not be extradited, when States parties accept the jurisdiction of the court, the court shares jurisdiction with the national courts in considering these cases. This entails an obligation to surrender to it accused citizens or nationals in the event the court should so request.

Malta

[*Original: English*]
[*29 June 1994*]

General comments

1. The Government of Malta takes note of and welcomes the report of the Working Group of the International Law Commission which contains a comprehensive and systematic set of draft articles on a draft statute for an international criminal court.

2. The Government of Malta supports the establishment of an international criminal court. This support has already been affirmed by Mr. Guido de Marco, Deputy Prime Minister and Minister for Foreign Affairs of Malta during the International Conference for Protection of War Victims held at Geneva from 30 August to 1 September 1993 and during the general debate of the forty-eighth session of the United Nations General Assembly. This position was reiterated during the Commonwealth Heads of Government meeting held in Cyprus in October 1993.

3. The Government of Malta believes that the relationship between the court and the United Nations is crucial both to the court's establishment and to its long-term viability. Therefore, Malta prefers that the court should be an organ of the United Nations. However, in the light of the practical and technical difficulties expounded during the debate on this subject, and in particular the controversy as to whether such an option would necessitate an amendment of the Charter of the United Nations, Malta could agree to the establishment of the court by a statute in the form of a treaty entered into by States. If this second option is adopted, it would be essential to create, through appropriate agreements, a close cooperative relationship between the court and the United Nations as this would greatly enhance the court's authority and effectiveness as well as its universal appeal.

Comments on specific articles

4. Article 4 (Status of the Tribunal) provides for a court which is not a full-time body but which would sit when required. While being aware that such an option is less costly and, therefore, more attractive to potential parties to the statute, the Government of Malta believes that the consequential weakening of the court caused by the lack of continuity and its diminished independence and authority might undermine its continued existence. The possibility that the president of the court might become full time if circumstances so required does little to redress the problem.

5. With regard to the rest of part 1, which covers articles 1 to 21, it presents few problems to Malta.

6. Malta shares the Working Group's adoption of the principles that judges should not be eligible for re-election. At the same time it is felt that the 12-year terms could be shortened.

7. Part 2 of the statute (Jurisdiction and applicable law) is a serious attempt to address a series of complex issues. The basic approach adopted by the Working Group to the court's jurisdiction *ratione materiae* is shared by Malta. The compilation of a list of crimes defined by treaties such as that found in article 22 can provide the core of this jurisdiction. In this context, the setting up of an international criminal court, vested with jurisdiction to try crimes against humanity, war crimes, international terrorism and global traffic in narcotics, will give an institutional concept in dealing with the international dimension of such offences.

8. Regarding article 23 (Acceptance by States of jurisdiction over crimes listed in article 22), Malta reiterates its position in favour of a flexible jurisdictional regime. This would encourage a larger number of States to become parties to the statute. The net result of both "opting-in" systems (alternatives B and C) achieves the aim of allowing States that so desire to become parties to the statute to decide over which crimes they would be prepared to accept the court's jurisdiction. The initial presumption in favour of the lack of jurisdiction of the court in alternative A would probably make this alternative appear less inhibiting to potential States parties.

9. Note is taken of the fact that the Working Group's draft statute separates the establishment of the court from the entry into force of the draft code of crimes against the peace and security of mankind. Any linkage between the court and the code could prove detrimental to the early establishment of the court and therefore such linkage should be avoided.

10. While understanding the logic explained in the Working Group's commentary to article 25 (Cases referred to the Court by the Security Council), Malta feels that the drafting of article 25 could be improved in the light of paragraph 2 of the commentary.

11. Malta feels that article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22), paragraph 2, which provides for the court's jurisdiction over crimes under general international law, may give rise to concerns over the proper application of the principle *nullum crimen sine lege*, since it is arguable whether such crimes are defined with a precision that is acceptable as a basis for criminal jurisdiction. This may cause difficulty for Malta in the light of section 39 (8) of the Constitution of Malta which states that:

> 8. No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is more severe in degree or description than the maximum penalty which might have been imposed for that offence at the time it was committed.

12. This is very similar to article 7 of the Convention on the Protection of Human Rights and Fundamental Freedoms, which speaks of the same principle in an almost verbatim manner, and article 11 of the Universal Declaration of Human Rights, which speaks out in favour of the principle. Furthermore, recognition of the jurisdiction of the international criminal court may mean constitutional changes, as well as extradition treaties with the States parties involved and the United Nations. All this necessarily

implies an enormous number of changes in the laws which will have to take place.

13. Malta is largely in agreement with part 3 to part 7 of the draft statute, which deal, *inter alia*, with several procedural issues of fundamental importance. It notes with approval that article 53 (Applicable punishment) does not empower the court to award capital punishment. On the other hand, the possibility, albeit restricted, of holding trials *in absentia*, provided for in article 44 (Rights of the accused), paragraph 1 (*h*), should not be included in a revised draft statute since there is little benefit in a purely declamatory justice that risks possible infringements of the rights of the accused.

CONCLUSIONS

14. Malta looks forward to the early submission by the International Law Commission of a revised version of the draft statute that has been prepared by the 1993 Working Group. Malta believes that the Commission's work on this subject matter will prove to be a determining factor in successfully meeting the increasing need being felt in the international community for the establishment of an international criminal court.

Mexico

[*Original: Spanish*]
[*15 February 1994*]

GENERAL COMMENTS

1. [The Government of Mexico] is not attempting to comment exhaustively on the report of the International Law Commission's Working Group on a draft statute for an international criminal court, for its comments refer only to those points relating to the establishment of an international criminal court, which it thinks need further study.

2. Mexico expresses its thanks to the 1993 Working Group for its report. Its in-depth treatment of the relevant issues without a doubt significantly advances the development of the topic, yet it also brings out the variety of complex problems that have to be dealt with before proceeding to establish such a court.

3. The Working Group must therefore carefully analyse the comments made by the various States both in the Sixth Committee debates during the forty-eighth session of the General Assembly and subsequently.

SPECIFIC COMMENTS

4. The tribunal as proposed in its draft statute is expected to be a body that will meet only when a case is submitted for its consideration. The practicality of such a mechanism will no doubt attract the general support of the international community.

5. As to the manner in which the tribunal is to be set up, it became clear during the last session of the General Assembly that most States endorsed the idea of a tribunal established by an international agreement. Mexico shares that view, and once the basic problems relating to the establishment of an international criminal court are resolved, the body to be instituted should be defined in an international treaty under which each State assumes the obligations it deems appropriate, and the observance of the principle *res inter alios acta* is fully guaranteed.

6. How the tribunal is to be linked to the United Nations is a question that has been approached in different ways. Although the majority recognize the need for a relationship with the United Nations system, the manner in which this is to be done is still being debated. Since the body in question is a jurisdictional one where impartiality and independence become essential, Mexico believes that the relationship to the United Nations must be limited to an agreement to cooperate. The tribunal must not be conceived as an organ of the United Nations, as proposed, within brackets for the moment, in article 2.

7. Articles 19 and 20 of the draft statute give the court the power to determine its own internal rules, rules of procedure, rules of evidence and in general all the rules necessary for the proper implementation of the draft statute. Mexico believes that power to be too broad. In the interests of legal certainty, it would be preferable if the rules governing the functioning of the court were established in the draft Statute itself as clearly as possible, leaving the court only the authority to determine administrative provisions.

8. The observance of the principle *nullum crimen sine lege, nulla poena sine lege* demands that special attention be given to the crimes over which the tribunal is to be given jurisdiction. Mexico believes that only exceptionally serious international crimes should fall within its purview. Consequently, the list of crimes in article 22 (List of crimes defined by treaties) must be studied with greater care, because the fact that a crime is covered under an international treaty is not of itself enough to confer jurisdiction on the court.

9. Furthermore, the provisions of articles 25 and 26, which would give the Security Council the authority to submit cases to the tribunal and give it jurisdiction over violations of peremptory norms of international law and over exceptionally serious crimes so identified in national legislation, in practice create serious legal difficulties that demand an in-depth study, in the light specifically of criminal law, of the scope of those articles.

10. In establishing an international court, another problem clearly arises in connection with the question of applicable substantive law. Article 28 determines that in settling cases submitted to it the court shall apply the statute, the applicable international treaties, the rules and principles of general international law and, as a subsidiary source, any applicable rule of national law. A provision of such scope, which leaves it to the court's discretion to decide which norm to apply, not only opens the door to legal uncertainty but runs counter to the principle of legality as it pertains to criminal law. Accordingly, progress must first be made in integrating the rules of international criminal law.

11. On the subject of international cooperation and judicial assistance, the machinery set up for bringing the accused before the court must always take account of the need at all times to respect the guarantees of due process which local laws generally afford individuals. If this concern is reflected and met in the draft statute, it will attract greater support from the international community. Trials *in absentia*, dissenting opinions, double jeopardy and appeals are still matters of considerable concern among the members of the international community. The establishment of an international criminal tribunal gives rise to quite a few problems. However, Mexico expects that the Working Group in charge of the topic will succeed in finding satisfactory solutions.

12. Only a tribunal whose goal is to guarantee genuine compliance with the law and in which effectiveness, respect for the law and impartiality combine and complement each other will secure the support of the international community.

New Zealand

[*Original: English*]
[*23 February 1994*]

1. In response to the invitation issued by the General Assembly in its resolution 48/31 of 9 December 1993, the New Zealand Government submits the following comments on the draft statute for the establishment of an international criminal court, prepared by the International Law Commission.

Comments on individual articles

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

2. New Zealand considers that an international criminal court should be established by a statute in the form of a treaty among States parties. New Zealand does not see the question of the form of the court's relationship to the United Nations as a central issue in the draft statute. The purpose of the court is the administration of criminal justice for the international community and this important role may need to be reflected by giving the court appropriate judicial status within the United Nations system, as in the case of the International Court of Justice. While we would be happy accordingly to see the court established as a judicial organ of the United Nations, further consideration does need to be given to the feasibility and ease of proceeding in this way within the terms of the Charter of the United Nations.

Article 7 (Election of judges)

3. New Zealand is aware that the statute of the International Tribunal for the Former Yugoslavia provides a precedent for the procedure for nomination of candidates contained in article 7, paragraph 2. The court, on the other hand, will be a permanent rather than an ad hoc body. A nomination process comparable to that in Article 4 of the Statute of the International Court of Justice, whereby candidates are nominated by an independent body rather than by States parties, could enhance the quality of membership of the court.

4. Draft article 7 departs from the model provided by the Statute of the International Court of Justice in a number of respects. In New Zealand's view, the term of office should be reduced to nine years instead of 12, to bring the tenure of office in line with that of judges to the ICJ (Article 13 of the Statute of the ICJ).

5. Furthermore, New Zealand is not persuaded by the reasons given for the non-re-election principle. In both the Statute of the ICJ and the statute of the International Tribunal for the Former Yugoslavia, provision is made for the re-election of judges. We would favour reconsideration of this issue, with a view to providing for a shorter term coupled with the possibility of re-election.

Article 19 (Rules of the Tribunal)

Article 20 (Internal rules of the Court)

6. A useful distinction has been made between the rules of the tribunal (art. 19) and the internal rules of the court (art. 20). In New Zealand's view, it is appropriate to have a general rule-making power and for the procedural rules and rules of evidence to be published. Article 20 as it stands simply provides for the court to regulate its own internal procedure.

Article 21 (Review of the Statute)

7. New Zealand supports the five-year review provision contained in article 21. We should also favour the addition of a provision whereby a review conference shall be held *every* five years. The review option is important in relation to the jurisdictional provisions in part II of the statute. New Zealand can agree that this article may be more appropriately located in the final clauses of the statute.

Article 22 (List of crimes defined by treaties)

8. New Zealand supports article 22 in its current form. It is important for the credibility of the international criminal court that it have a strong consensual base from the outset. It follows therefore that the court's broadest jurisdictional responsibilities should relate to agreed international crimes in respect of which jurisdiction should be readily accepted by a large number of States. New Zealand supports the list of treaty-based international crimes compiled by the ILC. Consideration should also be given to the addition of other especially serious and important international crimes, in particular aggression and war crimes which do not constitute "grave breaches" in terms of article 22 (*b*).

9. New Zealand agrees with the distinction between the treaties creating "international crimes" and other treaties where the crimes are more a matter of national than of international law. New Zealand believes that this distinction should be maintained when consideration is given to adding new crimes to the list in article 22 in future.

10. New Zealand notes that some support has been expressed for including certain drug-related crimes, including the illicit trafficking of drugs across national frontiers, the laundering of drug money and the activities of narco-terrorists which threaten international peace and security, in article 22. While fully acknowledging the grave nature of these crimes, New Zealand considers that jurisdiction of the court over such crimes should be considered only under article 26 as a matter of special consent on the part of States.

11. New Zealand notes the difficulty involved in deciding whether torture (as contemplated in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) also qualifies for inclusion in the list of crimes under article 22. New Zealand agrees that a line must be drawn between the two strands of jurisdiction (as underlined in the commentary on article 22), but further consideration should be given to the placement of the crime of torture.

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

12. Ideally, the court would have compulsory jurisdiction with States bound simply by virtue of becoming a party to its statute. New Zealand recognizes, however, that this would be unlikely in practice to achieve the widest possible support from the international community for the international criminal court.

13. On article 23, New Zealand considers that the flexibility offered by alternative A may detract from the effective operation of the court. Alternative B is preferred as a better mechanism for achieving a solid and certain jurisdictional base for the court for the article 22 crimes. If alternative B is adopted, New Zealand suggests that paragraph 4 of alternative A (whereby States not parties to the statute may accept jurisdiction over some or all of the categories of crimes in article 22) might also be included.

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

14. It is not clear whether paragraph 2 of article 24 applies in the case of a referral by the Security Council under article 25. In the absence of compelling reasons to the contrary, New Zealand believes paragraph 2 should apply to an article 25 referral. If it is right that the State concerned should consent to jurisdiction in the circumstances described in article 24, paragraph 2, it seems right that it should also consent where jurisdiction is invoked by a Security Council referral rather than a complainant State with jurisdiction to try the case itself (art. 24, para. 1). However, this would clearly not be the case if the Security Council, in referring a case, was acting pursuant to its powers under Chapter VII of the Charter of the United Nations.

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

15. The question of the relationship between the international criminal court and the Security Council is of fundamental importance. In the light of the primary responsibility of the Security Council for the maintenance of international peace and security under the Charter of the United Nations, New Zealand agrees that there is a case in principle for providing that the Security Council may refer cases to the court. A Security Council referral power may be all the more necessary if investigations are otherwise only to be commenced upon complaint by States.

16. It appears to be envisaged that the Security Council would not normally be expected to refer a "case" in the sense of a complaint against named individuals, but would more usually refer to the court a situation of aggression, leaving it to the court's own prosecutor to investigate and indict named individuals. In New Zealand's view, it should be made clear that article 25, in setting out a right for the Security Council to refer cases to the court, is subject to and does not impinge in any way upon the scope of the powers granted to the Security Council under the Charter of the United Nations.

17. New Zealand doubts whether it will be possible to extend this power of referral to the General Assembly, given the different role and powers accorded to the General Assembly under the Charter of the United Nations.

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

18. It is clear that the subject-matter jurisdiction of the court should be limited to crimes of an international character. Such crimes can be identified by reference to treaties in force. In addition, however, we recognize that the application of customary law in this respect has also to be considered.

19. New Zealand recognizes that, in principle, the court should be given jurisdiction in respect of crimes under customary international law. It is however also necessary in principle for acts constituting international crimes and subject to the jurisdiction of an international criminal court to be specified with as great a degree of clarity and precision as possible. New Zealand would support further elaboration of article 26, paragraph 2 (*a*) accordingly.

Article 29 (Complaint)

20. New Zealand considers that the prosecutor should be authorized to initiate an investigation in the absence of a complaint in the case of a crime apparently within the jurisdiction of the court but in respect of which the prosecutor has determined that there is no State which is willing and able to prosecute. New Zealand notes that broadly corresponding powers have been given to the Secretary-General under Article 99 of the Charter of the United Nations, whereby the Secretary-General may refer matters to the Security Council. It is also noted that means for preventing the abuse of the extension of the prosecutor's powers are contained in article 32 (Commencement of

prosecution), paragraph 2, and article 38 (Dispute as to jurisdiction).

Article 30 (Investigation and preparation of the indictment)

21. With regard to paragraph 1 of article 30, New Zealand doubts that the bureau should have power to direct the prosecutor to commence an investigation where the prosecutor decides not to proceed. The exercise of such power is likely to be seen by an aggrieved suspect or State as an indication of predisposition or bias and to impinge upon the prosecutor's independent exercise of the functions of the position.

22. New Zealand supports the fact that paragraph 4 makes provision for guaranteeing the rights of a person during the investigation phase before the person has actually been charged with a crime.

Article 38 (Disputes as to jurisdiction)

23. New Zealand agrees with the approach taken in article 38 that, consistent with the court's existence as the collective authority of the States parties, any State party should be able to challenge the court's jurisdiction, not only those States having a direct interest in the case.

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

24. New Zealand suggests that, rather than retaining the text contained in square brackets in subparagraph (*a*), what the statute needs to make clear here is whether the provision is concerned with treaties in force generally, or with respect to the State exercising jurisdiction over the individual concerned. New Zealand assumes the intention is to cover the latter; this should be clarified.

Article 44 (Rights of the accused)

25. New Zealand suggests that paragraph 1 (*b*) should guarantee directly the right of the accused to conduct a defence or to have the assistance of counsel, and not simply guarantee that the accused is entitled to be informed of such matters.

26. On the substance of the rights in paragraph 1 (*b*), it would be preferable for "means" to be qualified as "sufficient means" so that there is no suggestion that an accused has to exhaust all his or her means before becoming entitled to legal assistance. It should also be made clear that such legal assistance is both "adequate" and "free".

27. New Zealand is opposed to trials *in absentia*, and disagrees with paragraph 1 (*h*). The right to be present at one's trial is a fundamental principle which, as the ILC itself notes, is enshrined in article 14 of the International Covenant on Civil and Political Rights. New Zealand fully concurs with the views of the Secretary-General, as expressed in his report on the establishment of the International Tribunal for the Former Yugoslavia submitted pursuant to paragraph 2 of Security Council resolution 808 (1993):

> It is axiomatic that the international Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.[1]

It is noteworthy that Article 21 of that Statute does not permit trials *in absentia*.

28. Notwithstanding the difficulties involved in bringing the alleged offender before the court in certain cases in the absence of international enforcement mechanisms, New Zealand is not convinced by the arguments put forward in favour of derogating from the principle that there should not be trials *in absentia*. It is one of the incidents of criminal proceedings wherever they occur that an accused person may attempt to defeat the course of justice. It does not follow that an exception should be made to the principle because the court is dealing with the most serious international crimes. It may equally be argued that the more serious the crime, the more important it is that fundamental rights and guarantees are maintained.

29. New Zealand does not consider that a conviction *in absentia* would constitute any sort of "moral judgement" or sanction. It is more likely that such judgements could be regarded as placing the international court above the law, and undermining the credibility of the court to act impartially and within established human rights norms. New Zealand also does not consider that the principle can be respected by circumscribing the situations in which exceptions may be entertained. In New Zealand's view, the principle must be adhered to, consistent with existing international human rights law.

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

30. New Zealand is in principle opposed to any derogation from the principle of *non bis in idem*. We note that article 45 has been drafted carefully such that the court's role can be regarded as serving more in the nature of an appellate or review function *vis-à-vis* national courts. It is also noted that article 45 is modelled closely on article 10 of the Statute of the International Tribunal for the Former Yugoslavia, and that the circumstances in which it applies are exceptional. Whether, however, paragraph 2 (*a*) of article 45 is appropriate in this context, given that the jurisdictional base of the court will be much broader than the International Tribunal for the Former Yugoslavia, is a matter for further consideration.

Article 51 (Judgement)

31. With reference to paragraph 2, New Zealand supports provision for a dissenting judgement at first instance. It would be wrong in principle to prevent judges from expressing their views. It would also put the court on a different and inferior basis to both the ICJ and the International Tribunal for the Former Yugoslavia in this respect. Dissenting or separate opinions would also be very important to the jurisprudence of the court and to both the defendants who chose to appeal convictions and to appeals chambers when considering whether to overturn convictions.

