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Draft Code of Crimes against the Peace and Security of Mankind: Report of the Working Group on the question of an international criminal jurisdiction - reproduced in Yearbook…1992, vol. II (Part Two), annex

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:-

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Annex

REPORT OF THE WORKING GROUP ON THE QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION

A. Summary and recommendations

1. General Assembly resolution 46/54 invited the Commission

> ... to consider further and analyse the issues raised in its report on the work of its forty-second session[1] concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter ...

2. The Commission discussed these issues at its forty-fourth session in the framework of its discussions on the draft Code of Crimes against the Peace and Security of Mankind, and on the basis of the tenth report of the Special Rapporteur, Mr. Doudou Thiam.[2] It then established a Working Group on the question of an international criminal jurisdiction, chaired by Mr. Abdul G. Koroma.[3] The terms of reference of the Working Group were as follows:

> To consider further and analyse the main issues raised in the Commission's report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism. In so doing, the Working Group will take into account the issues raised by the Special Rapporteur in part two of his ninth report and in his tenth report as well as the discussions held thereon at the Commission's previous and current sessions. In the light of its consideration and analysis of the various issues within its terms of reference, the Working Group will also draft concrete recommendations on the various issues which it will consider and analyse within the framework of its terms of reference.

3. The Working Group held 16 meetings, at which draft papers prepared by some members of the Group were extensively discussed and revised. The Working Group proceeded throughout on the basis that it had to draft concrete recommendations, and thereby to assist the Commission in discharging the mandate of the General Assembly referred to in paragraph 1.

4. Since the Commission now seeks to go beyond the analysis and exploration of possible options and to adopt concrete recommendations, it was necessary for the Working Group to agree on the basic approach to be adopted. The Working Group agreed on a number of propositions which form the basis of its report to the Commission. They are as follows:

(*a*) An international criminal court should be established by a statute in the form of a treaty agreed to by States parties;

(*b*) In the first phase of its operations, at least, a court should exercise jurisdiction only over private persons as distinct from States;[4]

(*c*) The court's jurisdiction should be limited to crimes of an international character defined in specified international treaties in force. These should include the crimes defined in the draft Code of Crimes against the Peace and Security of Mankind (upon its adoption and entry into force), but should not be limited to the Code. It should be possible for a State to become a party to the statute without thereby becoming a party to the Code;[5]

(*d*) The court would be essentially a facility for States parties to its statute (and also, on defined terms, other States). In the first phase of its operations, at least, it should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the statute is obliged to accept *ipso facto* and without further agreement;

(*e*) In the first phase of its operations, at least, the court would not be a standing full-time body. On the other hand, its constituent instrument should not be a mere draft or proposal, which would have to be agreed on before the institution could operate. Thus the statute should establish a legal mechanism which could be available to be called into operation as and when required;

(*f*) Other mechanisms were suggested and considered, as reflected in part B below;

(*g*) Whatever the precise structure of the court or other mechanism, it must guarantee due process, independence and impartiality in its procedures.

5. These propositions form the basis for the report, the full text of which is to be found in part B below. The report contains concrete recommendations on the various

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[1] *Yearbook ... 1990*, vol. II (Part Two), paras. 93-157.

[2] For a summary of the discussions, see chap. II, paras. 25-97 above.

[3] For full membership, see chap. I, para. 6 above.

[4] This is consistent with the approach taken by the Commission in relation to the draft Code of Crimes against the Peace and Security of Mankind, hereinafter the "draft Code". See the report of the Commission on the work of its thirty-sixth session, *Yearbook ... 1984*, vol. II (Part Two), see also article 3 of the draft Code as provisionally adopted on first reading by the Commission in 1991, *Yearbook ... 1991*, vol. II (Part Two), p. 94.

[5] This leaves open the question whether any of the offences defined in the Code should fall exclusively within the competence of an international criminal jurisdiction. Some members of the Working Group, at least, believe that the Code is inconceivable without an international criminal jurisdiction, and that it would be desirable, if not essential, to provide that a State party to the Code would thereby accept *ipso facto* the statute of a court.

issues which the Working Group has considered and analysed within the framework of its terms of reference and in some cases more detailed discussion of various options. The Working Group believes that a structure for an international criminal court, along the lines suggested in the attached report, could provide a workable system. It believes that it could be an appropriate basis for the initial establishment of an international criminal court, if this is judged to be opportune. In that sense, it reiterates the Commission's earlier conclusions (in 1950 and again in 1990) that such a body is feasible.