[1] S/25704, para. 106.

Article 58 (International cooperation and judicial assistance)

32. This article is based substantially on article 29 of the statute establishing the International Tribunal for the Former Yugoslavia. New Zealand notes that a number of points will need to be addressed by States parties when enacting their requisite domestic legislation pursuant to this article. Consideration might therefore be given to other matters which are important to countries in terms of their domestic law. Such matters include whether it is envisaged that there could be grounds on which a request for assistance could be refused, who bears the cost when substantial assistance is given, and the exercise of compulsory powers within the limits available to domestic law-enforcement authorities.

Article 61 (Communications and contents of documentation)

33. Consideration should also be given to making provision in paragraph 3 of this article for requests to include the following elements:

(*a*) Details about the form in which documentary assistance (evidence) is to be supplied. It may need to be in a particular form to be admissible later in the court;

(*b*) A statement about the court's wishes concerning confidentiality and the reasons for confidentiality where it is required;

(*c*) The desired time-frame for compliance.

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

34. Further to paragraph 6, New Zealand considers that the power of delay in paragraph 3 should be extended to include persons who are mentally disordered (insane) or too ill to travel and face proceedings.

CONCLUSION

35. Several provisions in the draft statute touch on the interrelationship between national courts and national processes on the one hand and the international criminal court on the other in respect of the crimes at issue. Consideration should be given to making a suitable reference, perhaps in the preamble to the statute, to this relationship and to the respective roles and complementarity of the national and international processes.

Nordic countries

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GENERAL COMMENTS

1. As expressed in the Nordic statement on this item in the debate of the Sixth Committee during the forty-eighth session of the General Assembly,[1] the International Law Commission should be commended for its preparatory work on this draft statute for an international criminal tribunal. The establishment of an international criminal tribunal is a project of the utmost importance to the international community. The task is difficult and sensitive, but certainly achievable. The spirit of cooperation in which States have discussed the issue recently is encouraging.

2. In the following, the Nordic countries present their comments on the draft articles, as well as on specific questions referred to in the commentaries. As a general preliminary observation, it should be pointed out that the procedural aspects of the statute should not be left to general principles, but should be as specific as possible.

COMMENTS ON THE RESPECTIVE ARTICLES

PART 1: ESTABLISHMENT AND COMPOSITION OF THE TRIBUNAL

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

3. The two draft alternatives found in this article have no bearing on the tribunal's independence. The Nordic countries do have a clear preference for the tribunal as a judicial organ of the United Nations. The tribunal must be empowered with a clear United Nations mandate, in order to maintain its permanence and legitimacy. In addition, this would give the tribunal more widespread acceptance, and no separate bureaucracy with, for example, a standing committee would be needed. Among possible models that might be considered in this connection are arrangements similar to those made for the establishment of the United Nations Administrative Tribunal.

4. Should, however, the tribunal not become an organ of the United Nations, it is nevertheless necessary to ensure a formal linkage to the organization. One possibility might be to consider paragraph 9 of General Assembly resolution 47/111 of 16 December 1992. In that resolution, the General Assembly provided for arrangements concerning the bodies established under the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 5 (Organs of the Tribunal)

5. The Nordic countries wish to stress the significance of ensuring that the prosecutor be given an independent role in relation to the tribunal.

Article 8 (Judicial vacancies)

6. According to this article, judges who have been elected to fill a vacancy may sit consecutively for a longer period of time (16 years) than judges who have been

[1] See *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee*, 26th meeting.

elected through the ordinary process. This may be considered inadvisable, and the wisdom of such a permitted service ought to be reviewed.

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

7. The bureau should be primarily assigned administrative duties. Should other duties be conferred, the risk of disqualification arises. Such a system might lead to a vague distribution of power within the tribunal. It must furthermore be noted that all steps in the decision-making process of a case should be the responsibility of the pertinent chamber and never of the bureau.

Article 11 (Disqualification of judges)

8. It is vital that the tribunal exemplifies a non-partisan stance in all cases, something which causes this article to be important for the totality of the rules pertaining to the tribunal. The possibility of clarifying what types of situations merit disqualification should be considered. One may here note that article 37 (Establishment of Chambers), paragraph 4, deals with precisely this issue in regard to individuals of the same nationality.

9. There is a potential problem where the president or a vice-president faces disqualification. As a result, the requirement that such individuals take part should not be seen as necessary. The text should require only the members of the chamber, with the addition of one member from the bureau.

10. In principle it is inadvisable to limit the right of the accused to request a competency review of a judge. It follows therefore that there ought not to be a limit on the number of judges whose removal can be requested on competency grounds. This is important in order to maintain a non-partisan appearance, which is essential for ensuring a continued and unassailable legitimacy for the tribunal.

Article 13 (Composition, functions and powers of the procuracy)

11. Legal safeguards require that there must also be rules of disqualification for the procuracy. In addition, a rule should be included requiring different nationalities for both the prosecutor and deputy prosecutor.

Article 16 (Privileges and immunities)

12. It should be determined whether income received for service by those listed under this article should not be subject to tax. As most of these positions are part-time duties, it might be argued that such immunity is not called for.

13. In paragraph 4, it is important that the deputy prosecutor be considered equal to the prosecutor in regard to privileges and immunities. This section of the article could therefore end with "other than the acting Prosecutor". As a result, the judges should not have the opportunity to revoke an acting prosecutor's immunity.

Article 17 (Allowances and expenses)

14. A determination should be made as to whether judges' receiving a salary derived from other non-tribunal duties might provide a problem for their independence.

Article 19 (Rules of the Tribunal)

15. A framework for rules of evidence and procedure should be found within this statute, i.e. basic rules of evidence and procedure. Such a framework would thus be complied with in the more detailed rules which the tribunal will adopt after its establishment.

16. The suggestion that the various chambers should have the possibility of developing rules of procedure is acceptable, provided such rules have not been otherwise adopted by the tribunal/chambers. One must stress here that requisite uniformity of rules amongst the chambers should be maintained.

Part 2: Jurisdiction and applicable law

17. Reliance on State consent during the various stages of procedure does not create unnecessary obstacles for bringing to justice persons who have committed crimes covered by the statute. The Nordic countries have some hesitation about the rather complicated system of strands of jurisdiction and various categories of crimes set forth in articles 23 to 26. This type of system has the potential to lead to procedural difficulties. Furthermore, it is vital that the statute avoid any possibility of jurisdiction shopping by States.

18. Of the two proposed "strands" of jurisdiction, the Nordic countries are critical of the second strand (arts. 26-27), which they suggest should be deleted. Article 26 is particularly vague. In addition, it is suggested that a clarified presentation of the complex rules should be found in the first strand (arts. 22-24).

19. Should the above suggestion be adopted, it might be advisable prior to article 22 to add the following as an article 21 *bis*:

> "The Court has jurisdiction under this Statute in respect of crimes referred to in article 22, provided that its jurisdiction has been accepted in accordance with the provisions in articles 23-24."

As a result, article 24 might need to be slightly amended.

Article 22 (List of crimes defined by treaties)

20. Giving priority to treaty rules which are as far as possible part of international customary law serves the purpose of predictability and assessing individual responsibility for serious crimes, thereby preventing ambiguity. The Nordic countries are therefore gratified to see the enumeration of the serious crimes in this article, as these

States continue to maintain the view that the tribunal should be limited to serious crimes against mankind.

21. It may be advisable that certain rules be drafted more specifically, and that jurisdiction is limited to acts of particular gravity. Hence, the jurisdiction drafted in this article may be unnecessarily broad. Not all of the crimes referred to have the degree of seriousness which should be deemed mandatory. In addition, it should be determined whether the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should also be listed.

22. The statute of the International Tribunal for the Former Yugoslavia appears to be more adequately formulated, with reference to its articles 2 through 5.

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

23. Alternative B is preferred by the Nordic countries. This alternative provides for a presumption of jurisdiction, with the possibility of an opting-out declaration by a party which might wish to exclude the tribunal's jurisdiction in some respects. The other alternatives might lead the tribunal to end up with a very narrow scope of jurisdiction, based upon individual declarations of the parties, thereby weakening the statute's general aim.

24. A State that intends to become a party to the statute under article 23 should be required to accept some minimum basis of jurisdiction, e.g. jurisdiction under article 22 (*a*) and (*b*).

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

25. Paragraph 2 of this article requires that the State in which the accused is present also accepts the jurisdiction of the tribunal; however the related article for the International Tribunal for the Former Yugoslavia[2] appears to be more adequately drafted. Further consensual requirements to those already in the article should not be appended.

26. Paragraph 1 (*b*) is formulated in an unnecessarily complex way. An interpretation of this section might be that the tribunal has jurisdiction in regard to genocide once a State party to the Genocide Convention has consented. It is important that this paragraph correlates with the drafting comments.

27. The limitation in paragraph 2 may not be necessary. It might be sufficient that the territorial State is party to the statute.

[2] See the report on the establishment of an international tribunal for the former Yugoslavia submitted by the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704), annex, arts. 1, 8 and 9.

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

28. Although articles 25 and 27 provide a rather large and undefined political discretion when the Security Council intends to bring cases before the court, the Nordic countries support the role which might be played by the Security Council according to these articles, with the proviso that the Council should not refer to the tribunal specific complaints against named individuals. One must ensure that the discretion given to the Security Council does not raise questions about the court's credibility when the Council intends to bring cases before the court. The principle of legality (*nullum crimen sine lege*) would seem to require that the modalities and criteria through which the Security Council exercises its proposed functions under the statute be more carefully elaborated. It is however entirely appropriate that the Council be given a prerogative to refer to the tribunal particular situations and leave it to the latter to decide whether prosecution should be instigated.

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

29. Should this section not be deleted, the Nordic countries have the following comments and suggestions:

(*a*) Both of the crimes presented in article 26 are vaguely formulated;

(*b*) Paragraph 2 (*a*) provides for the tribunal to judge in accordance with international legal principles not promulgated. This in itself is contrary to principles of legality, which for criminal prosecution requires written law (*nullum crimen sine lege*). In summation, this section is too broad from the perspective of the principle of legality in criminal law, and should therefore be deleted.

30. The Nordic countries are sceptical with regard to the regulation of narcotics crimes through this statute, despite full concurrence with the general conviction that action against international narcotics-related crimes requires international cooperation on the basis of agreements. It is difficult to perceive this tribunal as constituting the appropriate forum for cases of this nature. It must further be noted that the mere fact that a crime occurs over international boundaries cannot be considered sufficient basis for making this tribunal the appropriate legal forum.

Article 28 (Applicable law)

31. In order to maintain consistency it should be expressly stated that previous decisions of the tribunal are also considered a source of law. In subparagraph (*c*), national legislation may also be needed as a primary source, not merely as a secondary source. This may be necessary, as the relevant treaties do not all provide applicable punishment. For instance, article 26, paragraph 2 (*b*), is already based on national legislation.

PART 3: INVESTIGATION AND COMMENCEMENT OF PROSECUTION

Article 29 (Complaint)

32. The provision of free access to deposit a complaint would arguably be functionally counter-productive. However, in addition to States being given the right to file complaints, the prosecutor should be given the right to commence investigation prior to the filing of complaints. A determination should also be made as to whether proceedings might also be instituted on the basis of information provided by internationally recognized humanitarian organizations.

Article 30 (Investigation and preparation of the indictment)

33. As stated previously, the bureau should have primarily administrative duties. Providing the bureau with the power to review a prosecutorial decision is difficult to accept, as it may be problematic in maintaining the impression of non-partisanship. Such a construction is not compatible with the independence of the prosecutor, nor with the principle of maintaining the separation of the roles of the tribunal and the prosecutor.

34. Review may be done differently, perhaps by review of one of the tribunal's chambers. It must be noted that the chamber in question would thereafter not be deciding the case.

Article 31 (Commencement of prosecution)

35. After certain periods of time a review should be made determining as to whether continued custody is required. The practice of the European Court of Human Rights might provide useful guidance in this connection.

Article 32 (The indictment)

36. It is once again important to stress that the bureau should primarily have administrative duties. First, it is unacceptable that the tribunal's three leading judges should decide the validity of the indictment yet also try the case; and secondly, it is unacceptable that the bureau has anything to do with the issuance of orders and warrants. In summation, the bureau should not be any type of "indictment chamber".

37. The Nordic countries strongly suggest that article 32 be deleted. Should however this article be retained, it must be clarified as to what occurs when a *prima facie* case is not found. Is the suspect thereby found not guilty, is the case dismissed, or are further investigations automatically commenced?

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

38. The use of the concept of bail is unacceptable for the Nordic countries. It is furthermore against the legal traditions of many other countries, and should therefore not be included. Such procuring of the release of a charged individual is a procedure which most likely would not be realistic for this tribunal, considering the magnitude of the crimes in question.

PART 4: THE TRIAL

Article 37 (Establishment of Chambers)

39. The tribunal's chambers should be established prior to the adoption of rules of procedure, as was indeed done by the International Tribunal for the Former Yugoslavia. There should be a structured rotation system for the judges, rather than having the bureau determine which cases should be decided by the various judges. Reference can here be made to the process applied in connection with the establishment of the International Tribunal for the Former Yugoslavia. Finally, it is self-evident that a random distribution of cases must be ensured.

40. Should the above suggestion be pursued, it would be natural that paragraph 4 be transferred to article 11, as that article concerns disqualification.

Article 38 (Disputes as to jurisdiction)

41. All member countries should have some control over the tribunal's competence, not solely countries with a legal interest in the case concerned. This should also be possible prior to the main hearing. In addition, any further determination of sufficiency of indictment should not be necessary.

Article 40 (Fair trial)

42. It is essential that trials be held in public. Use of closed sessions must be better defined and more clearly regulated. Reference may here be made to the International Covenant on Civil and Political Rights, article 14, paragraph 1.

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

43. The fact that a treaty has entered into force is considered sufficient in maintaining legality. This view is based on the following two factors: first, the various countries will have fulfilled their obligations relating to a treaty at different times; and secondly, a requirement of incorporation or transformation would debilitate the tribunal's legal basis. The various conventions should serve the purpose of providing a description of the offence. A "written law" or catalogue of prohibited actions will thus be found within the conventions.

44. Should article 26 be deleted, it is logical that this should also occur with article 41, subparagraphs (*b*) and (*c*).

Article 42 (Equality before the Tribunal)

Article 43 (Presumption of innocence)

45. Although these articles present the two important principles of equality before the law and innocence of the defendant before proved guilty, one should here determine as to whether it ought to be expressly stated that the defendant has the benefit of the doubt.

Article 44 (Rights of the accused)

46. Considering the matter of legal safeguards, the Nordic countries have some hesitation regarding the provision of trial *in absentia*. Such trials could give rise to political as well as legal difficulties which ought to be avoided, thereby precluding any judgement in such a situation.

47. Should it nevertheless be determined that trial *in absentia* is essential, it must be noted that such trials should only occur in a very limited manner, on condition that they be regulated more clearly than is currently worded in the draft statute.

48. In regard to paragraph 4 of the commentary to the draft article, one may question the rationale of having a trial whatsoever, should a person convicted *in absentia* in fact be given merely a temporary judgement.

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

49. Within this article should be included rules regarding the protection and assistance of victims of the crimes, in accordance with certain basic principles set forth in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[3]

Article 48 (Evidence)

50. There should be more specific evidentiary rules. Such principles as best evidence and free assessment of evidence should be mentioned at the beginning of this article.

51. There should not be access to appeal decisions regarding evidence from the main hearing. This would cause a division of the proceedings and could also be utilized by the parties as a postponing tactic. If the parties are dissatisfied with a decision of the tribunal in this regard, they may refer to article 55, paragraph (1) (*a*).

Article 51 (Judgement)

52. Dissents are an expressive outlet for legal views in many legal systems, and should therefore be permitted. Such views would not have any negative effect on the tribunal's standing or authority. One may here refer to the European Court of Human Rights, which permits dissents.

[3] General Assembly resolution 40/34 of 29 November 1985.

Article 53 (Applicable penalties)

53. The tribunal should be exclusively a criminal tribunal. Consequently, the application of civil law-related penalties should be reconsidered, as it is highly doubtful as to whether such rules should be included. To illustrate, a potential case resulting in a judgement for damages presents a difficult choice of law issues. In addition, there is the question of how such a judgement is to be executed, something which is unclear.

54. It might be advisable to delete the possibility of judgement of fines. Considering the magnitude of the crimes in question, it is difficult to imagine how fines would be applicable. Furthermore, it should be noted here that the penalty of confiscation/seizure is a punishment for criminal activity which should be included in the statute, as it is in fact related to criminal punishment. This should be possible in order to provide a compensating remedy for victims of certain crimes, such as victims of stolen property.

55. The Nordic countries are pleased that the provisions regarding punishment do not include the death penalty.

Article 54 (Aggravating or mitigating factors)

56. The possibility that such issues as necessity, self-defence, intent, etc., be added to this article ought to be considered, and a determination should be made as to whether or not such inclusion in this statute would present a basis for antithetical conclusions. One must determine whether material rules should be coupled with procedural rules in such a statute or whether the former should be found in a "Code of Crimes".

PART 5: APPEAL AND REVISION

Article 55 (Appeal against judgement or sentence)

57. The decisions of the tribunal should also be appealable by the prosecution. Reference should here be made to article 31.

Article 56 (Proceedings on appeal)

58. It is important that the tribunal's chambers be established from the outset, and that the composition of the chambers be not chosen by the bureau. A rotation plan determining which judges should decide appeals is advisable. Considering the limited number of cases the tribunal is likely to review, the necessity of a separate appeals tribunal ought to be looked into.

59. The wording of the statute can possibly be interpreted as implying that with six judges and a split-vote determination of 3-3, the court of the first instance's decision would stand. Majority vote ought to be required for any decision against the defendant. A split vote would thus negate the guilt of the defendant, thereby observing the principle that all doubt shall be to the benefit of the defendant.

Article 57 (Revision)

60. To have the possibility of requesting a re-examination or careful review for correction or improvement of a judgement is important in most legal systems. The prosecutor should also have the possibility of applying for revision of the tribunal's judgement.

PART 6: INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 61 (Communications and contents of documentation)

61. It is possible that use of the word "normally" in paragraph 1 might not be necessary, and a determination should be made on that issue. It is also important to clarify that in paragraph 2, the word "communications" must mean written documentation.

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

62. An indictment should be sought only from a constituted chamber. Thus, reference to the bureau should be deleted.

Article 66 (Enforcement of sentences)

63. The possibility of serving time in the country where the violation was perpetrated merits further careful consideration.

64. Should fines be maintained as a penalty in the final draft, it is important that the statute contain rules regarding the execution of such a judgement, and where such funds should be distributed. In addition, it is necessary to have rules for confiscation/seizure and claims of vindication.

Norway

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

Panama

[*Original: Spanish*]
[*8 March 1994*]

1. The Government of Panama agrees to the elimination of international trafficking in narcotic drugs and massive violations of human rights from the list of crimes contained in the draft Code of Crimes against the Peace and Security of Mankind, as these topics are amply covered by international treaties, and as specialized bodies have already assigned working groups to them; this is true of the inter-American system for the protection of human rights established by the Organization of American States, as well as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

2. With regard to the establishment of the international criminal tribunal, the Government of Panama believes that the draft articles do not fully meet the aspirations of Member States of the United Nations for the establishment of such a tribunal, because they do not offer guarantees of a supranational tribunal, they restrict access in terms of working languages (see article 18), and they do not clearly resolve cases in which the acceptance by States of the court's competence to prosecute crimes against the peace and security of mankind involves only the consent of the affected State and not of the aggressor State, so that simple non-ratification by the State which does not accept the court's competence can render the implementation of sanctions ineffective.

3. The foregoing notwithstanding, in view of the work accomplished by the Commission up to now, the Panamanian Government trusts that legal mechanisms of understanding and consensus will be found so that the current difficulties and obstacles can be overcome.

4. The Government of Panama is of the view that the elaboration of such rules requires the broadest range of scientific and political opinions which can harmonize the views of Member States to the greatest possible extent.

Romania

[*Original: French*]
[*25 February 1994*]

COMMENTS CONCERNING SPECIFIC ARTICLES

Article 1

1. Calling the body a "Tribunal" is preferable to the initial name of "Court".

Article 2

2. As for the link between the tribunal and the United Nations, Romania favours the wording that "the Tribunal shall be a judicial organ of the United Nations".

Article 4

3. We consider the best formulation to be that in article 4, paragraph 1.

Article 5

4. Romania also favours the option of making the "Court", the "Registry" and the "Procuracy" the component parts of the tribunal, thereby constituting an international judicial system.

Article 7

5. Romania considers it somewhat excessive for judges to hold office for a term of 12 years. Setting a term of six

years, with possible re-election for a single further term, seems more in keeping with the requirements, for the following reasons:

(*a*) A 12-year term is not to be found in the statutes of other international courts, the maximum being terms of nine years (in both the International Court of Justice and the European Court of Human Rights);

(*b*) A six-year term, with a possible one-time renewal, would we believe be closer to the spirit of the draft statute under consideration, which makes registrars (art. 12) and prosecutors (art. 13) eligible for re-election;

(*c*) If it is decided to establish a six-year term, the term of the registrar would have to be reduced from seven to five years (five years being also the term of the prosecutor).

Article 22

6. Romania supports the proposed inclusion in the list of crimes defined by treaties of actions considered crimes by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 23

7. Of the three variants of article 23, we opt for alternative A.

Article 25

8. We consider it appropriate to broaden the category of subject matters that may be brought before the court under article 25, and to confer the authority to do so upon the General Assembly as well, thus avoiding impasses, particularly in cases where a member of the Security Council uses its right of veto.

Article 26

9. With regard to the discussions concerning special acceptance by States of the court's jurisdiction as foreseen in paragraph 2 (*a*) over crimes not defined as such in international treaties, such as aggression, or genocide in the case of States not parties to the Convention on the Prevention and Punishment of the Crime of Genocide, we find the proposal to deal with this problem also in article 25 to be justified. In that case, the Security Council and the General Assembly (as proposed earlier) would have the authority to submit to the court a crime under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals. Such a submission would naturally entail fulfilment of the condition laid down in article 27, requiring that it must first be determined that the State concerned has committed the act of aggression which is the subject of the charge.

Slovenia

[*Original: English*]
[*28 February 1994*]

1. The Republic of Slovenia supports the establishment of an international criminal court on the basis of the statute as its constituent document. That would not necessarily require an amendment to the Charter of the United Nations. We favour the idea that the court be linked to the United Nations, but it would not need to be its organ. Consequently, the Republic of Slovenia supports the composition of the tribunal, as envisaged in the draft statute, including the establishment of the procuracy as a separate organ of the court.

2. Concerning the rules of the tribunal stipulated in article 19 of the draft statute, the Republic of Slovenia favours the idea that the basic procedures concerning the rules of evidence to be applied in the trial be the subject matter of the statute rather than of the rules of the tribunal itself, a position also expressed by some members of the Working Group. In order to guarantee the complete independence of the procuracy in relation to the court, the procuracy should be governed by its own internal rules.

3. The Republic of Slovenia expresses the opinion that part 2 on jurisdiction and applicable law is the core issue of the present draft statute. In principle, the Republic of Slovenia supports the treaty-enumeration approach to crimes defined by these treaties, as the basis of the jurisdiction *ratione materiae* of the court, as laid down in article 22. Thus can the application of the principle *nullum crimen sine lege* be most properly preserved.

4. Besides, the Republic of Slovenia notes with satisfaction that the grave breaches of Protocol I additional to the Geneva Conventions of 1949 and relating to the protection of victims of international armed conflicts of 8 June 1977, have been listed among the crimes covered by article 22. It is true that the two Additional Protocols of 1977 to the Geneva Conventions of 1949 have not been as universally accepted as the Conventions themselves. Nevertheless they have been by now ratified by two thirds of all States and may soon, if not yet, be tested as the customary source of international humanitarian law. Therefore, the position expressed in the commentary of the Working Group, that Protocol II of 1977 to the Geneva Conventions of 1949 and relating to the armed conflicts of non-international character was left outside the scope of article 22 for the reason that it contained no provision concerning grave breaches, is not convincing. Protocol II contains under its part II very clear provisions as to which acts are and shall remain prohibited at any time and in any place whatsoever and may prima facie be characterized as serious violations of humanitarian law. Drafters of the draft statute of an international criminal court should bear in mind that the most brutal and massive violations of humanitarian law and human rights are one of the most evident features of armed conflicts which are not of an international character.

5. The Working Group decided to put in the first strand of the court's jurisdiction *ratione materiae* the anti-terrorist conventions of a universal character that qualify

specific terrorist acts as grave crimes and oblige their State Parties to act according to the rule *aut iudicare aut dedere*.

6. Here the Republic of Slovenia suggests that the Working Group reconsider whether terrorist international crimes can be put on the same footing as war crimes and crimes against humanity in respect of the gravity of their criminality. Certain legal distinctions between the two groups of crimes in question can already be drawn. We must bear in mind that the most serious war crimes and crimes against humanity are not the subject of the statutory limitation, as stipulated in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[1] and put down in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Secondly, terrorist crimes are to be treated in the domestic legislation as classical non-political crimes in order to fit into already existing bilateral extradition agreements. On the other hand, war crimes and crimes against humanity are to be prosecuted by domestic courts on the basis of the principle of universality.

7. The list of anti-terrorist conventions could be supplemented with the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which extends the scope of this Convention to terrorist acts committed at international civil airports.

8. The Republic of Slovenia in principle agrees that drug-related crimes fall within the subject-matter of the jurisdiction of an international criminal court but the Working Group should re-examine whether drug-related crimes should fall within the group of crimes which require a special acceptances of jurisdiction according to article 26. As a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Republic of Slovenia supports the position that this Convention too is included among the treaties that fall within the jurisdiction of an international criminal court. Bearing in mind the acceptance by States of the jurisdiction over crimes listed in article 22, the Republic of Slovenia favours the "opting in" system, by which the jurisdiction is not conferred automatically for the States Parties of the statute, but requires the additional acceptance of a special declaration.

9. As many other Member States of the United Nations, the Republic of Slovenia must express a reservation against the territorial scope of the jurisdiction of the court in relation to its own nationals, who by our Constitution cannot be surrendered for trial outside the country.

10. As we come to the second strand of the jurisdiction *ratione materiae* of an international criminal court as laid down in article 26, for which a special acceptance of the jurisdiction is required, the delegation of the Republic of Slovenia cannot accept the position of the Working Group that war crimes and crimes against humanity that are not listed in the Convention on the Prevention and Punishment of the Crime of Genocide, nor in the Geneva Conventions of 1949 and Protocol I, should be separated from the crimes envisaged in the said Conventions and put under the special acceptance of a jurisdiction clause. The Working Group obviously had in mind international crimes which had their basis in the customary international law, such as the Hague Convention respecting the Laws and Customs of War on Land, and the Regulations annexed thereto, the Charter of the Nürnberg International Military Tribunal, annexed to the London Agreement,[2] and the common article 3 of the 1949 Geneva Conventions, and applying to internal armed conflicts. Here, the ILC should follow the approach of the Statute of the International Tribunal for the Former Yugoslavia, which unconditionally covers the said crimes under its subject matter jurisdiction.

11. Predetermination of the act of aggression by the Security Council as envisaged in article 27 of the present draft statute is, in the opinion of the Republic of Slovenia, in contradiction with the principle of independence of the judiciary and should be reconsidered most carefully by the Working Group.

12. The provision on the applicable law in article 28 in our view does not suffice to follow the principle *nullum crimen sine lege* and should be reconsidered accordingly.

13. In respect of the jurisdiction *ratione personae* the future court will have its jurisdiction over natural persons on the basis of individual criminal responsibility. Here, in the opinion of the Republic of Slovenia, the draft statute needs further elaboration with regard to the responsibility of governmental officials, crimes committed on an order of a superior and other related questions.

14. The Republic of Slovenia believes that one of the fundamental questions concerning an efficient international judicial system is the question of how to bring the suspected or the accused perpetrator of an alleged crime to the court. In this respect, it must be noted that the Constitution of the Republic of Slovenia does not permit a trial *in absentia*.

15. Pending the trial, the procedural standards as laid down in article 14 of the International Covenant on Civil and Political Rights must be respected. The Republic of Slovenia suggests that more care should be devoted to victims and witnesses at the court.

16. As regards the applicable penalties, the Republic of Slovenia notes with satisfaction that there is no capital punishment envisaged since in Slovenia it is prohibited by the Constitution. The legal system of the Republic of Slovenia does not envisage life imprisonment either and it should be, in the view of the Republic of Slovenia, replaced by a maximum term of imprisonment.

17. The age of the perpetrator of an international crime cannot be taken into account as a sole aggravating or mitigating factor. The Working Group should decide whether juvenile perpetrators, i.e. under the age of 18 according to the well-established international standards, will take a stand at an international criminal court.

18. The Republic of Slovenia does not oppose the possibility that the prosecutor, too, may submit an appeal

[1] See *Official Records of the General Assembly, 5th Session, Supplement No. 12* (A/1316), pp. 12 et seq., text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

[2] London Agreement of 8 August 1945 for the Prosecution and Punishment of Major War Criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279; see particularly p. 289.)

against or apply for the revision of the judgement of an international criminal court. However, if these rights are granted to the prosecutor, it must be carefully foreseen by the statute of the court, in which case the sentence may be altered, and whether a more severe judgement may ever be promulgated, should the circumstances of a case so require.

19. Finally, the Republic of Slovenia suggests that the International Law Commission continue its work on the draft statute of an international criminal court as a matter of urgency.

Spain

[*Original: Spanish*]
[*25 January 1994*]

General comments

1. The Government of Spain firmly supports the establishment of an international criminal tribunal with general competence to punish international crimes. The existence of such a tribunal is an increasingly felt ethical and political need in the international community.

Comments on specific articles

2. There is no doubt that a close link between the tribunal and the United Nations is necessary for both practical reasons and reasons of moral authority. It would therefore be best for the statute to be adopted by an international conference convened under the auspices of the United Nations. Moreover, in order properly to establish the relationship between the tribunal and the United Nations system, appropriate references must be made to the latter system in the preambular and operative parts of the statute of the court. All of this should be without prejudice to the possible adoption of a treaty of cooperation formalizing and even reinforcing the link.

3. Another question closely related to the previous one concerns the number of ratifications of or accessions to the proposed treaty for the establishment of the tribunal which would be necessary for the statute to enter into force. The Government of Spain is of the view that this number should be neither too low, since this would deprive the tribunal of its necessary representativeness, nor too high, so as not unduly to delay the start of its functioning.

4. Articles 22, 23 and 24 of the draft submitted by the 1993 Working Group provide that the *court's jurisdiction* shall be voluntary and not binding. Binding jurisdiction would no doubt be ideal; however, until such time as this becomes feasible, the Government of Spain considers the system contemplated in the draft articles to be perfectly acceptable.

5. Given the importance of this question, the Government of Spain considers that, in the absence of an international code of crimes, article 22 (List of crimes defined by treaties) appears to be acceptable, especially when viewed against article 21 (Review of the Statute), which provides for the revision of the list of crimes.

6. Of the three alternatives presented in article 23 (Acceptance by States of jurisdiction over crimes listed in article 22), Spain is in favour of alternative B, which provides for the voluntary nature of the court's jurisdiction without emphasizing it too strongly.

7. Article 25 (Cases referred to the Court by the Security Council) is acceptable on the understanding that it would be directed more towards the denunciation of general situations than against individuals, and would perhaps provide a good alternative to the establishment of ad hoc tribunals.

8. On the other hand, article 27 (Charges of aggression) needs to be examined more fully, since its current wording not only contradicts in some measure the circumscription of the tribunal's jurisdiction *ratione materiae* to natural persons, but also causes some degree of confusion with regard to the crime of aggression.

9. The Government of Spain considers that as far as trials *in absentia* are concerned, article 44 (Rights of the accused) adopts in paragraph 1 (*h*) a balanced approach to the arguments for and against the inclusion of a provision on such trials, by excluding in principle such a possibility while allowing it, on an exceptional basis, in cases in which the court, after hearing the submissions and considering the necessary evidence, determines that the absence of the accused was deliberate. In such a case, and in order to guarantee the full protection of the rights of the accused, provision should be made for a new trial if the accused appears before the court at a later stage.

10. The Government of Spain has certain misgivings with regard to paragraph 2 of article 53 (Applicable penalties), concerning applicable penalties, since the provision does not seem fully to respect the principle of the legality of penalties (*nulla poena sine proevia lege*). In order to comply with the provisions of article 15, paragraph 1, of the International Covenant on Civil and Political Rights ("Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed"), provision must be made for the court to have, when deciding upon the length of a term of imprisonment or the amount of a fine, the duty—and not merely the ability—to take into account the penalties provided for in the national law of the States referred to in paragraphs 2 (*a*), (*b*) and (*c*) of article 53.

11. With respect to recourses, the Government of Spain holds the view that provision should be made for recourse by appeal and revision.

12. In addition to the convicted person, the prosecutor should also be empowered to appeal against a decision or to apply for revision of a judgement. It will therefore be necessary to remove the square brackets in articles 55 and 57.

Sri Lanka

[*Original: English*]
[*15 March 1994*]

General comments

1. The Government of Sri Lanka is of the view that an international criminal court, in order to command the widest possible international confidence and acceptance, which it must necessarily enjoy in order to discharge the onerous responsibilities to be entrusted to it, must be established as an impartial judicial institution committed to upholding the rule of law and administering justice free from any taint of political considerations. The court would often be called upon to adjudicate on complex legal issues which might also involve a substantial element of political sensitivity. It is essential that, in the performance of its functions, the court pay due regard to the principles of sovereignty, territorial integrity and political independence of States as enshrined in the Charter of the United Nations.

2. The Government of Sri Lanka wishes to commend the International Law Commission and members of the Working Group on a draft statute for an international criminal court on the pragmatic and flexible approach adopted in the formulation of the draft articles. However, there are several matters of substantial political, legal and practical difficulty which need to be addressed and satisfactorily resolved before wide acceptance of the statute can be assured.

Comments on specific articles

I. Substantive issues

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

3. The Government of Sri Lanka is of the view that the establishment of an international criminal court, as either a principal or a subsidiary organ of the United Nations, would be impractical. It is of the view that there does not at the present stage appear to be sufficient support within the international community for an international criminal court to be established with the status of a principal or subsidiary organ of the United Nations and requiring for such purpose such a major undertaking as an amendment of the Charter of the United Nations. However, the Government of Sri Lanka recognizes the importance of a formal link with the United Nations in order to ensure that the institution is vested with the requisite authority for the exercise of international criminal jurisdiction and to generate the confidence of the international community. This could be achieved through the conclusion of a multilateral treaty under the auspices of the United Nations. This would enable the court to have a close cooperative relationship with the United Nations, while maintaining a separate status.

Article 5 (Organs of the Tribunal)

4. It is noted that the term "Tribunal" is used in the draft statute to include the court, the registry and the procuracy. While appreciating the reasoning of the Working Group that for conceptual, logistical and other reasons the three organs had to be considered in the draft statute as constituting an international judicial system as a whole, the Government of Sri Lanka wishes to stress the importance of ensuring the independence which must necessarily exist between the judicial and prosecutorial branches of an international judicial system.

5. In terms of the statute, the procuracy will be in charge of the investigations, the institution of proceedings and the conduct of the prosecution. In relation to these functions the procuracy should have independent authority. No doubt the tribunal will have the power to examine and rule on the exercise of such authority at relevant stages. However, the exercise of the functions stated should not be under the direction of the tribunal.

Part 2 (arts. 22 to 28) (Jurisdiction and applicable law)

6. The Government of Sri Lanka is of the view that the provisions in part 2 of the draft statute relating to jurisdiction and applicable law, which constitute the core provisions of the statute, raise a number of legal issues which require further examination by the Commission.

7. The question arises whether there are adequate reasons for the separation presently made in the crimes referred to in article 22 (List of crimes defined by treaty) and those referred to in article 26 (2) (*b*), i.e. the distinction made between primary and secondary strands of jurisdiction. The Government of Sri Lanka is of the view that the jurisdiction of the proposed court must, at least initially, be confined to crimes established under multilateral treaties enjoying a wide degree of international acceptance. It is noted in this context that the list of agreements in article 22 covers such international treaties, and these define specific acts which are required to be considered as serious crimes and create an "extradite or prosecute" regime in respect of such crimes.

8. With regard to the crimes defined under the Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation, (art. 22 (*d*)), consideration should be given to the extension of these provisions to include unlawful acts against airports and civil aviation facilities (as distinct from unlawful acts against aircraft) covered under the 1988 Protocol to the 1971 Montreal Convention.

9. The Government of Sri Lanka is also of the view that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances should be dealt with in article 22. The growing link between narcotic trafficking, acts of terrorist groups and the illicit arms trade poses an ever-increasing threat to peace and security within and among nations in many parts of the world. This phenomenon demands that the international community treat these activities as grave crimes under international law.

10. Furthermore, the provisions of the above-mentioned Convention, as in the case of those conventions listed under article 22, create an "extradite or prosecute" regime in relation to drug-related offences and provides for the exercise of extraterritorial jurisdiction in respect of such offences, where extradition is not granted. These factors would justify the Convention's being treated on a par with other multilateral treaties under article 22.

11. With regard to the category of crimes referred to as "crimes under general international law" under article 26, paragraph 2 (*a*), the Government of Sri Lanka is of the view that these provisions lack the standard of exactitude and specificity which must be present before vesting the court with jurisdiction. The Government of Sri Lanka therefore wishes to reiterate that the jurisdiction of the proposed court must at least initially be confined to crimes under multilateral treaties.

12. On the question of the court's jurisdiction, it is noted that the draft statute as presently formulated is concurrent and not exclusive, preserving the inherent right of a State party either to try an accused before its national courts or to refer the accused to the international criminal court. The Government of Sri Lanka is in agreement with this approach which is a logical extension of the "extradite or prosecute" regime incorporated in the treaties listed in article 22. Such a regime could help to fill a jurisdictional vacuum which could well arise where a requested State refuses to extradite its own nationals and the requesting State clearly has no trust or confidence in the judicial system of the requested State.

13. Moreover, the concurrent jurisdiction of the court is made subject to the consent of States, i.e. the State in which the crime has been committed and the State of which the perpetrator of the crime is presumed to be a national.

14. The draft statute provides in article 23 for specific acceptance of the "subject matter" jurisdiction of the court by each State party to the statute. Of the two alternatives suggested, the Government of Sri Lanka would support the "opting-in" procedure in alternative A, which is in consonance with the consensual basis of the court's jurisdiction.

15. Article 25 of the draft statute, which provides that cases pertaining to crimes referred to in article 22 or article 26, paragraph 2 (*a*), may be submitted to the court "on the authority of the Security Council", requires further examination.

16. It is unclear under the present provisions whether the "authority" purported to be vested in the Security Council would be subject to the same conditions regarding consent as would apply to the submission of cases to the court by a State. The vesting of such authority in the Security Council alone without it's also being vested in the General Assembly would prejudice the general acceptability of the statute and make any agreement on this issue elusive.

17. The Government of Sri Lanka is of the view that it would be prudent to restrict, at least in its initial phase, the right to refer cases to court only to States parties. In any event, it seems reasonable to assume that if the court is to be established as a viable institution for the exercise of international criminal jurisdiction, the statute would require the widest possible adherence of States. Thus a case could be submitted to the court by one or more States pursuant to a decision taken by the Security Council.

18. The provisions of articles 24 and 26, requiring that before a case is submitted to the tribunal, a State otherwise having domestic jurisdiction over a case or over an accused in the case present in its territory should agree to the submission of the case to the court, seem directed to the objective of ensuring that there is consistency between, on the one hand, the proposed obligations of States under the statute and, on the other, requirements under their national laws and treaties. The validity of such an objective is unquestionable.