6. Certain members of the Working Group continue to have doubts whether even a comparatively modest and flexible system of the kind suggested would serve a useful purpose. In their view, the system of prosecution and trial of the accused before national courts is the only realistic method of administration of criminal justice. One member, in particular, believes that it is sufficient at this stage for the international trial mechanism as envisaged to be described in a draft text for use by particular States when required; at this point it could be established by bilateral treaty or even by resolution of a competent international organization.

7. Other members of the Working Group would have preferred to go even further, favouring a more extensive system, including a court with compulsory and exclusive jurisdiction over certain offences. However, they are prepared to accept the proposal outlined in this report, so that the proposed mechanism can at least be given the chance to establish itself and to prove its utility, after which the extension of its jurisdiction and powers may prove easier to achieve and be more acceptable to States.

8. Whatever differences remain in this regard, there is no disagreement on one essential point. The Working Group believes that the phase of preliminary consideration and analysis called for by the General Assembly in 1989 has been completed. It is now for the General Assembly and for Member States to decide whether the Commission should proceed to the detailed work that will be required in drawing up a statute and associated rules of procedure for an international criminal jurisdiction, on the general basis outlined here, or on some other basis.

9. The Working Group accordingly recommends that the Commission should:

(*a*) Accept the attached report in discharge of the mandate of the Working Group;

(*b*) Endorse the basic propositions on which the Working Group has proceeded, as enumerated in paragraph 4 above, and the broad approach to the question of the establishment of an international criminal court or other international criminal trial mechanism as set out in the report;

(*c*) Report to the General Assembly:

(i) that, with its consideration of the ninth and tenth reports of the Special Rapporteur on the topic of the draft Code of Crimes against the Peace and Security of Mankind and of the report of the Working Group (which would be an annex to the Commission's report), it has completed the task of analysing "the question of establishing an international criminal court or other international criminal trial mechanism" entrusted to it by the General Assembly in 1989;[6]

(ii) that its detailed study confirms the view expressed earlier by the Commission that a structure along the lines of that suggested in the Working Group's report could provide a workable system;

(iii) that further work on the issue requires a renewed mandate from the Assembly, and rather than calling for still further general or exploratory studies, needs to take the form of a detailed project to draft a statute; and

(iv) that it is now a matter for the Assembly to decide whether the Commission should undertake the project for an international criminal jurisdiction, and on what basis.

B. *In extenso* report

1. Introduction

10. The General Assembly, in resolution 46/54:

Taking note with appreciation of the section of the report of the International Law Commission concerning the question of the possible establishment of an international criminal jurisdiction, and noting the debate in the Sixth Committee pertaining to this topic,

1. ...

2. ...

3. *Invite[d]* the International Law Commission, within the framework of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter ...

11. The General Assembly's invitation has a considerable history behind it. This goes back to 1948, when the Assembly invited the Commission

... to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international convention.[7]

In 1950 the Commission concluded, after its initial study of the question, that the establishment of an international criminal court was both "desirable" and "possible".[8] Thereafter the issue was dealt with by several ad hoc committees, which produced and revised a draft statute for an international criminal court.[9] Consideration of a

[6] See footnote 10 below.

[7] See General Assembly resolution 260 B (III). The history of the Commission's consideration of the matter and of previous United Nations efforts in the field is fully described in *Yearbook ... 1990*, vol. II (Part Two), paras. 96-100 and 103-115 respectively.

[8] See *Yearbook ... 1950*, vol. II, pp. 378-379, document A/1316, paras. 128-145; see also *Yearbook ... 1949*, p. 283, paras. 32-34.

[9] See report of the Committee on International Criminal Jurisdiction, *Official Records of the General Assembly, Seventh Session, Supplement No. 11* (A/2136) and "Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953", ibid., *Ninth Session, Supplement No. 12* (A/2645), annex.

draft statute was, however, deferred until some conclusion could be reached on the pending issues of the Definition of Aggression and the draft Code of Offences against the Peace and Security of Mankind.