19. However, the present somewhat involved provisions of the draft statute raise several issues of substantial complexity, which require further examination. Particular mention must be made in this context of the provisions of article 63 on the surrender of an accused person to the tribunal.

20. Article 63 requires a State party which has accepted the jurisdiction of the court with respect to a particular crime to take immediate steps to arrest and surrender an accused to the court. A State party which is also a party to the treaty in question which defines the particular crime but has not accepted the court's jurisdiction is required either to surrender or to prosecute the accused. The article also requires that a State party should, as far as possible, give priority to a request from the court for the surrender of an accused, over a request for extradition from other States.

21. The question of pre-existing treaty obligations to extradite devolving on a State party to the statute, *vis-à-vis* a State which is not a party to the statute, in a situation where there is a competing request from the court, requires further examination.

22. The multilateral treaties defining the crimes set out in article 22 create an "extradite or prosecute" regime between the States parties to these treaties. Considerable difficulties, legal as well as political, could well arise where a State party to one of these multilateral treaties which is not a State party to the statute of the court makes a request for extradition from a State which is a party both to the statute and to the multilateral treaty. It must also be noted that, except for the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid, the multilateral treaties referred to in articles 22 and 26 did not provide for the submission of a case to an international criminal court. Article 63 attempts to extend the "extradite or prosecute" regime by analogy to cover the case of the surrender of an accused to court.

23. This is a question which requires further examination, paying due regard to the relevant provisions of the Vienna Convention on the Law of Treaties (1969) on modification of treaties. Particular care should also be taken to ensure that provisions of the statute do not prejudice the legal regime created through bilateral extradition treaties.

II. Procedural issues

Article 30 (Investigation and preparation of the indictment)

24. This draft article refers to the receipt of the complaint by the prosecutor. It is recommended that the complaint be received by the procuracy division, where a decision will be made as to whether an investigation should be carried out or not. This is comparable to a situation when information is received in respect of the commission of a crime which is cognizable by the court.

25. The discretion granted to the prosecutor to decide whether an investigation shall be launched or not is in line with the performance of his duties. However in the matter of the review of his initial decision, the direction to the prosecutor on finding that there is sufficient basis should be to commence investigations, and not to commence a prosecution.

26. At the conclusion of such investigation as directed by the bureau, it will be the duty of the prosecutor to decide whether an indictment should be framed against the suspect. A decision of the prosecutor not to prosecute may be reviewed at the instance of the complainant party. However, it will be advisable for the bureau to have a preliminary inquiry without the participation of the parties concerned, subject to a hearing in exceptional situations. In the absence of exceptional circumstances, the decision of the prosecutor not to indict should not be made subject to review. This observation is made having regard to practical reasons. No doubt the prosecutor should in the exercise of his power not to indict act with great caution. The system will not be satisfactorily operative in the event of a direction to indict when the prosecutor is not willing to do so.

Article 32 (The indictment)

27. This article provides for a review of the indictment. This provision appears to undermine the position of the prosecutor. It also appears to provide for an inquiry within an inquiry. It also does not appear to coincide with the earlier provisions which provide for a direction issued by the bureau to the prosecutor to indict.

28. The institution of the prosecutor must be organized in such a way as to ensure that indictments are forwarded only in fit and proper cases.

Article 38 (Disputes as to jurisdiction)

29. It may be provided that objection to the jurisdiction of the court be taken prior to the commencement of the trial and not after the accused has pleaded to the indictment. Challenges to jurisdiction at any other stage result in loss of time and energy for no purpose. Only those with a direct interest in the case should have the right to challenge the court's jurisdiction.

30. The question of jurisdiction, since it goes to the root of the matter, should be decided at a pre-trial stage by a chamber set up to hear the case.

Article 48 (Evidence)

31. Matters of relevancy, admissibility and value of evidence should be left to be decided by the court. There are basic principles applicable in respect of admissibility of evidence. Illegal means adopted to obtain evidence should be taken into account in considering whether such evidence should be admitted or not. In certain situations some evidence may be admitted but the court may decide not to attach value to such evidence. It should be left to the court's discretion to decide for good reason whether or not to admit any given item of evidence.

Article 49 (Hearings)

32. The matter of objection to jurisdiction is dealt with in this article. It appears that the objection is to be taken at a stage prior to the accused's pleading to the indictment. This is in accordance with the observations made above. The court will rule on the objection prior to proceeding any further with the trial.

Article 51 (Judgement)

33. It is submitted that dissenting opinions serve a purpose and should not be shut out. A majority decision of the court will be the decision of the court. Judges must have the freedom to differ.

Article 55 (Appeal against judgement or sentence)

34. A time limit should be provided within which an appeal should be lodged.

35. It is accepted that there should be a right of appeal against decisions of the court. In the exercise of this right, however, it may be provided that there shall not be a right of appeal where the accused has pleaded guilty to the indictment.

36. It may also be considered whether the right of appeal granted to the prosecutor could be structured in the following manner:

(*a*) On a question of law;

(*b*) On a question of fact alone or on a question of mixed law and fact with the leave of the court;

(*c*) On the ground of inadequacy or illegality of the sentence imposed.

Article 56 (Proceedings on appeal)

37. The procedure in the hearing of appeals has not been provided for. Perhaps the rules of the court may make necessary provisions. It is suggested that provision be made to enable the court to receive additional evidence if it thinks necessary at the stage of the appeal.

38. As and when required, an appeals chamber could be constituted from the same court to hear the appeals. Judges of eminence who are appointed to the court will be competent to act in the dual capacity.

III. Other issues

39. The statute may not provide for all situations relating to investigations, institution of proceedings, indictments, trials, sentences and appeals and revisions. Therefore it is suggested that a provision be included for cases not provided for. Such procedures as the justice of the case may require, and not inconsistent with the statute, may be adopted in such situations.

40. Another matter for which provision may be made is for trial *in absentia* of an accused person. Having accepted an indictment, if a person wilfully evades appearing in court or wilfully does not appear in court to receive indictment, or having appeared wilfully obstructs the proceedings of the court or is unable due to ill-health or other disability to present himself in court, and so on, a procedure may be stated for trial *in absentia*.

41. Since the law of evidence will figure prominently in the proceedings before the court, it may be advisable to have at least a compendium of the rules of evidence applicable in the court.

42. Provision may also be made to enable the court to discharge an accused person at any stage of the case for the prosecution on the ground that further proceedings in the case will not result in the conviction of the accused. The court shall record the reasons for doing so.

43. It will also be appropriate to have a provision to enable the court to terminate proceedings at the close of the case for the prosecution, on the ground that the evidence produced fails to establish the commission of the offence charged against the accused in the indictment. If the court considers that there are grounds for proceeding with the trial, the court shall call upon the accused for his defence.

IV. Financial and other resources

44. As the provisions of the statute are developed, it would be important for consideration to be given to the funds and other resources that would be required for the establishment and operations of an institution such as the tribunal.

45. An early identification should, of course, be made of possible cost-components, e.g. such international institutional and other administrative requirements that would have to be permanently in place; and other facilities that would have to be available for use whenever necessary (especially, investigatory, prosecutorial, judicial and incarceration).

46. If the tribunal were to be established as a principal or subsidiary organ of the United Nations, the manner of funding (regular budget or voluntary) would, of course, be carefully examined in the budgetary committees of the General Assembly.

47. If the tribunal were to be established by treaty, the provisions on funding would be some of the most important issues that would need to be satisfactorily resolved. However, whether such a tribunal be established as a principal or subsidiary United Nations organ or as a treaty body, it would be essential (having in view the importance of securing the objectivity and integrity of the tribunal, and of the public perception thereof) that it should have independent financial viability, and, accordingly, that its funding should be self-sustaining and not dependent on government contribution.

Sweden

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

Tunisia

[*Original: French*]
[*25 February 1994*]

I. Relationship of the tribunal to the United Nations

1. Tunisia supports the option under which the tribunal would be a United Nations body. This formula would give this jurisdiction the requisite authority and permanence and would ensure international recognition of its competence.

II. Applicable law

2. Tunisia agrees that the list of international agreements and conventions set out in draft article 22 should constitute the basis of the law to be applied by the court. Nevertheless, it believes that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should be added to this list.

3. Moreover, only a few of the treaties mentioned in article 22 define with precision the acts which they prohibit. Customary international law, which supplements these treaties, is equally powerless to define these offences accurately. This situation could be a source of difficulty in terms of specifying, at the international level, the elements constituting an international offence so as to comply with the principle of legality, which is recognized by all criminal justice systems in the world. Accordingly, it would be advisable to expedite the work on the draft Code of Crimes against the Peace and Security of Mankind.

III. Competence

4. Tunisia is of the view that the competence of the court should be limited to individuals and, accordingly, should not be extended to States and international organizations, as that would be contrary to the principles of sovereignty and jurisdictional immunity of States, which are the subject of a draft convention prepared by the International Law Commission.[1]

[1] For the text of the draft articles on jurisdictional immunities of States and their property, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 12-62.

5. Furthermore, pending the completion of the draft Code of Crimes against the Peace and Security of Mankind, the subject-matter competence (competence *ratione materiae*) of the court could be defined by special agreements between States parties to the statute or by individual acceptance. In this way, the offences in respect of which one or more States recognized the competence of the court would be determined with the greatest possible precision. Such agreements or individual declarations could be made at any time.

6. Moreover, the court could be competent to try any individual, provided that the State of which he is a national and the State in whose territory the crime is committed accept its jurisdiction (this solution is similar to that proposed by the Special Rapporteur).

7. Lastly, the rights of the State against whose property criminal acts are committed, where such property is situated in territory other than its own, should also be taken into account (Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the Protocol thereto).

IV. Nomination of judges

8. Tunisia suggests that each State party to the statute should nominate a judge who possesses the requisite moral qualifications and competence. Subsequently, judges would be elected to the court by the General Assembly. This formula is designed to ensure the independence and impartiality of the judges, while strengthening the relationship between the United Nations and the court.

V. Structure of the court

9. Tunisia supports the Special Rapporteur's proposal regarding the component parts of the court, namely:

(*a*) The "Court" or judicial organ;

(*b*) The "Registry" or administrative organ; and

(*c*) The "Procuracy" or prosecutorial organ.

VI. Referral of cases to the court

10. Contrary to the Special Rapporteur's proposal that cases should be referred to the court solely in response to complaints by States, whether or not they are parties to the statute, Tunisia is of the view that the right to refer cases to the court should also be extended to international organizations. This solution would ensure better protection of human rights.

VII. Indictment

11. The indictment should be upheld by a procuracy, rather than by the complainant State, as in the second formula proposed by the Special Rapporteur, in order to guarantee the neutrality and impartiality of the court.

VIII. Investigation

12. The investigation should be carried out by the court itself at a hearing. If the case is too complicated, the court could establish a special investigation commission. This choice is necessary in order to guarantee the rights of the accused and the objectivity of the investigation.

IX. Fair trial

13. With regard to draft article 40, a general principle should be formulated relating to the enjoyment by the accused of the basic rights established by international treaty and customary law and recognized by the general principles of law.

X. Principle of legality

14. Two comments seem to be called for in this connection:

(*a*) The principle of legality, as set out in article 41, does not clearly mention one of its most important corollaries, namely, the non-retroactivity of international criminal law. Yet such a reference would appear to be essential, thus implying application of the only factor mitigating that principle, namely, the invoking of those provisions of international criminal law which are most favourable to the accused, notwithstanding the seriousness of the crimes punished;

(*b*) With regard to the question of international and national double jeopardy, it is quite clear that an international criminal court would be ineffectual if it could prosecute an individual guilty of a crime against the peace and security of mankind only if such acts were condemned by the law of the country of which he was a national. What would happen if countries did not include certain criminal acts in their domestic legislation? It might therefore be possible to omit a reference to the principle of double jeopardy provided that such crimes were contemplated in international treaty or customary law.

XI. Applicable penalties

15. Tunisia supports the Special Rapporteur's proposal to leave to the court, in the absence of an international criminal code prescribing penalties, the option of referring to the law of the State of which the perpetrator of the crime is a national, the law of the complainant (victim) State, or the law of the State in whose territory the crime is committed.

16. However, the possibility of a crime in whose commission several persons of various nationalities participate has not been envisaged. If the court insists on referring to the law of the State of which each of the accused is a national, this could result in varying judgements and penalties, which would constitute discrimination in the treatment of the accused. In order to remedy this situation, a single system of law should be applied, preferably that of the victim State; this would ensure a measure of homogeneity in judgements and would strengthen the feeling of the victim State that justice has been fully rendered.

XII. Remedy of review

17. The accused should be entitled to the remedy of review if a new fact comes to light which was unknown at the time of trial or appeal and which could have had a decisive impact on the judgement of the court.

XIII. Working languages

18. Draft article 18 provides that the working languages of the court shall be English and French. This provision is restrictive. The official languages of the court should be those of the United Nations.

United Kingdom of Great Britain and Northern Ireland

[*Original: English*]
[*23 February 1994*]

General comments

1. The Government of the United Kingdom of Great Britain and Northern Ireland has made clear its support for the project which is being undertaken by the International Law Commission to prepare a statute for an international criminal court. While it is very conscious of the serious problems—jurisdictional, procedural, institutional, financial and others—which must be solved before an international criminal court is created, it is convinced that the attempt to resolve the difficulties is a worthwhile undertaking.

2. The draft statute which was before the Sixth Committee of the General Assembly last year, and which is the subject of the present comments, is an admirable beginning for this difficult task. Because of the expertise and working methods which the Commission has at its disposal, the Government regards it as important that the Commission should ensure that it has addressed and fully dealt with all of the problems of a legal nature connected with the setting up of a criminal jurisdiction before any draft statute is dealt with in the more political arena of an intergovernmental conference. The Government considers in particular that rules of evidence are of such significance to the proper operation of the prosecution and of the court itself—an importance which goes beyond mere procedure—that the rules should be included in the draft statute and should initially be drafted by the Commission.

3. The Government of the United Kingdom of Great Britain and Northern Ireland considers that any international criminal tribunal which is established must be of the highest authority and the highest legal and moral quality. The Government regards it as necessary that States should enter into a solemn treaty commitment in relation to it, and that it should have the widest possible acceptance. The tribunal should be given a close institutional link with the United Nations, to give it a universal authority.

4. As a final point, the United Kingdom Government considers it important that the international community learn from the experience of the other international court which has recently been established: the International Tribunal for the Former Yugoslavia .

Comments regarding specific articles

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

5. Leaving aside the question whether it would fall within the competence of the General Assembly or the Security Council to establish the tribunal as an organ subsidiary to them under Article 22 or 29 of the Charter of the United Nations, it is clearly inappropriate that the court should be subordinate to either of those two bodies. Further, the statute will impose obligations upon States and it will be necessary for this to be done in some legally valid way. Since the new tribunal will not, unlike the International Tribunal for the Former Yugoslavia, come within the responsibilities of the Security Council for the maintenance of international peace and security, it will not be possible to impose the necessary obligations upon States by means of a Security Council resolution, as in the case of the International Tribunal for the Former Yugoslavia. It will therefore be necessary to establish these obligations by treaty. It is suggested that the statute be adopted by international treaty, and it may be useful for the Commission to draft the necessary treaty provisions. The treaty could be negotiated and adopted under the aegis of the United Nations. It is also suggested that an institutional link of some kind with the United Nations be created, not amounting to the establishment of an organ subordinate to one of the principal organs.

Article 4 (Status of the Tribunal)

6. The Government welcomes the provision that the tribunal should sit only when required to consider a case submitted to it.

7. The provision in paragraph 2 will need more thought, in relation to status, legal capacity and the persons authorized to negotiate on behalf of the tribunal, once a decision has been taken as to the relationship between the tribunal and the United Nations.

Article 5 (Organs of the Tribunal)

8. Whatever the prosecutor's office is called in other languages, "Procuracy" is inappropriate in English.

Article 6 (Qualifications of judges)

9. The court is a criminal tribunal. In the Government's view, it is inappropriate that judges should be appointed who have had no judicial experience in criminal cases. In addition to the qualifications set out in the first sentence of the article, the United Kingdom suggests it should be made a condition of appointment that a judge should have had judicial experience in criminal trials.

Article 7 (Election of judges)

Article 8 (Judicial vacancies)

10. Consideration should be given to making express provision for what is already implicit in article 8 that vacancies may arise because of the death or resignation of a judge.

Article 11 (Disqualification of judges)

11. Paragraph 3 provides that the accused may request the disqualification of a judge. It will be necessary to make provision for grounds to be put forward by him to justify disqualification for one of the reasons set out in paragraph 1.

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

12. In the Government's view, careful consideration should be given to the qualifications required of the prosecutor and the deputy prosecutor, particularly in relation to the following points:

(*a*) If the prosecutor is to be disqualified from acting in relation to a complaint involving a person of the same nationality, there should be a requirement that the deputy is of a different nationality;

(*b*) The requirement that the prosecutor and the deputy have the highest level of competence and experience in the conduct of both investigations and prosecutions would give difficulty to many common-law countries where those functions are in separate hands. The qualifications should be in the alternative. It should be a requirement that either the prosecutor or the deputy be a lawyer of several years' seniority.

13. The Commission might consider whether paragraph 3 is sufficiently clearly worded.

14. As regards paragraph 4 of the commentary, the Government is of the view that consultation of the bureau on the prosecutor's staff appointments would not compromise the prosecutor's independence, and such a provision might appropriately be included.

Article 19 (Rules of the Tribunal)

15. Rules of evidence include matters of considerable importance which affect the rights of the accused. It is noted that one or two basic provisions of the rules of evidence are included in article 48 and elsewhere in the statute. The Government considers however that the Commission should give further consideration to this important subject and should provide draft provisions for the rules as a whole, to be included in the draft statute.

Article 21 (Review of the Statute)

16. The Government shares the view that this article is better placed in the final clauses of a treaty adopting the statute. The Government doubts whether it is appropriate to refer to the code of crimes against the peace and security of mankind in the way in which the draft article does. While a generally accepted code will of course have relevance to any international criminal jurisdiction which is created, it is difficult to frame a satisfactory reference to an instrument which has not yet been adopted, and it may be preferable not to refer to it at all.

Article 22 (Lists of crimes defined by treaties)

17. As the Working Group notes, part II of the draft statute is the central core of the draft. Articles 22 to 26 lay down two strands of jurisdiction, based on a distinction drawn between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. As regards article 22, the Government of the United Kingdom understands and shares the reservations expressed by some delegations in the Sixth Committee with regard to conferring jurisdiction upon an international court over crimes which were defined with insufficient precision in the relevant treaties, in respect of which the treaties were drawn up without any idea of bringing the crimes before an international criminal court, and for which the treaties did not specify any penalties. Nevertheless, the Government of the United Kingdom considers that, if an international court is to be established under present conditions, a list of crimes along the lines of those set out in article 22 should form the major part of its jurisdiction. The Government does however consider that the list of crimes in article 22 should be examined again to ensure that only those treaties which have received a very substantial acceptance by the international community should be included; the criterion of entry into force is not, in the United Kingdom's view, sufficient to qualify a treaty for inclusion in the list. Subject to this proviso, however, the Government would not oppose the inclusion of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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

18. The United Kingdom Government shares the view expressed in paragraph 2 of the commentary that the approach set out in alternative A (the "opting-in" approach) best reflects the consensual basis of the court's jurisdiction. Conferring jurisdiction on an international court represents a certain ceding of jurisdiction by individual States; this ceding is best established by the two-stage process of acceptance of the statute and the separate acceptance of the jurisdiction of the court over specific crimes in accordance with alternative A.

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

19. In the Government's view, the Commission should also give consideration to requiring the acceptance of its jurisdiction by the State in whose territory the offender is located. That consent will not always be required under the existing provisions of paragraph 1 (*a*).

20. The Commission is requested to consider whether the drafting of paragraph 1 (*a*) and (*b*) is adequate. It is unclear whether all States parties having jurisdiction under a treaty to try the suspect before their own courts are required to accept the court's jurisdiction, or whether the consent of any one of the States parties to the relevant treaty is sufficient. The Government assumes that the latter is intended but does not regard this as acceptable, at least with regard to paragraph 1 (*a*). The Commission is asked to consider whether, in relation to paragraph 1 (*a*), the consent of all such States should be required.

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

21. It is not clear from this article whether the Security Council may refer cases to the court where the consents required under article 24 or 26 have not been obtained, or whether it is intended that the court will only have jurisdiction in respect of a complaint referred to it by the Security Council if the relevant States have accepted the court's jurisdiction. If the substance of the article is to remain, the Government would prefer the latter view to prevail.

22. The Government is not, however, convinced that the understanding of the Working Group expressed in the second sentence of paragraph 2 of the commentary is adequately reflected in the provision. The Commission is asked to consider changes to articles 25 and 29 to ensure that the Security Council does not have the powers to refer complaints against named individuals, but only to request the prosecutor to investigate particular situations.

23. The Commission is asked to consider the inclusion of a provision in this part of the statute requiring that where the Security Council is seized of a dispute or a situation, a case falling within that dispute or situation may not be referred to the tribunal except with the leave of the Council.

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

24. The United Kingdom has grave doubts about the desirability of all the provisions of this article. As regards paragraph 2 (*a*), it is not satisfactory that a criminal court has jurisdiction over unspecified offences in respect of which there cannot but be uncertainty and controversy. It is not satisfactory to argue that it will be for the court itself to determine whether there is the necessary international consensus for the existence of a particular crime: an accused is entitled, even during the prosecution process, to more certainty about what he is accused of than this article provides; even if the court eventually decides that the crime is not one "accepted and recognized by the international community of States as a whole", he will have been subject to the prosecution process even though not convicted.

25. The Commission is invited to consider whether there are indeed any crimes under general international law of the kind referred to in paragraph 2 (*a*), and if so, to identify them expressly in the article.

26. As regards paragraph 2 (*b*), the United Kingdom is not in favour of including in the statute crimes under national law which have not been defined with precision in an international treaty, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Furthermore, the attempt to restrict jurisdiction to "exceptionally serious crimes" is unlikely to be workable: no definition of "exceptionally serious" is attempted and it is unlikely to be possible to produce one that would be generally agreed.

Article 28 (Applicable law)

27. The Commission is requested to look again at the description of national law as a "subsidiary source". Even if, as the United Kingdom would wish, a decision is taken to delete article 26, paragraph 2 (*b*), national law will often have to be resorted to by the court. The components of an offence (with the exception of genocide), the applicable defences and the relevant penalties (subject to the provisions of the statute) will all be matters for national law. This being so, it is important that the court be directed to the appropriate national law: the Government presumes that it will be the law of the State (or the jurisdiction within that State) where the crime was committed.

Article 29 (Complaint)

28. The Commission is requested to consider whether it would not be advisable to elaborate upon what supporting documentation is required as a minimum to accompany a complaint.

Article 30 (Investigation and preparation of the indictment)

29. The provision does not specify, in paragraph 1, what constitutes a "sufficient basis" for the prosecutor to proceed with the prosecution of a case. Paragraph 5 of the commentary, and the provisions of article 32, make it clear that the test is the existence of a prima facie case. The government doubts whether the establishment of a prima facie case is a sufficient basis for instituting a prosecution. The Commission is invited to consider the practice of States with regard to the institution of prosecutions in national courts: the Government doubts whether the standard for a prosecution in an international court should be lower than that required for a national court. In the United Kingdom, for example, a prosecution is not instituted unless it is considered that there is at least a realistic prospect of conviction.

30. Paragraph 1 provides that the bureau may direct the prosecutor to commence a prosecution. The Commission

is requested to consider whether a defendant prosecuted at the behest of the court contrary to the inclination of the prosecutor following a thorough investigation would believe that he was receiving an impartial and fair hearing.

31. Paragraph 4 (*a*) provides for a person under investigation to be informed that his silence in response to questions will not be a consideration in the determination of his guilt or innocence. The Government fully shares the view that there ought to be no question of a person being convicted on the basis of silence alone, without other evidence. The Government does not, however, regard it as an indispensable element of a fair trial that no consideration at all should be given to whether or not an accused person has remained silent. In the United Kingdom, the Criminal Law Revision Committee recommended in 1972 that it should be possible in certain carefully defined circumstances for inferences to be drawn, in support of other evidence, from the refusal of a defendant to answer relevant questions; the British Parliament is currently considering legislation based on its proposals.

32. The Commission is requested to reconsider the wording of paragraphs 2 and 3, which may be read as suggesting that the prosecutor may summon suspects, victims and witnesses, collect evidence and conduct on-site investigations directly on the territory of States parties and others, without seeking the cooperation of the State concerned. Such powers are, in the view of the Government of the United Kingdom, only necessary and appropriate in situations where a State fails in its cooperation obligations or where its criminal justice system has broken down. Previous recommendations by the Commission clearly envisaged that evidence should be collected through cooperation mechanisms based on international mutual legal assistance arrangements (but with fewer grounds for refusal and, of course, no mutuality). The draft statute might be augmented so as to place legal assistance obligations on States parties whose cooperation is requested by the prosecutor or the court, and to differentiate between different degrees of acceptance, rather as article 63 does for surrender of suspects.

33. It is therefore suggested that article 30, paragraphs 2 and 3, be modified so as to provide that the prosecutor shall have power to request: (*a*) the presence of suspects, victims and witnesses for questioning; (*b*) the disclosure and production of evidence, including any documents or exhibits relating to the complaint; and (*c*) on-site investigations.

Article 31 (Commencement of prosecution)

34. The relationship between articles 31 and 62 (*a*) on the one hand, and article 33 on the other, may need further thought. Article 31 indicates that a person may be arrested or detained under the statute while the indictment is still in preparation, on the basis of the issuance of a warrant or other order of arrest or detention by the court (a provisional arrest warrant) and article 62 (*a*) provides that in cases of urgency the court may request provisional arrest. Article 33 implies, however, that States parties' obligations to arrest and detain the subjects of such warrants arise only after the indictment has been personally notified to the accused. There are no provisions designed to secure cooperation in pre-indictment arrest or detention. The Commission may wish to cover this. If it does, however, for human rights reasons it would not be right to allow too long a period to elapse between execution of the provisional arrest warrant and the notification of the indictment to the accused: the European Convention on Extradition, for example, imposes a 40-day limit.

Article 32 (The indictment)

35. The Government is of the view that it is not sufficient to leave to rules of court matters such as details of the requirements for the "necessary supporting documentation" which must be considered by the bureau before the indictment is affirmed. It is presumed that the phrase is intended to refer either to the evidence, in written form itself, or to a summary. The provision should specify the extent of evidence required and the manner in which it is to be placed before the chamber. It is presumed that the indictment itself will not contain a summary of the evidence.

Article 37 (Establishment of Chambers)

36. The Government of the United Kingdom considers that five is a good number for the judicial strength of a trial chamber. The Government is of the view that the constitution of chambers should be dealt with by the bureau in whatever manner it thinks fit. This is preferable to leaving the matter to be regulated by inflexible rules.

Article 38 (Disputes as to jurisdiction)

37. The Government of the United Kingdom considers that the view expressed in paragraph 5 of the commentary, that it would be imperative for the accused to be allowed to challenge the jurisdiction of the court before trial, should be acted upon and that the merely institutional obstacles thought to exist should not stand in the way of a solution's being found. The chamber to deal with the case should rule on the question, or if the challenge is made before the indictment is confirmed (possibly after the person's arrest), a chamber should be made available for the purpose.

Article 44 (Rights of the accused)

38. The Commission is invited to look again at the possibility of distinguishing different situations for the purpose of determining whether a trial should be held in the absence of the accused; the Government is of the view that the question should not be left to decision by the court, as provided in paragraph 1 (*h*). In the Government's view a trial should not be held in the absence of the accused unless (*a*) he has been duly notified and chooses to appear not in person but by means of a legal representative, and (*b*) the accused has been arrested but escapes after the trial has begun but before it has been completed.

39. Paragraph 3 deals with the information which is to be made available to the defence. This is another case in

which the Commission is invited to consider the inclusion in the statute of further details governing the role of the prosecutor and the court. In particular, the explanations given in paragraph 8 of the commentary might usefully be included.

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

40. The Commission is requested to look again at paragraph 2 (*a*), which has a reference to an "ordinary crime". The concept is a very difficult one to define and it may be that the best course is simply to delete this.

Article 47 (Powers of the Court)

41. Paragraph 1 (*a*) and (*b*) refers to the court's having the power to require the attendance and testimony of witnesses, and to require the production of documentary and other evidentiary materials. In view of the comments on article 30 above, to the effect that in practice the most acceptable and indeed most efficient way of obtaining both persons and evidence is by requesting cooperation from the States parties which will have certain obligations to assist, it is suggested that it would be preferable to refer to the court's power to issue orders for the attendance and testimony of witnesses, and for the production of documents, etc. The word "orders" is in fact used in the commentary. The same point arises on article 48, paragraph 1.

Article 48 (Evidence)

42. The Government draws attention to its comments on article 19 above, relating to the desirability of the statute's providing further rules of evidence. One matter that should be addressed is whether a witness is to have a privilege against self-incrimination before the tribunal. The question arises whether a witness is, in particular, obliged to answer questions which may place him in breach of his national law.

43. As regards the point made in paragraph 4 of the commentary, it is considered that in view of the evidentiary difficulties for national courts in prosecuting perjury before the tribunal, it would be preferable to address in the statute the question of giving false testimony before the court.

Article 53 (Applicable penalties)

44. Paragraph 2 departs from the previous recommendations made by the Commission to the effect that penalties should be based on the applicable national law, subject to residual provision for the court to lay down penalties where none is specified or where the penalty specified falls outside international norms. The Government considers that the Commission should revert to the previous recommendations. The penalties imposed by the State in whose territory the crime was committed should be the first point of reference and should be followed, subject to the reservations made above. Such an approach would accord with the generally accepted principle that a person committing a crime should know what punishment he might expect.

45. As regards paragraph 4, the Commission is invited to consider whether the court should be directed to the order in which fines or confiscated property should be paid out. As regards subparagraph (*c*), it is questionable whether the provisions referred to in paragraph 4 of the commentary are likely to be used in practice. It is doubtful whether a trust fund is needed at all, and it may be that the tribunal should itself have the power to pay sums of money directly to the victims or to the State of their nationality expressly for their benefit.

Article 55 (Appeal against judgement or sentence)

Article 56 (Proceedings on appeal)

Article 57 (Revision)

46. The Government is in favour of providing a right of appeal for the accused. It is of the view, however, that seven is too small a number for the Appeals Chamber, having regard to the fact that the judges in the Appeals Chamber will be of the same rank as the trial judges. It is suggested that an Appeals Chamber of at least nine judges would be more appropriate.

47. As regards the possibility of the prosecution's being given a right of appeal, it is considered that any such right should be limited to specified grounds of appeal, namely on a point of law or on the sentence given by the trial court. The prosecutor should not have a general right of appeal.

Article 58 (International cooperation and judicial assistance)

48. The Commission is requested to consider what "interim measures" might be required.

Article 62 (Provisional measures)

49. Attention is drawn to earlier comments on provisional arrest. In relation to any provisional measures the request from the court would need to be a formal request if it is to be acted upon by States. States will be able to respond only in so far as their national laws permit which may not, for instance, include preventing the escape of a suspect unless a provisional arrest or arrest warrant has been issued. National laws may also impose special conditions for search and seizure of evidence; this is recognized in most international mutual legal assistance agreements.

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

50. The Government notes that, under paragraph 3 (*a*), a State party which has accepted the jurisdiction of the court with respect to the crime in question is obliged to take immediate steps to arrest and surrender the accused

person to the court. Having regard to the provisions of article 9 (4) of the International Covenant on Civil and Political Rights, the Government's view is that the accused person must have a right to challenge arrest and detention in the requested State, though the grounds on which challenge is possible should be kept to a minimum. The view is taken, therefore, that a State which had taken immediate steps to arrest the suspect would have fulfilled its obligations even if the suspect successfully exercised his right to challenge his arrest and detention.

51. Paragraph 3 (*b*) refers to a State party which is also a party to the treaty establishing the crime in question but which has not accepted the court's jurisdiction over that crime. The Government queries the obligation to arrest. Arrest may be premature if the national authorities are not ready to lay a charge immediately or find, on reviewing the case, that a charge would not be likely to succeed.

52. Paragraph 5 requires States parties, as far as possible, to give priority to court requests over requests for extradition from other countries. This departs from the Commission's previous recommendation that States parties should be free to choose in the case of multiple requests, but could be offered non-binding guidelines on choosing, for example suggesting that requests from the court are given special consideration. The paragraph 5 requirement, moreover, relates to any request under paragraph 2: the requested State might not even have accepted the court's jurisdiction over that crime or that category of crimes. The Commission is invited to consider deleting paragraph 5. Non-binding guidelines, as originally proposed, could however be helpful.

53. Paragraph 6 is, in the Government's view, helpful, as is the recognition of the speciality rule in article 64.

54. Attention was drawn earlier in these comments to the desirability of an additional article on legal assistance, which would, *inter alia*, spell out the obligations of States parties to comply with requests. It is for consideration whether obligations, or the same degree of obligation, should be imposed on States parties that have not accepted the court's jurisdiction in relation to the crime, or the category of crime, in question. It would also seem desirable for the statute to indicate, even if the list is non-exclusive, the types of legal assistance that may be sought from States parties—as, for instance, in the United Nations Model Treaty on Mutual Assistance, article 1, paragraph 2.

Articles 66 (Enforcement of sentences)

Article 67 (Pardon, parole and commutation of sentences)

55. The Commission is asked to consider whether the statute should cover the procedures to be followed if a prisoner convicted and sentenced by the tribunal escapes from custody.

United States of America

[*Original: English*]
[*2 June 1994*]

GENERAL COMMENTS

1. The United States of America wishes to express its appreciation to the 1993 Working Group of the ILC for its impressive efforts. As a result, Governments have before them a document which provides a useful focal point for examining the complexities of this topic.

2. These comments are by necessity preliminary, and the United States Government may wish to provide further views in the future. Failure to comment on an aspect of the draft statute, however, does not mean that the United States either supports or does not support the ILC's specific formulation.

3. Although the Working Group's report addresses many of the concerns shared by the United States and other nations regarding the establishment of an international criminal court, a number of significant problems remain. We believe that unless these problems are corrected, the court will not make the kind of contribution to world order the ILC envisions. It is therefore important that the ILC take into account the views of States as it continues its effort to create a statute that builds upon, not displaces, effective national judicial and international processes.

4. As the ILC continues its deliberations, the Government of the United States of America urges the Commission to reflect on the following considerations:

(*a*) An international criminal court should be viewed as a supplementary facility—one that does not compete with existing functioning law enforcement relationships. In other words, it should exist expressly for those cases where interested States perceive a need for this type of forum, presumably because no other forum will serve;

(*b*) The statute must reflect a consensus among States. If there is no such consensus, the treaty will fail to gain a meaningful acceptance among States, and this important effort will fail;

(*c*) In keeping with the need for consensus, it is necessary to avoid any linkage between the proposal to create an international criminal court and the development of the Draft Code of Crimes Against the Peace and Security of Mankind. The Code of Crimes is, so far, a highly controversial and imperfect document. As long as it remains this way, it cannot form the basis for an international court's jurisdiction;

(*d*) The budgetary and administrative requirements of the tribunal must be handled with great care. The tribunal could be an extraordinarily expensive undertaking, especially if it is used at any one time for extensive investigations or more than a limited number of cases.

5. The rules of evidence and procedure of the tribunal should be agreed to by States parties and formulated in conjunction with the statute, and not left to the discretion of the court. In many instances, the content of the rules can be as important as that of the statute. One reason for

this is that such rules have an important impact on the rights of defendants, and thus must be in keeping with relevant human rights and due process norms.

COMMENTS ON SPECIFIC ARTICLES

PART 1: ESTABLISHMENT OF THE TRIBUNAL

Article 1 (Establishment of the Tribunal)

6. The United States supports the approach taken by the 1993 Working Group in establishing the proposed tribunal through a multilateral treaty, binding those States which choose to become parties to the instrument.

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

7. The United States believes that the proposed tribunal should not be established as an organ of the United Nations, which would involve the complicated task of amending the Charter of the United Nations, but the tribunal should none the less have a clear relationship to the United Nations. An agreement between the United Nations and the tribunal is desirable because it would facilitate cooperation. This is especially important given, as noted by the commentary, that a part of the tribunal's jurisdiction might depend upon decisions by the Security Council. One appropriate way of establishing such a relationship would be for the United Nations and the proposed court to enter into an agreement along the lines of agreements between the United Nations and specialized agencies, pursuant to Articles 57 and 63 of the Charter of the United Nations.

8. The United States believes that the statute should include an appropriate mechanism for "ratification" by States parties of major decisions by the tribunal that may have financial or operational repercussions. This might be accomplished by including an article in the statute providing for specified matters to be put before States parties.

Article 3 (Seat of the Tribunal)

9. This issue could be resolved in the convention establishing the proposed court. Alternatively, the resolution of the issue should be subject to approval by the majority of States parties.

Article 4 (Status of the Tribunal)

10. The United States agrees that, for budgetary reasons, the tribunal should sit only when it needs to conduct business. This result does not mean that the tribunal will lack the requisite degree of permanence or authority for it to accomplish its mission. At this point, States are not in a position to predict how active the tribunal might be. Requiring that the proposed court be in permanent session would deprive the institution of necessary flexibility, and subject States parties to unnecessary costs.

Article 6 (Qualification of judges)

11. The United States believes that the statute should make a distinction between the qualifications for trial and appellate judges. Trial judges should be required to have experience in trying criminal cases. While it would be desirable for appellate judges to have a background in hearing appeals of criminal cases, given the international law character of this tribunal, it may not be necessary to require such experience in cases where an individual has had other relevant experience.

Article 7 (Election of judges)

12. The United States believes strongly that the appellate function should be independent from the trial function in order to ensure full and fair appellate review. Consequently, judges should be elected separately for these two functions. Candidates for judicial positions will be likely to have more experience in one or the other capacity, and thus separate voting will assure States parties that relative expertise will be channelled appropriately.

13. The United States reserves judgement as to whether 18 judges is the proper number. Much depends on how many cases States parties predict the tribunal will have, and the overall budgetary requirements of the tribunal.

14. The judges should be elected by States parties.

Article 9 (Independence of judges)

15. The rules of the tribunal will need to include specific guidelines for judicial service, and will need to strike a proper balance between allowing part-time judges to earn a living and the necessity of ensuring that the integrity of the judges and the tribunal in appearance and fact is protected. For example, judges should be permitted to teach or practise law (although they may not take cases that relate to matters before the tribunal or that otherwise are inconsistent with the tribunal's conflict of interest standard). They should not participate as members of executive or legislative branches of Governments. Whether they could act as judges in domestic courts is an issue which should be explored.

16. One important reason to have the rules of service specified in advance is that candidates for judgeships may not put themselves forward if they cannot predict how their outside activities and incomes will be affected.

Article 10 (Election and functions of president and vice-presidents)

17. It would be appropriate for States parties to elect the president and vice-presidents, rather than leaving the matter to the judges.

Article 11 (Disqualification of judges)

18. The United States does not believe that there is any reason to limit the number of judges whose disqualification an accused can request. There should be no difficulty

in handling such challenges in the ordinary course. The prosecutor should also have the right to request the disqualification of a judge. Other judges, too, should have this right. Rather than have the chamber, or the chamber supplemented by the bureau, render a decision on this question, it would be preferable for the court as a whole to do so. The final decision should be reached on the basis of a majority vote, with a majority consisting of more than half the eligible judges present and voting.

19. In certain circumstances, States parties may have information bearing upon whether a judge should be disqualified. In such circumstances, there should be a procedure to permit such States parties to file a motion with the court requesting a review by the chamber concerned.

Article 12 (Election and functions of Registrar)

20. The statute should provide that the registrar can be removed for cause by a vote of a majority of the court. A seven-year term appears somewhat long for this type of office, and we suggest that five years may be a more appropriate period particularly in view of the permissibility of re-election.