12. In 1989, in the changing international climate, the General Assembly again specifically requested the Commission

> ... when considering ... the item entitled "Draft Code of Crimes against the Peace and Security of Mankind", to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code of crimes, including persons engaged in illicit drug trafficking in narcotic drugs across national frontiers, ...[10]

The specific reference to international drug trafficking was the result of a proposal from Trinidad and Tobago, which had called for an international court or other mechanism to assist States in dealing, *inter alia*, with that problem.[11]

13. In response to the General Assembly's request, the Commission, at its forty-second session in 1990, gave extensive consideration to the issue, within the context of its work on the draft Code. After a general debate, a Working Group was established. Following its adoption by the Commission, the Group's report was incorporated in the Commission's report to the General Assembly.[12] The report surveyed various issues involved in the establishment of an international criminal court (jurisdiction and competence *ratione materiae* and *ratione personae*; whether it should have exclusive, concurrent or only review jurisdiction; the submission of cases; institutional structure; composition; mode of prosecution; legal force and implementation of judgements, and the financing of the court). In its survey of these issues, the Commission did not indicate any preference for one particular solution over another. However, the report did record that the Commission had reached

> ... broad agreement, in principle, on the desirability of the establishment of a permanent international criminal court to be brought into relationship with the United Nations system, although different views were expressed as to the structure and scope of jurisdiction of such a court.[13]

14. These "different views" involved the choice between three very different models of criminal jurisdiction: (*a*) a court with exclusive jurisdiction over specified crimes, (*b*) a court having concurrent jurisdiction with national courts, and (*c*) a court having only review competence. The three models were presented for discussion by the General Assembly, without the Commission indicating any preference.[14]

15. The Commission returned to the question during its forty-third session, in 1991. As an aid to its discussion, it had before it a study of certain issues by the Special Rapporteur on the draft Code, Mr. Doudou Thiam, in part two of his ninth report.[15] In that report the Special Rapporteur pointed out that the Commission had not been asked by the General Assembly to draft a statute for an international criminal court, and that the Assembly had as yet expressed no preference for any of the three models of an international criminal jurisdiction. Nor had it expressed any preference for any version of an international criminal jurisdiction over the present system based on national courts with universal jurisdiction over certain offences of an international character. None the less, he raised two issues in the form of possible draft provisions. These dealt with the jurisdiction of the proposed court and the requirements for the institution of proceedings. The Special Rapporteur did this not with a view to having the draft articles submitted to the Drafting Committee as part of a project to draft a statute for an international criminal court, but in order to stimulate and clarify debate on the underlying question of the possibility of establishing an international criminal court —essentially the same question that had been asked of the Commission by the Assembly in 1948. During the debate, members of the Commission expressed a wide range of views on the possible draft provisions.[16]

16. Views on the issues were also canvassed by the Sixth Committee in its debate on the Commission's reports on its forty-second and forty-third sessions but no conclusion was reached, nor did any clear preference emerge for any one of the possible models outlined by the Commission in 1990.[17] That position is reflected in the wording of General Assembly resolution 46/54, with its call for further analysis and consideration of the issue (see para. 13 above).

17. An important stage in the Commission's work was reached in 1991 with the adoption on first reading of the draft Code of Crimes against the Peace and Security of Mankind. As adopted, that draft Code is intended to be applied by national courts, but article 6 (which deals with the obligation on States parties to try or extradite persons accused of crimes against the peace and security of mankind) provides:

> 1. ...
>
> 2. ...
>
> 3. The provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court.

Article 9, which elaborates on the principle *non bis in idem*, also contemplates the possible establishment of an international criminal court.

18. The Special Rapporteur in his tenth report[18] discussed in some further detail the issue of the possible es-

[10] General Assembly resolution 44/39, para. 1.

[11] *Official Records of the General Assembly, Forty-fourth Session, Annexes*, vol. II, agenda item 152, document A/44/195.

[12] *Yearbook ... 1990*, vol. II (Part Two), paras. 93-157.

[13] Ibid., para. 155.

[14] Ibid., paras. 156-157.

[15] See *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/435 and Add.1.

[16] The Commission decided that it would continue at forthcoming sessions to consider the issue of an international criminal court or other international criminal trial mechanism. For a summary of the debate, see *Yearbook ... 1991*, vol. II (Part Two), paras. 106-165 and 175.

[17] See Topical summary, prepared by the secretariat, of the discussion held in the Sixth Committee of the General Assembly during its forty-fifth session (A/CN.4/L.456, paras. 119-186) and forty-sixth session (A/CN.4/L.469, paras. 217-255).

[18] See *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/442.

tablishment of an international criminal jurisdiction. Part one dealt with certain objections to such a jurisdiction. Part two went on to consider certain specific issues which would arise in the course of establishing such a jurisdiction, namely the law to be applied, the jurisdiction of the court *ratione materiae*, complaints before the court, proceedings relating to compensation, the handing over of the subject of criminal proceedings to the court and its relationship to extradition, and the question of appeals (under the heading of "the double-hearing principle"). A number of draft proposals were put forward, again with the intention of stimulating debate rather than for referral to the Drafting Committee.