21. The tribunal, as a supplementary facility, should have a small professional staff, which States parties could agree to expand as needed. This basic principle should apply to both the registry and the procuracy.

22. The number of employees of the registry and its budget should be subject to approval by States parties. As drafted, the bureau could authorize unlimited numbers of additional staff, presumably to be paid for by assessments from States parties. Instead, on a yearly or shorter basis, the registry should submit to the president of the court a detailed accounting of its activities, along with a proposal for changes in expenditures for the next period. The president would submit a proposal to States parties, based on the registrar's proposal.

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

23. The United States Government agrees with the Working Group's proposal that the prosecutor and deputy prosecutor be elected by States parties. That election should require a super majority vote, for example an affirmative vote of two thirds of the States parties.

24. Without affecting its basic independence, States parties must none the less have oversight with respect to the budget of the procuracy. Thus, as with the registry, the procuracy should draw up periodic budgetary proposals for approval by States parties.

Article 15 (Loss of office)

25. The statute should provide, here or elsewhere, that judges, the prosecutor or deputy prosecutor, and the registrar may be removed from office, or suspended, by reason of inability to perform their functions because of long-term illness or disability.

26. Given the importance placed in the independent status of the prosecutor, we question whether the court should have the authority to remove the prosecutor or deputy prosecutor from office. Thus, we suggest that the statute limit the authority of the court to barring participation of any prosecutor for cause, but leave removal from office of the prosecutor or the deputy prosecutor to a super majority decision of States parties. The ILC will need to develop mechanisms for expeditious consideration of issues by States parties and voting procedures.

Article 16 (Privileges and immunities)

27. This provision should be revised so that it states clearly, and without reference to the standards used by other institutions, the privileges and immunities of specific persons or categories of persons. Thus, judges and the prosecutor (and perhaps the deputy prosecutor) should enjoy full diplomatic immunity while present in the territory of any State party where they are performing official functions related to the work of the tribunal. Full privileges and immunities would be provided to the prosecutor because he or she will be likely to make the kind of controversial decisions that would require such protections. All other categories of persons listed should enjoy the privileges and immunities provided to administrative and technical staff under the Vienna Convention on Diplomatic Relations while present in the territory of any State party where they are performing official functions related to the work of the tribunal.

28. Further consideration should be given to who should be able to waive immunities (we prefer the term "waive" to "revoke"). The person with authority to waive immunity should normally be someone with direct authority over the person whose immunity is affected. Thus, it would be appropriate for the prosecutor to be able to waive the immunity of other prosecutors or members of the procuracy, the president (perhaps in consultation with the rest of the court) for the staff of the court, the registrar and his staff, and counsel, experts and witnesses.

Article 17 (Allowances and expenses)

29. If judges reach the point where they are working full time, there should be a transition mechanism, so that per diem payments do not exceed what would normally be paid as a full-time salary for the same period.

Article 19 (Rules of the Tribunal)

30. As noted above (para. 5), the United States believes that the tribunal's rules should be formulated in conjunction with the statute and agreed to by States parties prior to establishment of the international criminal court. The conduct of pre-trial investigations, rules of procedure and evidence and other matters "necessary" to the implementation of the statute can have a fundamental impact on the ability of the tribunal to have fair and acceptable proceedings. Rules that affect the operation of the tribunal to this degree will require painstaking effort to draft; States parties should not be asked to give their approval to the court

unless that effort has been made and the results have met with general approval.

Article 20 (Internal rules of the Court)

31. As a general proposition, we agree that the court should have leeway in determining its own internal rules. Nevertheless, care needs to be taken to ensure that these rules do not adversely affect the rights of the accused. If the court's internal rules are not subject to prior approval of States parties, then the statute should provide that the rules of procedure and evidence (which would be subject to such approval) take precedence over the rules of the court in case of conflict.

Article 21 (Review of the Statute)

32. While we agree that providing for a review conference is desirable, this article should not refer to the Code of Crimes. As noted above (para. 4 (*c*)), the Code is a controversial document which at this time cannot form the basis for the jurisdiction of an international criminal court, and which will not be able to form such a basis in the near future.

PART 2: JURISDICTION AND APPLICABLE LAW

Article 22 (List of crimes defined by treaties)

33. The United States Government has reviewed the draft articles on jurisdiction with great attention. This is undeniably the heart of the international criminal court proposal, and must be crafted with great care. In making a number of recommendations on structuring the jurisdiction of a court, we have borne in mind the need to attain a very wide degree of support for an ambitious project of this nature.

(a) *War crimes, crimes against humanity, genocide*

34. Recent events have shown that there is an important need to ensure that war crimes, crimes against humanity and genocide do not go unpunished. While international prosecution is not an effective substitute for systems of military justice and discipline in most cases, there are circumstances in which domestic efforts will not suffice. For that reason, such crimes are appropriate subjects for the jurisdiction of an international criminal court. These crimes are of fundamental concern to all States. Beyond the fact that such crimes may be so serious that they shock the conscience of the civilized world, in large measure the significance of such cases to all States derives from the fact that the commission of such crimes may create instabilities which threaten international peace and security, or because such crimes are committed in connection with international conflicts. Because of this connection to issues of peace and security, the United States concludes that such crimes should be subject to the tribunal's jurisdiction only where such cases are referred to the tribunal by the Security Council.

35. At the same time, we believe that these types of cases should not be initiated in the tribunal by individual States. The Council is well-placed to make judgements about when particular situations are of so great a concern to the international community that an international (rather than a national) prosecution is required. In addition, we are concerned that there would be a temptation for States to invoke the jurisdiction of the tribunal for political purposes.

36. The United States believes that it is appropriate for the international criminal court to have jurisdiction over offences under the laws of war that are well-established. Because aspects of Protocol I additional to the Geneva Conventions of 12 August 1949 have yet to attain a sufficient level of recognition and acceptance, we conclude that Protocol I should not form part of the tribunal's jurisdiction. Furthermore, in armed conflicts, applicable laws of war derive from the treaties to which all belligerents are parties. The ILC draft would allow one of the belligerents to a future conflict to initiate court prosecution of members of another belligerent's armed forces for violations of laws of war under an instrument to which the latter is not a party, and for crimes which have not been sufficiently well accepted as crimes. Such a result should be avoided. (In addition, as discussed below (para. 45), we believe that the tribunal should not have jurisdiction over cases otherwise subject to an existing status-of-forces agreement.)

37. In these circumstances, the United States Government supports establishment of an international criminal court which permits referral of cases for investigation and prosecution only by the Security Council for crimes set forth in the instruments listed in sections 22 (*a*) and (*b*) (i)-(iv). In addition to grave breaches under the Geneva Conventions, we would also include violations of equivalent gravity of the 1907 Hague Conventions. With respect to crimes against humanity, in the absence of an appropriate instrument defining the crime, the ILC should consider developing a definition for inclusion in the statute, perhaps modelled along the lines of article 5 of the statute of the International Tribunal for the Former Yugoslavia. In the context of an international criminal court, we would suggest that the ILC make clear that there is no requirement that crimes against humanity be limited to those cases arising out of or even during an armed conflict.

(b) *Crimes under the "terrorism" Conventions*

38. The United States Government also recognizes that it might, in principle, be desirable in some cases to have a forum available for prosecution of persons committing crimes defined in the conventions listed in sections 22 (*c*), (*d*), (*f*), (*g*) and (*h*) where national forums are unavailable or will not suffice. At the same time, however, the possibility of international criminal court jurisdiction should under no circumstances impede or undermine the effective prosecution of terrorists in domestic courts. Unfortunately, under the present proposal this latter risk is presented.

39. Many difficulties may arise in bringing such cases to an international criminal court. Such difficulties include whether a tribunal of this nature would be able to conduct investigations of complex terrorist cases as competently as national governments. Such investigations often take many years and considerable resources,

resources which the international criminal court prosecutor may not possess. In addition, a court might end up competing with or pre-empting legitimate national investigations, or causing national authorities to leave to the tribunal elements of investigations which in fact could be more efficiently performed by those authorities.

40. In addition, the United States continues to have a number of reservations about creating jurisdiction on the basis of treaties which in many respects do not provide precise definitions of crimes, but instead impose obligations in aid of the exercise of national jurisdiction. As a general rule, important elements of crimes and defences are left to national jurisdictions. The statute, and the rules of evidence and procedure, will need to provide an adequate guide to the court on the question of elements of crimes and defences if the court is to meet the requirements of *nullem crimen sine lege*.

41. The ILC and Member States will need to give careful consideration to whether these difficulties can be overcome so as to justify inclusion of terrorism within the ambit of the international criminal court. The United States Government reserves judgement on whether this is possible, but hopes that the ILC will be able to make progress in presenting an analysis of issues which can assist in further discussions among United Nations Member States.

(c) *Protection of peacekeepers*

42. The United States notes with satisfaction that progress is being made at the United Nations in elaborating a convention concerning responsibility for attacks on United Nations peacekeepers and associated personnel. Should such a convention come into force, consideration should be given to including crimes under that convention within the jurisdiction of the court. The ILC should consider now mechanisms for bringing these crimes within the jurisdiction of the court expeditiously once the treaty comes into force and States parties determine that they wish to add it to the statute.

(d) *The International Convention on the Suppression and Punishment of the Crime of Apartheid*

43. The United States believes that article 22 should not include the International Convention on the Suppression and Punishment of the Crime of Apartheid. This convention was addressed primarily to a particular situation, that of the system of apartheid in South Africa, which has now been dismantled. This convention was controversial at its adoption and has not gained wide support, in part because it is not sufficiently precise in defining the crimes which are its subject.

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

44. With respect to the three options provided in the draft statute, we prefer alternative A because it best reflects, as pointed out in the commentary, the consensual basis of the tribunal's jurisdiction.

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

45. It is essential that the tribunal should not substitute for or undermine existing and functioning law enforcement relationships. Thus, States should not be permitted to avoid their obligations under existing extradition treaties by referring a case to the international criminal court. Moreover, military personnel who would otherwise be subject to the jurisdiction of their national courts by reason of a status of forces or similar agreement should not be tried by the tribunal. The most compelling reason for establishing a court is that persons who commit the most serious crimes will otherwise go unpunished; where persons would be tried and punished in a national forum but for the intervention of the court, it becomes a competing rather than a supplementary mechanism.

46. National prosecutions are usually preferable for criminal prosecutions. There are many reasons for this: the applicable law in a national prosecution will usually be clear; the prosecution will be less complicated, based on familiar precedents and rules; the prosecution and defence is likely to be less expensive; evidence and witnesses will normally be more readily available; language problems are minimized; the local courts will apply established means for compelling production of evidence and testimony, including application of rules related to perjury. International criminal proceedings will almost always be more complicated and expensive than national proceedings, and will not necessarily produce a more just result.

47. In these circumstances, it is necessary to provide appropriate mechanisms to ensure that, with respect to State-initiated cases, where States are willing and able to bring national proceedings, those proceedings will be preferred over international criminal court ones. This preference was recognized in the eighth report of the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind,[1] which provided for broader consent requirements than does the 1993 Working Group's draft.

48. The Government of the United States proposes that article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) be revised so that the very limited consent regime currently reflected in the statute is expanded to include States with a critical interest in the prosecution. Specifically, for each case under sections 22 (*c*), (*d*), (*f*), (*g*) and (*h*) the statute should require the consent of the State where the crime occurred or the State of nationality of the victim (or in cases where there are victims of many nationalities, the State or States with the most significant interest). The State where the crime occurred will in almost all cases have jurisdiction over the crime, and a very strong interest in the prosecution of any person who committed it. The State of nationality of the victim will often be, in terrorist cases, the State against which the attack was directed; as a result, that State has a particular interest in trying persons accused of the crime.

[1] See *Yearbook... 1990*, vol. II (Part One), p. 27, document A/CN.4/430 and Add.1, especially p. 36, para. 84.

49. The United States is not opposed to including a requirement that the State with custody have a right of prior consent. However, among States with an "interest" in a prosecution, the State with custody does not necessarily have the strongest interest. Indeed, the presence of the fugitive in that State may be no more than fortuitous. Traditional extradition practice has given particular weight to the role of the State with custody, but that emphasis may not be appropriate where the objective is to identify those States which have such a strong reason to prosecute themselves that their preferences should prevent an international criminal court prosecution.

50. If a State with custody under any circumstances exercises a right either to refuse to surrender the accused to the international criminal court, or a right to withhold consent for an international criminal court prosecution, that State (if it has jurisdiction over the crime) must be required to submit the case to its appropriate authorities for prosecution or surrender to another State that is ready to prosecute.

51. In addition, any State which has an applicable extradition agreement with the State with custody, or any State which could make a request for extradition under the provisions of the latter State's domestic extradition law, should be given the opportunity to seek extradition prior to the international criminal court's taking a case. If the State with custody is not obliged and does not intend to extradite to the requesting State (or is not obliged to prosecute under the terms of an extradition treaty), or the State having received the fugitive via extradition for any reason does not proceed with the prosecution within a reasonable period of time, the Court could take jurisdiction over the case.

Article 25 (Cases referred by the Security Council)

52. As noted above (paras. 34 and 37), the United States believes that only the Security Council should have authority to refer war crimes, crimes against humanity and genocide cases to the court. In addition, articles 29 and 30 should be revised to make clear that no investigation may commence nor complaint be filed with respect to those types of cases prior to such Security Council action.

53. The Government of the United States noted with interest the view contained in the commentary that the Security Council would not normally be expected to refer a "case" in the sense of a complaint against individuals, but would more usually refer to the tribunal's situation. The Council would normally refer situations, which would then be the subject of investigation by the procuracy. However, we see no reason why the Council, in appropriate circumstances, should be prevented from referring specific cases for the consideration of the international criminal court. In such instances, the Council would not require that a prosecution be brought, but would refer a case that would then be taken up by the prosecutor. If the prosecutor did not find that the case involved criminal conduct, he or she would be under no obligation to seek an indictment.

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

54. The Government of the United States does not support inclusion within the jurisdiction of the international criminal court of crimes under general international law or crimes under national law which give effect to provisions of a multilateral treaty. The concept of "crimes under general international law" is not sufficiently defined, and inviting States to initiate prosecutions on such a basis would be potentially counterproductive and ill-advised. As discussed in paragraph 37 above with respect to article 22, we are prepared to include within the tribunal's jurisdiction crimes against humanity—a category of crimes which is sufficiently well-defined under customary international law. The United States would also be willing to consider proposals for the inclusion of other particularly well-defined categories of crimes, if any, under customary international law when referred by the Security Council.

55. The United States Government does not support including drug-related crimes which give effect to the provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It shares the concerns expressed by many States in the Sixth Committee debate that this Convention does not provide the level of specificity needed to form the basis of criminal charges in an international criminal court. Moreover, even if this defect could be rectified, we are not convinced that a way could be found to ensure among other things that the tribunal would hear only the most significant drug cases; instead, the court would be likely to be overwhelmed with cases, with all the resource implications this implies. The tribunal could become a drug court with little time for other cases of critical importance to the world community.

Article 27 (Charges of aggression)

56. The Government of the United States would not support prosecutions on charges of aggression, even if the Security Council had first determined that the State concerned had committed the act of aggression which is the subject of the charge. Although the Council is the international political body charged with determining the difference between unlawful aggression and lawful self-defence, the offence of aggression is not yet sufficiently well-defined as a matter of international criminal law to form the basis of international criminal court jurisdiction. In addition, charges of aggression are essentially charges of State and not individual responsibility. Recent difficulties in determining whether particular armed conflicts are international armed conflicts are examples of definitional problems also encountered in defining aggression.

Article 28 (Applicable law)

57. The United States is concerned about the reference to "the rules and principles of general international law" as well as references to "applicable national law". Neither the statute nor the commentary make clear the purposes for which the court may have reference to these sources of law. Application of some elements of national law to fill

out the elements of crimes specified in the treaties (or the rules of procedure and evidence) is inevitable unless there is a more developed international law to which the court can refer. The crimes in the listed treaties, for example, would normally be interpreted by national courts in conjunction with domestic legal principles, often pursuant to domestic legislation defining elements of the crimes, related defences, and other matters. This lack of more detailed international law, however, poses serious questions and concerns. Our preference is to develop supplementary legal principles for the court in conjunction with the statute.

58. If reliance on national laws is necessary, which law is to be applied, the law of the State where the crime was committed, that of the State of nationality of the defendant, or of where the defendant is located? Is the court to survey the laws of all States on the matter and come up with general principles as recognized under article 38, paragraph (*c*), of the Statute of the ICJ? These are matters that need to be further analysed by the ILC.

59. Finally, unless addressed in the statute, an overlap will exist between the International Court of Justice and the international criminal court regarding jurisdiction to determine questions relating to the interpretation and application of the provisions of as many of the treaties as would be covered by the statute. Consequently, it is possible that the two courts will opine on the same or similar issues. Of course, the States parties to the statute can agree among themselves to bring such questions only to the court, but this would not preclude other States from bringing the same or similar questions to the ICJ.

PART 3: INVESTIGATION AND COMMENCEMENT OF PROSECUTION

Article 29 (Complaint)

60. States should not be allowed to pick and choose when they will subject themselves to the general obligations of the statute. It would be particularly inappropriate if a non-party could bring a case to the international criminal court, but would be under no treaty obligation to cooperate with the tribunal in legal assistance matters. Moreover, the United States opposes giving a right to non-States parties to bring cases before the tribunal. Only States paying for the court's operations should be able to act as complainants.

61. As noted above (paras. 34 and 37), the United States Government concludes that only the Security Council should be permitted to refer cases involving war crimes, crimes against humanity and genocide to the international criminal court. Thus, no complaint regarding crimes under instruments listed in sections 22 (*a*) and (*b*) (i)-(iv) should be accepted by the court unless referred by the Security Council.

62. The statute should provide that there be some threshold showing, if not determination of, jurisdiction before the investigation begins—rather than waiting for the issue to be raised on the eve of trial under article 38 (Disputes as to jurisdiction). As a minimum, the complaining State should be required to make a showing on the issue of jurisdiction and the prosecutor or tribunal would be able to decline or defer the case if there appeared to be a serious jurisdictional defect. In order to avoid a waste of investigatory resources, all interested States which have a right under the statute to withhold consent (and thereby curtail a prosecution) should be required to make an election (either irrevocable or provisional) at a specified early point, without prejudice to the right of the defendant to challenge the jurisdiction of the tribunal. In addition, States must be given a reasonable amount of time in which to make a decision concerning consent.

63. Further consideration needs to be given to the role and function of the bureau, especially to the extent to which it will perform judicial functions that would otherwise be referred to a chamber of the court. One member of the Working Group suggested the possibility of establishing an "Indictment Chamber". (See article 29, comment 6.) Article 30 (Investigation and preparation of the indictment), paragraph 1, stipulates that the bureau can direct the prosecutor to commence a prosecution which he or she has declined, and article 32 (The indictment), paragraph 2, states that the bureau determines the sufficiency of an indictment. Giving authority to the court under article 30, paragraph 1, to direct that a prosecution be brought might constitute an infringement on the independence of the prosecutor and thus we should prefer to limit the authority of the court in this respect to requiring reconsideration of the matter.

Article 30 (Investigation and preparation of the indictment)

64. To avoid potential abuse of the tribunal's investigative powers and waste of financial and personnel resources, the standard for declining an investigation (para. 1 stipulates that "unless the Prosecutor determines that no possible basis exists for action by the Court") should be made less demanding. In addition, provision should be made for retention of information or evidence, for possible future use, in the event the prosecutor declines prosecution.

65. Paragraph 2 provides that the prosecutor shall have the power to request the presence of certain persons and the production of information. The obligations of States to cooperate with the tribunal, e.g. with respect to subpoenas seeking disclosure and production of documentation or exhibits, should be spelled out more clearly with respect to both this article and article 58.

66. Although this may be presumed in paragraph 4, it would be preferable for the right of a person to be informed, at the time of the questioning, that he or she is a suspect, to be included explicitly in the list of the suspect's rights.