19. These proposals were discussed by the Commission during the first three weeks of the session, and met with a diverse response. It is not necessary to summarize the debate here, except to say that the proposal for the court to have exclusive jurisdiction over a range of offences[19] proved controversial (although it was not without supporters). As in previous years, there were some who were opposed to any version of an international criminal jurisdiction at all, while others favoured a permanent full-time court with extensive jurisdiction over the crimes defined in the draft Code, and possibly other international offences. There was a substantial body of opinion within the Commission which favoured exploring a more flexible and limited trial mechanism. This could be available to States in situations where it was needed, but would require neither an extensive prior commitment on the part of States, nor an expensive new structure to be established by the United Nations. By contrast there was little support for the third option proposed in the 1990 report of an international court with powers of review over national courts (see para. 31 below).

20. Following the discussion of the Special Rapporteur's tenth report in plenary, it was decided to set up a Working Group on an international criminal jurisdiction.[20]

21. The Working Group at its first meeting agreed that it was necessary to give a direct answer to the question whether the establishment of an "international criminal court or other international criminal trial mechanism" was "possible".[21] The Commission had, in the report on its forty-second session and through the successive reports of the Special Rapporteur, provided an extensive discussion of the issues, without committing itself to the feasibility or desirability of particular solutions. It was time to go further, but the question of the possibility of a court or other international trial mechanism could not be answered in the abstract. It required an analysis of certain major questions which had to be resolved before the establishment of such a court or mechanism could be contemplated, and an indication of the preferred approach to these issues. Only in that way could the Commission respond adequately to the General Assembly, and the Assembly thereby be in a position to provide guidance to Member States in their subsequent discussion of the matter.

22. The Working Group thus concluded that its report should first outline the basic arguments which have been made in favour of some kind of court or other mechanism, and then proceed to analyse the more important specific issues that have to be faced before such a body can be established. The Working Group initially identified five "clusters" of specific issues of this kind, as follows:

(*a*) the basic structure of a court or of the other options for an "international trial mechanism";[22]

(*b*) the system of bringing complaints and of prosecuting alleged offenders;

(*c*) the relationship of the court to the United Nations system, and especially to the Security Council;

(*d*) the applicable law and procedure, and especially the issue of ensuring due process for the accused;

(*e*) how to bring defendants before a court; the relationship between this process and extradition; international judicial assistance to proceedings before a court; and the implementation of sentences.

Papers were prepared by members of the Working Group on each of these "clusters" and, in addition, some members of the Working Group provided short papers on specific issues.

23. As work proceeded, relationships between issues in the different "clusters" became clearer and it emerged that internal sub-categorization of issues was a somewhat artificial exercise. Accordingly, this report seeks to deal sequentially with the basic issues identified by the Working Group, and to provide a sufficient indication of its preferred approach or of possible alternatives. A balance has had to be struck: the report seeks to give a sufficient indication of possible solutions, without going into excessive detail or dealing with particular points which are not essential to any overall scheme. In some cases the Working Group has done no more than outline the range of solutions, without indicating a preference for one over another. The aim throughout has been to provide enough information and argument to enable a judgement to be made as to whether and how to proceed.

24. Thus, this report begins with an outline of the basic arguments which underlie calls for an international criminal court (sect. 2). Sections 3-6 then deal in turn

[19] Specifically, the offences over which exclusive jurisdiction was contemplated were genocide, systematic or mass violations of human rights, apartheid, illicit international drug trafficking, seizure of aircraft and kidnapping of diplomats or internationally protected persons.

[20] For the composition of the Working Group, see chap. I, para. 6 above and for the terms of reference, see para. 1 of this annex.

[21] The Special Rapporteur defined *possibilité* for this purpose as requiring the Working Group to consider the various objections raised to an international criminal court or other mechanism and to show *qu'il n'y a pas de difficultés insurmontables au plan juridique*. He distinguished this from the question of *opportunité*: the question of whether such a court or other mechanism is opportune is not a matter for the judgement of the Commission, but for the political judgement of the General Assembly. The Working Group agrees with this definition of its task.

[22] In this report, the term "court" should be understood to include other forms of international criminal trial mechanism. The range of possibilities raised by the term "international criminal trial mechanism" is discussed in paras. 81-95 below.

with various categories of issues: structural and jurisdictional issues (sect. 3); the question of an "international criminal trial mechanism" other than a court (sect. 4); questions of applicable law, penalties and due process (sect. 5); and the issues involved in bringing defendants before the court (sect. 6).