67. Because war crimes, crimes against humanity and genocide cases should be referred only by the Security Council (see discussion above with respect to article 22), this article should be redrafted to take the distinction between State-initiated and Council-referred cases into account.

Article 31 (Commencement of a prosecution)

68. We propose that the prosecutor be authorized to proceed with preparation of an indictment if he determines there is a prima facie case, not, as provided in the statute, if he determines "there is a sufficient basis to proceed". This is in line with article 32 which requires there to be a prima facie case for affirmation of the indictment. The prosecutor should proceed to indictment only if he or she believes in good faith that the indictment will be upheld by the court.

69. In addition to information specified in paragraph 1, the indictment should specify the alleged facts establishing the elements of the offence. It could also include a statement of the basis of jurisdiction. The standard for pre-indictment arrest ("sufficient grounds to believe") should be clarified. This sounds like the equivalent of probable cause (the standard used in the United States), but it is hard to determine whether this is the case.

70. The statute leaves the period of pre-indictment detention to the discretion of the court. Many judicial systems, provisional arrest articles in extradition treaties, and international human rights standards (for example, art. 9, para. 3 of the International Covenant on Civil and Political Rights) allow detention for a stated period of time, or for a "reasonable" period. If the prosecutor cannot seek a timely indictment, e.g. cannot establish a prima facie case, the appropriateness of a lengthy detention is open to question. Thus, article 31 might be revised to permit pre-indictment detention for a "reasonable" period.

Article 32 (The indictment)

71. We question whether the judges who affirm an indictment should hear the resulting case or appeal. The statute or rules should provide for the amendment of an indictment after it has been affirmed and for the sealing of indictments. Presumably determination of whether there is a prima facie case would be based on a review of the evidence submitted as part of the "supporting documentation". It is unclear from the language of the statute what facts must be established preliminarily, and how "prima facie" would be defined.

72. So that the court will have control over the tribunal's docket, we believe that the court should have discretion to decline to hear State-initiated cases which otherwise meet the requirements of the statute, based on appropriate criteria to be developed by the ILC. Such criteria might include the fact that a case would be better handled at the national level, or is not of sufficient gravity to warrant the attention of the international criminal court.

Article 33 (Notification of the indictment)

73. This article should be read together with article 58 (International cooperation and judicial assistance) and article 63 (Surrender of an accused person). The statute made a distinction between States parties which have accepted jurisdiction of the tribunal with respect to the crime(s) in question, which are ordered to make the necessary notification and/or arrest, and those which have not accepted jurisdiction of the tribunal for those crimes, which are merely "requested" to cooperate in this regard. We agree that, with respect to a State which does not accept the jurisdiction of the tribunal for the crime in question, the tribunal should be able to do no more than make a request for cooperation with respect to service of the indictment and detaining the accused. Similar limitations on States' obligations should be reflected in article 58.

Article 34 (Designation of persons to assist in prosecution)

74. In particular because the tribunal will function on an ad hoc basis, the prosecutor will have limited staff, and thus will need the ability to designate persons to assist in prosecutions. This is also desirable because the prosecutor will be likely to need assistance with issues related to local law. It is not clear from the text whether this article applies to pre-indictment investigations (which it should).

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

75. The statute or rules need to address issues related to the standards for determination of whether a person should be detained or released on bail prior to trial, duration of detention and right to review. Given the nature of the offences the court may hear, consideration of both the risk of flight and of danger would seem appropriate and would frequently result in a decision not to grant release. The statute or rules should also specify that these provisions will apply to pre-indictment proceedings. It is not clear that the place of detention should be limited to the host State; if the tribunal were to handle many cases at the same time, this limitation could create difficulties.

PART 4: THE TRIAL

Article 37 (Establishment of Chambers)

76. As noted with respect to article 7, the statute should be revised so that there is a clear distinction between trial and appellate judges. As for the question of composition of the chambers, we prefer the option of rotation on an annual or other periodic basis among the specially-selected trial judges (consistent with the need to preserve the composition of the panel of judges hearing a particular case). There should be no rotation between the trial and appellate benches.

77. Regarding paragraph 4, we recognize that disqualification of judges who are nationals of the complainant State or who are from a State of which an accused is a national is a difficult question. Although the removal of any taint of partiality is a valid objective, this prohibition can remove from the proceedings an expert on what is potentially relevant local law. Thus, we would delete paragraph 4.

Article 38 (Disputes as to jurisdiction)

78. An allegation of jurisdiction and the basis thereof should be included in the indictment. Pre-trial challenges to jurisdiction upon arrest or indictment should also be authorized.

79. Allowing any State party to challenge jurisdiction is not necessary and would only complicate the proceedings. However, we believe that any interested State should be able to make such a challenge at the beginning of the proceedings. Such States could be any State that asserts a right to consent under the statute, the State of nationality of the accused, the State of nationality of the victims, the State (or States) where the crime occurred and the State where the accused is present.

Article 39 (Duty of the Chamber)

80. The statute appropriately authorizes disclosure of evidence to the accused and exchange of information between the defence and prosecution before trial. This fosters a more efficient trial and improves the accused's ability to prepare a defence. However, the court should also be given the authority to issue protective orders and to take other measures to address legitimate concerns that may arise about the scope or nature of discovery. In addition, there will need to be procedures to protect disclosure of sensitive information provided by governments (see comments below with respect to articles 47 and 48).

81. The details concerning handling of exculpatory evidence, prior convictions, witness lists, defences, and related matters should be provided for in the rules of procedure and evidence.

82. Paragraph 2 should be read in conjunction with article 44 (Rights of the accused). This paragraph states that the chamber "may" order disclosure of evidence to the defence "having regard" to article 44, paragraph 3. This presumably means the court will in fact (i.e. is authorized to) ensure that exculpatory information is disclosed, not that it might do so.

Article 40 (Fair trial)

83. The reference to an "expeditious" trial is an important one, and might be emphasized in the statute or rules by including not only an explicit "speedy trial" requirement (which we find in article 44's provision for trial "without undue delay", based on article 14, paragraph 3 (*c*) of the International Covenant on Civil and Political Rights), but standards for the amount of time in which a trial should normally take place after the accused has been placed in custody.

84. This article permits closed sessions only in order to protect a witness, but broader issues are involved, such as the need to protect sensitive information provided by governments (see discussion below with respect to articles 47 and 48).

Article 41 (Principle of legality (Nullum crimen sine lege))

85. The principle of *nullum crimen sine lege* is a critical one. The problem posed is in the difficulty of its application. Meeting this standard produces particular problems for crimes under "general international law" which in many cases will lack precise definitions, and will thus pose a risk to fair and effective prosecutions. We should not want the tribunal to make ad hoc determinations of criminality based on controversial notions of what constitutes general or customary international law.

Article 43 (Presumption of innocence)

86. The statute fails to establish a standard of proof for a finding of guilt. The commentary suggests that beyond a reasonable doubt will not necessarily be the standard. Rather than leave the matter uncertain, the statute should provide a standard. The United States suggests that that standard be a stringent one such as "beyond a reasonable doubt" (however expressed).

Article 44 (Rights of the accused)

87. The United States delegation listened with interest to the debate within the Sixth Committee on the question of whether *in absentia* trials should be permitted under the statute. By "*in absentia*" we mean that the accused never appears before the Court. Although such *in absentia* trials are not permitted under the United States system, trials are permitted in some circumstances where the defendant appears initially but later absents himself voluntarily.

88. We appreciate that a number of legal systems permit *in absentia* trials of some sort, and that such trials may serve in some circumstances to vindicate the rights of victims. Nevertheless, on balance we conclude that *in absentia* trials are too controversial and should not be part of the proceedings. The most effective and fair prosecutions will usually be those where an effective defence is presented, and this will not normally be the case in an *in absentia* trial. It is important that the court be not tempted to seek the easier route of hearing cases *in absentia* when the custody of accused persons becomes difficult to obtain. Rather, every effort should be made to ensure that States comply with obligations to surrender fugitives.

89. Paragraph 1 (*h*) is problematic given that the absence of the accused will often be wilful, and thus deliberate. Thus, trials *in absentia* would be permitted in any case where the accused does not voluntarily offer himself to the tribunal. Given our reasons for opposing *in absentia* trials, we cannot support this provision.

90. The United States notes that the statute of the International Tribunal for the Former Yugoslavia incorporates the right of the accused to be tried in his or her presence, based on article 14, paragraph 3 (*d*) of the International Covenant on Civil and Political Rights. The statute or the rules of procedure should cover post-indictment "voluntary" absence, and waiver of the defendant's right to be present after a warning by the Court that his or her disruptive behaviour justifies exclusion from the proceedings.

91. Other than the question of *in absentia* trials, we support this article, which reflects the International Covenant on Civil and Political Rights. Article 44, paragraph (*g*), requires that an accused should not be compelled to testify or to confess guilt. Consideration should be given also to ensuring that the defendant's silence cannot be considered evidence of guilt.

92. The United States notes that the commentary to article 39, paragraph 2, speaks of a "right" to simultaneous interpretation. While simultaneous interpretation is always preferable, this should not be viewed as a right of absolute dimension, as there may be times when this is not possible.

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

93. A number of questions need to be addressed with respect to this article, including whether lesser/greater offences implicate double jeopardy. What if the conduct in question has subjected the person to prior prosecution, but not for the particular crimes that are now charged? Should there be a requirement that the prior trial has resulted in a determination on the merits?

94. The United States Government agrees that a "sham" prior prosecution should not deprive the tribunal of jurisdiction. We note that the ILC 1993 Working Group employed in this context the formulation used in the statute of the International Tribunal for the Former Yugoslavia. The experience of the Yugoslavia Tribunal will be relevant to determining whether this formulation is a good one in practice.

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

95. We believe that the rules will need to provide details of the "measures" that might be taken by the court. In particular, while it is important to protect victims, a countervailing consideration is that the accused must have a meaningful opportunity to have witnesses against him examined.

Article 47 (Powers of the Court)

Article 48 (Evidence)

96. The relationship of articles 47 and 48 to article 58 (International cooperation and judicial assistance) needs to be clarified. While States parties will be obligated to cooperate in carrying out the court's orders to provide witnesses and evidence, it is not clear to what degree national legal systems will be able to comply. A series of questions concerning the relationship of the international criminal court to States parties and their domestic courts will often arise because the tribunal, lacking personal jurisdiction of persons having requisite evidence, must rely on States parties to enforce the tribunal's orders. The tribunal in every case will be operating in the realm of international judicial assistance. Its statute and rules must reflect the flexibility essential for effective prosecutions in this area.

97. The reference to "complete record of the trial" (art. 47. para. 2) should be construed to mean either a verbatim transcript or a video/audiotape record, together with copies of documents, and not merely the judge's or clerk's notes of the proceedings.

98. In order to make the oath requirement (art. 48, para. 2) meaningful, the tribunal must have the authority to prosecute witnesses for perjury. Asking States to punish persons who commit perjury before the international criminal court appears to us likely to be an impractical solution.

99. Article 48, paragraph 5 establishes a rather low threshold for exclusion of evidence ("obtained directly or indirectly by illegal means which constitute a serious violation of human rights"). Paragraph 6 of the commentary, proposed by some ILC members, suggests rejecting evidence obtained through violations of international law as well. We believe that the focus must be on whether the evidence to be placed before the court is reliable. Persons may differ on what constitutes serious violations of human rights or international law; we believe the ILC should indicate in detail what situations will be likely to result in exclusion of evidence under these standards. Using that information, States will be able to determine whether they can support either reference.

100. The ILC should give further consideration to the question of how national security information will be handled or disclosed. In particular, it will be necessary to permit a State to decline at its discretion to produce information related to its security despite a request from the tribunal. Furthermore, procedures should be developed to ensure that a State may disclose sensitive information to the prosecutor without fear that such information will be disclosed to defendants and defence counsel without that State's consent. If such rules are sound, it will greatly assist in widening the scope for cooperation between States parties and the tribunal. If there is uncertainty about how sensitive information may be used or disclosed, governments may be reluctant to provide certain types of valuable information to the tribunal.

101. The ILC will no doubt wish to consider national security implications as they affect a number of other articles related to rights of and measures to protect the accused (e.g. arts. 44 and 46), court orders on disclosure of evidence (art. 39), and the requirement of a fair trial (art. 40), as well as the rights and protection of the accused (e.g. arts. 44 and 46).

Article 49 (Hearings)

102. A host of issues, such as an opportunity for the court to rule on the sufficiency of the evidence presented by the prosecution at the close of its case, and handling of cross-examination and re-direct, are not dealt with here. Paragraph 2 of the commentary states that the rules will contain additional procedures. Consideration will need to be given by the ILC as to whether some of these issues should be reflected in the statute; if not they would unquestionably have to be reflected in the rules.

Article 50 (Quorum and majority for decisions)

103. Although making decisions by majority vote is sensible, in principle we would want the full bench of five judges to be present during the entire trial, particularly considering that the judges are finders of fact as well as of law. We propose that this provision be revised accordingly.

Article 51 (Judgement)

104. The statute should permit the judges of the court (both the trial and appellate benches) to issue dissenting and concurring opinions. The ability of the dissenters to challenge the majority's reasoning will help ensure that majority decisions are well grounded and publicly justified.

Article 52 (Sentencing)

Articles 52 (Penalties)

105. The United Sates of America believes that the rules of procedure will need to provide further details on issues related to sentencing. We also urge consideration of the adoption of uniform penalty provisions, so that the court will not need to search for and justify references to national law. Such provisions will assist the court in ensuring that persons committing similar crimes receive similar sentences.

106. Article 53, as drafted, appears to permit the tribunal to exercise jurisdiction over and attach individual and even government property located within States. This is likely to require subsequent enforcement actions in national courts. Such litigation can be complex. While we strongly support remedies of forfeiture and restoration of property to victims, this has proved one of the more difficult areas in international assistance. Thus, the statute may need to be revised to reflect the fact that court orders involving execution in States with respect to property may be subject to review by national courts under national law.

PART 5: APPEAL AND REVIEW

Article 55 (Appeal against judgement or sentence)

107. While the possibility for a prosecutor's appealing an acquittal is limited under United States law, we recognize that it is permitted in other countries. At the very least, we do not believe it is appropriate for the prosecution to be able to seek a reversal based solely on new evidence at the appellate stage.

Article 56 (Proceedings on appeal)

108. As noted above (para. 76), we propose that the court include separate trial and appellate chambers. (See also comments above on dissenting and concurring opinions with respect to article 51.)

109. There needs to be more specificity concerning the appeal process: can the court hear newly discovered evidence? Will the appeal be done primarily on the briefing or will there be oral argument? Can the court solicit views of States parties? Under what circumstances might the appellate chamber remand the case for further proceedings?

Article 57 (Revision)

110. The statute leaves open whether the prosecutor can seek revision. The United States has serious reservations about allowing the prosecutor open-ended authority to seek reversal of an acquittal particularly when the appellate phase has concluded. The ILC should clarify under what circumstances it would be appropriate for the prosecutor to seek revision.

111. It is assumed that the reference to "judgement of the Court" pertains to the finding of guilt or innocence. It would be generally inappropriate to utilize this remedy to seek additional review of a sentence. It is unclear whether discovery of a new fact clearly indicating that the court lacked jurisdiction would be encompassed in this provision—the United States thinks it should be.

PART 6: INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 58 (International cooperation and judicial assistance)

112. Paragraph 2 requires "States parties which have accepted the jurisdiction of the Court with respect to a particular crime to respond to international criminal court 'orders' or 'requests' for assistance". This obligation to cooperate extends to producing evidence and to arrest, detention and surrender of accused persons. However, there is no limitation on that obligation reflecting issues such as ongoing criminal proceedings, domestic constitutional requirements, jeopardy to the safety of victims or witnesses, and adequate articulation of the need for evidence. As a practical as well as a legal matter, it is not possible for States to cooperate with the tribunal smoothly (and in some respects at all) unless these types of matters are clarified. If they are not, States will take it upon themselves to determine the extent of their obligation to cooperate, leading to what will be likely to be inconsistent results.

113. As a general matter, States must not be required to cooperate in legal assistance matters if they do not accept the court's jurisdiction over the offence giving rise to the need for cooperation. Although States parties would expect to cooperate in most cases, establishing a legal obligation is inconsistent with the consensual nature of the court proposal.

Article 60 (Consultation)

114. The obligation to consult under this article is ambiguous. It is not clear who is to consult and for what purposes. It is not clear why formal consultations

generally among States parties would be necessary or useful prior to the review conference.

Article 61 (Communications and contents of documentation)

115. This article should provide that States parties will determine whom the competent national authority would be for purposes of communications, and would notify the registry.

Article 62 (Provisional measures)

116. Given the considerable legal complications of arresting individuals and seizing property, this provision must be expanded to cover at the very least issues addressed in standard extradition treaties. For example, the provision needs to spell out the form and content of requests. It should provide that the provisional arrest is for the purpose of awaiting the submission to the State with custody of a complete request for surrender (with accompanying documentation), and that if such complete request is not received in either a set period of time or a "reasonable" time, the individual will be released.

117. One difficulty with the statute is that the various articles dealing with arrest do not clearly interrelate. Article 31 provides for "pre-indictment" arrest, although this provision discusses the arrest as part of the procedural requirements necessary for commencing a case, rather than as a stand-alone element of an "extradition" process; article 62 is ambiguous in its relation to article 31 and requires further detail, and article 63 concerns the obligation to surrender rather than the functional steps needed to bring this about.

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

118. The precise interplay between article 63 and article 33 on notification of the indictment needs to be clarified. Moreover, this article should specify the documents that would be provided with the request for surrender. The lack of a provision for transmission of evidence or a summary statement of the evidence, combined with the need for the custodial State to take "immediate steps" suggests that the 1993 Working Group did not contemplate the need for judicial proceedings in the requested State. The United States and, we suspect, other countries as well, cannot surrender persons to another government or entity without judicial proceedings. Such proceedings have a constitutional dimension under United States law, and thus we could only participate in a criminal court structure that took this need into account.

119. As noted above with respect to article 22, deference should be given to national prosecutions, including adherence to existing extradition obligations in aid of national prosecutions. Thus, the obligation to surrender as set forth in article 63 should be revised to reflect that basic approach.

120. Although the statute permits delayed surrender while an accused is being prosecuted or serving a sentence, it might also include a clause permitting temporary surrender. It is sometimes useful, because of availability and freshness of evidence and recollections of witnesses, and where the accused is serving a long sentence, to surrender the accused temporarily to the tribunal for trial. The United States often includes such a clause in its bilateral extradition treaties.

121. Overall, the statute's approach to surrender obligations and their interplay with existing extradition treaties requires further review and analysis.

Article 64 (Rule of speciality)

122. Paragraph 2 provides that evidence tendered shall not be used as evidence for any purpose other than that for which it was tendered. Rather than make this an absolute requirement, with the burden on the court to request a waiver from the affected State, it is preferable for the State providing the information to request this treatment with respect to evidence it believes warrants special procedures.

123. Also, this paragraph could be interpreted to mean that the Prosecutor could not reveal even exculpatory evidence relevant to the defence in one case, if the relevant information had been received in connection with another case. Such a limitation on use of evidence could seriously affect the rights of an accused.

Part 7: Enforcement of sentences

Article 65 (Recognition of judgements)

124. The United States assumes that the purpose of this provision is primarily to provide for giving effect to judgements imposing fines or ordering return or forfeiture of property. Given the jurisdictional scheme envisioned for the court, the United States believes that obligatory recognition of court judgements should be limited to States which accept jurisdiction over the offence in question. This is because it would not be appropriate for a State to be forced to execute under its domestic law an order based on an offence which is not recognized by that State.

Article 66 (Enforcement of sentences)

125. The rules should set guidelines for the "supervision" envisioned under paragraph 4. As a general matter, once the court is satisfied that a particular State's correctional system is satisfactory, the details of the incarceration should normally be left to that State. The court would be expected to monitor whether basic norms for incarceration under relevant standards of international law are met.

Article 67 (Pardon, parole and commutation of sentences)

126. There appears to be some confusion in this article as to whether the court should rely on national law to decide issues related to pardon, parole and commutation.

There is a potential inequity in allowing the national law of the State of incarceration to be decisive on these questions, as persons who have committed the same grave crime may be subject to very different terms of actual imprisonment regardless of the fact that each received the same sentence. At the same time, it is convenient to use the national law of the State of imprisonment as a guide.

127. The rules of procedure provide basic guidelines on these issues, and such rules along with the law of the State of imprisonment should be considered by the court. Paragraph 4, which allows too much discretion to the State of imprisonment, should be deleted.

Yugoslavia

[*Original: English*]
[*10 March 1994*]

General observations

1. The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) wishes to make some general observations on the very question of the need for establishing such a court and to draw the attention of the Secretary-General to the position it has already taken on this matter.

2. In his letter of 19 May 1993 (A/48/170-S/25801), the Minister of Foreign Affairs for the Federal Republic of Yugoslavia recognized the need for establishing a permanent international criminal court, while, at the same time, he expressed his disagreement with the establishment of an hoc international tribunal to prosecute only persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia. The Federal Republic of Yugoslavia considers that it is in the interest of all members of the international community to enlarge the existing system of international legislation by such a court, which would, on the one hand, contribute to the settlement of disputes and, on the other, enable the international community to use successfully all measures of prevention and suppression of any threatening act.

Observations regarding specific articles

Articles 1 to 4

3. Out of three possible ways to establish the court—by the revision of the Charter of the United Nations in the sense of establishing a new organ, by a General Assembly resolution or by a multilateral convention—the best solution seems to be that the court be established as an organ of the United Nations by an amendment to the Charter. In doing so, use should be made of the possible revision of the Charter to allow the expected extension of the Security Council by the admission of new permanent members; an international criminal court could also be established by an amendment.

4. The principal disadvantage of having the court established by a General Assembly resolution is in that, according to Article 22 of the Charter, it would be only a subsidiary organ of the United Nations and subordinated to the General Assembly, contrary to the principle of the independence of the judiciary which it would be highly inappropriate to violate in the case of such an important court.

5. Apparently, the only possible solution at this moment seems to be to establish the court by a multilateral convention whereby all countries would be enabled to accede to its statute and recognize its competence for certain criminal acts, regardless of whether they were United Nations Member States or not. However, even in the case of the court's being established in this way, it should be linked with the United Nations as much as possible either through a cooperation agreement or a provision that the General Assembly should nominate its judges and the prosecutor.

6. As to the proposal in article 4 that the court "shall sit when required to consider a case submitted to it", the Yugoslav Government would like to point out that this court should be a permanent organ whose permanence should not necessarily be reflected in holding permanent sessions. It would suffice to establish the court, with elected judges, strictly determined competence and organized judicial administration.

Articles 5 to 11

7. As to the structure of the court, there is no doubt that it has to have the proposed structure; however, the judicial and prosecutorial organs have to be strictly separated. As to the procuracy, the position of the Yugoslav Government will be presented in its comments on article 13.

8. The election of judges should be left to the States parties to the convention on the establishment of the court and, in the case where the court is established by the Charter of the United Nations, the General Assembly of the United Nations should elect the judges. Either solution would heighten the independence and impartiality of judges and provide a firm link between the court and the States which have established it, i.e. the United Nations.

9. The court should also have well organized administrative organs since it will not be in permanent session but only when a case is submitted to it. The status and organization of the administrative organs should be regulated by the rules of procedure of the court.

10. The principle of the disqualification of judges is of great importance. Therefore, the reason for disqualification should be presented both by the disqualified judge and the accused. The number of judges whose disqualification is requested should not be limited, and, under paragraphs 1 and 2 of Article 11, decisions should be made in the same manner and by the same quorum.

Article 13

11. The functions of the procuracy should be separated from those of the court. Since the prosecutor has to bear the principal burden in the conduct of investigations and prosecutions, his status must be clearly determined and

separated from the status of other parties which might appear before the court and the court itself. Accordingly, the election and the functions of the procuracy should be regulated in greater detail.

12. The prosecutor could also be elected by the General Assembly from among candidates from various countries who would apply under the same conditions as judges.

13. Furthermore, in addition to the request of a State concerned, the prosecutor could institute proceedings himself or at the initiative of the Security Council if there is a well-founded suspicion that a war crime has been committed.

Articles 15 to 18

14. The loss of office should be regulated in the same manner as the Statute of the International Court of Justice. The Yugoslav Government considers it unacceptable that the loss of office is decided by the court, i.e. two thirds of the judges. It is of the opinion that this brings into question the independence the procuracy must have.

Article 19

15. The Yugoslav Government considers that this article (or a number of articles) of the draft statute should provide for the fundamental rules and general principles relating to the procedure and evidence.

Articles 22 to 26

16. The Yugoslav Government is in favour of the court's having *ratione personae* jurisdiction to prosecute only individuals.

17. The jurisdiction of the court *ratione materiae* in the cases under article 22 of the draft statute should be obligatory for all States parties to the statute, without providing for the possibility that the matter of the court's jurisdiction be left to the will of States and possible reservations.

18. If the proposal contained in article 23 is accepted, the purpose and functions of the international criminal court will be challenged. The Yugoslav Government considers that, in order to function effectively, the international criminal court should be vested with the authority to establish criminal responsibility and enforce sanctions in a generally accepted minimum of cases, always bearing in mind the sovereignty of States. The list of crimes in article 22 and possible supplements (e.g. as proposed in the case of mercenaries) is the optimum, in view of the structure and gravity of crimes and their consequences for which consensus of States should be obtained with respect to the obligatory jurisdiction of this court.

19. In this context, the court's jurisdiction for the crimes under Article 22 should not be made contingent on the consent of the State of the accused or the State in which the crime was committed, if these States are signatory to the statute.

20. As to the cases under article 26 of the draft, the Yugoslav Government is of the opinion that in that case the court could have a subsidiary jurisdiction, i.e. that its jurisdiction should depend on the consent of the States concerned.

21. As to the possibility that the Security Council may, on the basis of its authority, submit a case to the court, the Yugoslav Government considers that the Security Council could not, in such cases, act as a prosecutor, i.e. identify certain persons as the accused. Within its competences to maintain international peace and security, the Security Council should be enabled to draw the attention of the court/the prosecutor to the cases of aggression, while the prosecutor will conduct an investigation and prosecution.

Article 29

22. Since the role of the Security Council in the commencement of prosecution before the court must differ from the role of the prosecutor, a difference should be made between the requests submitted by States and the initial act of the Security Council. While States' requests should contain evident facts necessary for conducting criminal proceedings (i.e. identification of the accused, valid evidence, description of crimes, etc.), the initial act of the Security Council should not be corroborated in such a manner but should point to an aggression, i.e. provide an indication for the prosecutor to conduct investigations when crimes under article 22 of the draft are in question for which, in the opinion of the Yugoslav Government, the court should have the obligatory jurisdiction.

Articles 30 to 32

23. The Yugoslav Government considers that revision of a case should be provided for if the prosecutor decides not to proceed, i.e. that this rule should not be transferred to the bureau of the court.

24. Arrest and the issuance of a warrant prior to an indictment should be ordered only by court chambers, not by the bureau. It would also be justified to determine the length of detention.

25. The indictment prepared by the prosecutor could be submitted for discussion only to a court chamber which should determine whether or not a *prima facie* case exists.

26. All this indicates that, prior to an indictment by the court, there should exist a court chamber with the jurisdiction for all these acts.

Articles 37 and 38

27. Chambers of the court should be established on the basis of the rules of procedure to be adopted by the court, not only on the basis of the members of the bureau.

28. Challenges to the jurisdiction in every concrete case can be made only by the States concerned in a dispute, not by any State party to the statute, proceeding from the principle of efficient proceedings. The accused should also be enabled to challenge the court's jurisdiction prior to the indictment by the court or the trial itself which should be

the subject of the decision made by the court or a court chamber.

Article 44

29. The Yugoslav Government considers that paragraph 1, article 44, is contrary to paragraph 3 (*d*), article 14, of the International Covenant on Civil and Political Rights providing for the right of the accused to be present at the trial, which is one of the guarantees of the right to a fair trial. The possibility for the international criminal court to try *in absentia*, contrary to one of the basic international law conventions, would question the authority of the court, while the impossibility of enforcing the penalty would question its efficiency. The General Assembly and the Security Council are already in the position to establish a kind of moral sanction on the basis of their powers, so that there is no need for a court to do this.

Article 45

30. The Yugoslav Government considers unacceptable the possibility that the court may review a decision of the national court under article 45, paragraph 2 (*b*). If there are grounds for suspicion regarding the impartiality of the national court, the second-instance proceedings could be conducted before the international criminal court which would then act as an appellate court.

Article 47

31. Evidence collected in contravention of the relevant provisions of international law should not be taken into account nor should the court assess their validity.

Articles 55 to 57

32. The right to appeal against a decision of the court chamber should be provided both to the convicted and to the prosecutor. This right should be time-limited for both parties. However, this right of the prosecutor could be limited (but not completely excluded) in the case of acquittal.

33. The Yugoslav Government considers that the bureau, when discussing articles 30 to 32 of the draft, should not constitute the Appeals Chamber. This matter should be regulated in advance.

34. The most acceptable solution would be that the appeal is decided on by all the judges in the plenary, except those who made the first-instance decision.

35. In view of the provision of article 14, paragraph 7, of the International Covenant on Civil and Political Rights, the prosecutor should not be allowed to request the revision of judgement to the detriment of the convicted, i.e. in the case of acquittal (as provided in article 57).

Article 63

36. An order for the arrest and surrender of the accused can be issued only by the court chamber.

37. Extradition of persons accused of the crimes under article 22 of the draft, provided the jurisdiction of the court is compulsory in this case also, should be obligatory as well.

38. In other cases, extradition should depend on whether a State concerned accepted the jurisdiction of the court. In that case, the solution in article 63, paragraph 3 (*b*) is acceptable.

II. Observations received from a non-member State

Switzerland

[*Original: French*]
[*8 February 1994*]

GENERAL COMMENTS

1. The International Law Commission, its Special Rapporteur, Mr. Doudou Thiam, and the Working Group are to be congratulated for having adapted so rapidly to the constantly changing requirements of the international situation and preparing, in such a short period of time, the draft statute for an international criminal court, on which we wish to offer the following comments. It is true that the task of the Working Group and of the Commission has been facilitated to some extent by the excellent report of the Secretary-General of the United Nations concerning the establishment of an ad hoc international tribunal for the prosecution of persons alleged to be responsible for serious violations of human rights in the territory of the Former Yugoslavia since 1991,[1] (referred to below as the International Tribunal for the Former Yugoslavia).

2. It is clear, none the less, that the establishment of a permanent international criminal jurisdiction poses problems that are even more difficult than the creation of a tribunal whose jurisdiction is limited to crimes committed in the former Yugoslavia. In the latter case, the statute of the tribunal became immediately applicable to all States Members of the United Nations on the basis of Article 25

[1] Report drawn up pursuant to paragraph 2 of Security Council resolution 808 (1993) and submitted on 3 May 1993 (S/25704 and Corr.1 and Add.1).

of the Charter of the United Nations, since it was incorporated into resolution 827 (1993) adopted by the Security Council under Chapter VII of the Charter.

3. It must be remembered that this exceptional approach cannot be followed in the establishment of a permanent international court, and we shall therefore be obliged to use the treaty approach. Only those States which so desire will become parties to the proposed convention. The fear is, however, that those countries whose nationals have little or nothing to be reproached for will be the ones to accede to the treaty while other States will refrain from doing so, thereby depriving the new instrument of some of its usefulness. This is merely an observation and not a criticism of the International Law Commission. Indeed, it is difficult to see what approach other than the treaty approach could be adopted.

4. The future international criminal court will therefore be a jurisdiction in the service of the States parties to the convention establishing it (art. 4) rather than in the service of all States Members of the United Nations. This situation may be distinguished from that of the International Court of Justice, the "principal judicial organ of the United Nations" (Art. 92 of the Charter), which is governed by a Statute to which all States automatically become parties upon their admission to membership of the United Nations (Art. 93, para. 1, of the Charter). This automatic quality is lacking in the proposed new criminal court, which cannot therefore become another of the "judicial organs" of the United Nations, as contemplated in the text bracketed in article 2 of the draft and as suggested by a number of representatives who spoke on the matter in the Sixth Committee of the General Assembly.[2] The Swiss Government is of the view that efforts should be aimed at another approach—that of the independence of the court, which should, nevertheless, be linked to the United Nations through a cooperation agreement.

Comments on specific articles

Part 1 (arts. 2 to 21)

5. Part 1 of the Commission's draft deals with the organization of the proposed international jurisdiction. The new tribunal would comprise the court, consisting of 18 members of different nationalities elected for a single term of 12 years, the procuracy, and the registry with its appropriate staff.

6. These three organs, including the procuracy, would appear to be quite essential. Indeed, it is difficult to see how States that file complaints could themselves undertake the prosecution. The general approval thus given by the Swiss Government to part 1 of the draft articles in no way implies that it agrees with all the institutional provisions of the draft. It finds the number of judges, 18, excessive (art. 5)—even the International Court of Justice must make do with 15 members—and would prefer the example of article 12 of the statute of the International Tribunal for the Former Yugoslavia, which provides for 11 judges (divided into two Trial Chambers with three members each, and an Appeals Chamber consisting of five judges). The review clause contained in draft article 21 would further permit the number of members of the court to be increased in accordance with the workload. The Swiss Government also finds excessive the length of the non-renewable terms of the judges, which is set at 12 years (art. 7, para. 6), and proposes that it should be reduced to nine years.

Part 2 (arts. 22 to 28)

7. Part 2 of the draft statute, entitled "Jurisdiction and applicable law", lists those crimes over which the court may have jurisdiction and the limits of such jurisdiction. It draws a distinction between what are defined as international crimes by the treaties that provide for the suppression of such crimes (art. 22) and the "undesirable conduct" that is punishable under customary international law or treaty law. Even for those crimes falling into the first category, the court does not have absolute jurisdiction; the State in question, which is identified with the aid of the criteria set out in article 24, must have accepted its jurisdiction.

8. Article 23 offers three alternative modalities of such acceptance. The Swiss Government prefers alternative B: the presumption of acceptance of the court's jurisdiction for the international crimes listed in article 22; and the need for a unilateral declaration of acceptance for the "conduct" referred to in article 26.

Part 3 (arts. 29 to 35)

9. Part 3 of the draft concerns mainly the indictment and commencement of prosecution. Possible complainants who may refer a case to the prosecutor include a State (whether or not it is a party to the proposed convention) which has jurisdiction with respect to the crime in question and which has accepted the court's jurisdiction over this type of crime, and the Security Council of the United Nations (art. 25) in respect of those crimes referred to in article 22 and the "conduct" that is punishable under general international law (art. 26, para. 2 (*a*)).

10. The precise scope of draft article 25 is unclear: this provision should either give rise to the automatic jurisdiction of the court in respect of cases brought before it by the Security Council, or retain the requirement, laid down in articles 23 and 26, for acceptance of the court's jurisdiction by the State concerned. It is essential for the draft statute or the commentaries thereto to dispel all doubts in that regard. The Swiss Government would have serious reservations about subscribing to the former interpretation if the Commission decided to retain it. In other words, it believes that the requirement of the consent of the State in question should also exist for cases that are submitted to the court by the Security Council.

11. Again with respect to the commencement of prosecution, it is difficult to understand why the Commission should refuse to authorize the procuracy of the tribunal to initiate an investigation on the basis of information received, even if there is the possibility that the investigation might conclude that the court has no jurisdiction to

[2] *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee*, 17th to 28th meetings.

hear the case. The solution proposed in the draft articles differs from that adopted in article 18 of the statute of the International Tribunal for the Former Yugoslavia, which is preferred by the Swiss Government.

12. Still in part 3 of the draft articles, we also consider that the commentary to draft article 31 confers virtually unlimited discretion on the court in the matter of pre-trial detention. If it is impossible to limit the duration of detention, the Government of Switzerland believes that, at the very least, a mechanism should be established to permit the detainee to request his release on bail.

Part 4 (arts. 36 to 54)

13. Part 4 of the draft statute deals with the trial. One of the first questions to be raised in this regard is the invitation addressed by the Commission to States in paragraph 6 (*b*) of the commentary to article 38 to reply to the question of whether, as in the case of States (art. 38, para. 3), accused individuals should have the option to challenge the court's jurisdiction. Given that the objective of the draft statute is precisely to establish the international criminal responsibility of *individuals*, in the Swiss Government's view there can be no reason whatsoever to deny them this option.

14. Article 53 deals with applicable penalties. We note that the scale of penalties provided in this article is extremely flexible, ranging from imprisonment for a non-specified minimum term to life imprisonment, and that it authorizes fines of "any amount". It is true that in determining penalties, the court "*may* have regard to" (art. 53, para. 2) the criminal law of various States and aggravating or mitigating factors (article 54). Nevertheless, these rules seem to be too vague to do justice to the principle of *nulla poena sine lege*. Their clarity would be enhanced if article 53 provided that the trial chamber *must* (rather than "may") have regard to the penalties provided for in the national laws of the States in question.

15. Article 44, paragraph 1 (*h*), of the draft excludes the possibility of trials *in absentia*. According to the commentary to this provision, this possibility was excluded largely because of article 14 of the International Covenant on Civil and Political Rights, which requires the presence of the accused at the trial. The Commission has thus followed the precedent established for the International Tribunal for the Former Yugoslavia,[3] which has been denied the option of conducting trials *in absentia* for the same reason. This reason, however, does not appear to be decisive, at least in so far as a procedure would permit the convicted person to appeal on the grounds that he was tried *in absentia*. The key question is whether the power to try and to convict *in absentia* does not carry the risk of transforming the court into a totally ineffectual body. The Government of Switzerland believes that this is a very real danger and that article 44, paragraph 1 (*h*) should therefore be replaced by a provision which unconditionally prohibits trials *in absentia*.

[3] S/25704 (footnote 1 above), para. 101.

Part 5 (arts. 55 to 57)

16. Part 5 of the draft, entitled "Appeal and review", provides a recourse procedure for convicted individuals whose appeals are based on material errors of fact or of law, or on a manifest disproportion between the crime and the sentence (art. 55). While this provision should be maintained, it nevertheless raises a further problem.

17. International human rights instruments (International Covenant on Civil and Political Rights, art. 9, para. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, para. 4; American Convention on Human Rights, art. 7, para. 6) require national legislations to provide for recourse against arbitrary arrests. The draft articles should therefore authorize the introduction of an internal recourse procedure against arbitrary arrest when the aim is to bring a suspect before the court. The grounds on which such recourse may be based should, however, be strictly limited and largely procedural. Moreover, the time limits for the institution of recourse proceedings should be as short as possible.

Part 6 (arts. 58 to 64)

18. Lastly, part 6 of the draft lists important obligations in criminal matters for States parties to the statute of the future court, particularly in the following five areas: the location of persons; the taking of testimony; the production of evidence; the arrest and surrender of the accused; and the application of interim measures (arts. 58 to 63). Indeed, the cooperation thus contemplated between the national administrative and judicial authorities on the one hand and the court on the other seems to be essential in order to ensure the effective functioning of the court. In this connection, however, the draft fails to pronounce on the surrender of nationals (see article 63); this silence no doubt means that such surrender may be demanded by the court. However, certain countries refuse to extradite their nationals. Would it therefore not be preferable to determine the fate of the nationals of the State concerned by applying to it the principle of *aut dedere aut judicare*?

Conclusions

19. The preceding comments, which are based partly on the experience gained from the establishment of the International Tribunal for the Former Yugoslavia and partly on the problems that are currently being encountered in implementing its statute through national legal systems, are far from being exhaustive. They should not cause us to lose sight, however, of the fact that this thoughtful and valuable draft is also very timely. It therefore has the support of the Swiss Government. It is now important not to lose momentum and to take advantage of the keen interest which both States and the general public have shown in establishing an international criminal jurisdiction of a permanent nature.

20. We must act quickly and with determination. The Government of Switzerland sincerely hopes that the Commission will conclude its work on this topic during the course of its forty-sixth session (1994).