2. General arguments relating to an international criminal court

25. In any consideration of this issue, it is necessary to start from the fact that the normal and natural setting for criminal trials of individuals has always been the national criminal trial courts of States. The extensive system of international treaties dealing with crimes of an international character (war crimes, aircraft hijacking, terrorism, hostage-taking, and the like) proceeds from this basis. With few exceptions,[23] this body of treaties assumes that trial in a national court is the norm, and seeks to facilitate such trial, for example by conferring universal jurisdiction on the courts of all States.

26. However, that is not the only possible solution, and it has run into difficulties in certain special cases. Hence the debate on the need for an international criminal court of some kind, a debate which has continued for many years (see para. 11 above). It is not necessary here to deal with the various arguments in great detail, but some discussion of them is necessary to provide a background for the Working Group's consideration of the specific issues that need to be resolved before an international criminal court can be established, and to explain what underlies its approach to those issues.

(a) *The arguments for a court*

27. The case for some international jurisdictional mechanism starts from the fact that since 1945 there have been notorious cases of crimes against humanity that have gone unpunished. It has proved extremely difficult to bring the offenders to justice, and the lack of any alternative forum at the international level has exacerbated these difficulties. One reason for the difficulty is that, in many cases, serious crimes against peace or humanity have been committed by individuals who were at the time members of the Government of a State. It discredits the norms of international law if they are never enforced: for example, as far as the Working Group is aware, there has never been a prosecution for genocide under the Convention on the Prevention and Punishment of the Crime of Genocide since that Convention was concluded, despite the fact that there have been notorious cases of genocide during that time. Similarly, the proposition that superior orders, or the official position of a person as Head of State or member of a Government, should be no defence to an accusation of a crime under international law is discredited if the perpetrators are never brought to justice.

28. Thus, an international trial jurisdiction for certain kinds of offences arising in special circumstances has been identified as the main requirement. Situations where an international trial system might prove useful include the following:

(*a*) cases where trial in an international tribunal is the only forum that the relevant parties can agree on as appropriate for trial: this may be so, for example, where the nationals of a particular State are charged with a serious offence in which the State itself is alleged to have been implicated;

(*b*) cases where the State having custody of the accused is under threat, of further acts of terrorism, for example, if it proceeds with the trial, or where the criminal justice system of a small State is overwhelmed by the magnitude of a particular offence;

(*c*) cases where the alleged criminals, who were formerly members of the Government of a particular State, committed the alleged offences in that capacity, and the successor Government is unwilling or unable to try them, for whatever reason, or would prefer an international trial because of its greater legitimacy in the circumstances.

In some of these cases, there is no effective prospect of trial in any national court. In others, there may be perceived problems with the legitimacy or fairness of trial in a given national court, or even with trial in any such court.

29. One response to these arguments is to suggest that an ad hoc court or tribunal can be established, after the event, to deal with such cases. Although the criticism of retroactivity is levelled at ad hoc courts, proponents of this solution argue that that criticism is not justified. Article 15, paragraph 1, of the International Covenant on Civil and Political Rights states that

> No one shall be held guilty of a 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.

It does not prohibit "retroactive" changes in procedures. Proceedings before an ad hoc international criminal court would relate to offences defined by international treaties in force at the time the offence was committed, and they are accordingly not prohibited by that article.

30. But there are other difficulties with the idea of creating ad hoc courts. To set up an ad hoc mechanism at the international level to deal only with a single offence after the offence has been committed has certain disadvantages. It takes some time to create an international court, whereas the need for such a court may arise suddenly and unexpectedly. The publicity that is likely to be involved in establishing an ad hoc tribunal after the event may appear to prejudge the outcome of the trial. Above all, disagreement on the important legal and procedural issues which need to be resolved may prevent a court from being created at all.

31. Another solution which is sometimes suggested is that an international criminal court should be a court of review only, rather than a trial court. In other words, its function would be to review decisions of national courts dealing with crimes of an international character. As

[23] Both the Convention on the Prevention and Punishment of the Crime of Genocide (art. VI) and the International Convention on the Suppression and Punishment of the Crime of Apartheid (art. V) envisage the possibility of an international criminal jurisdiction, but without providing for its establishment.

noted in paragraph 5 above, such a system of review was suggested by the Commission in 1990 as one of three possible models. However, in subsequent debate many members opposed this idea. They stressed the difficulties of creating an effective system of review of national court decisions by an international court, and the duplication of the function of national appeal courts that would be involved. The Special Rapporteur, in his tenth report, proposed a possible draft provision on jurisdiction of the court *ratione materiae*, specifically excluding a court from acting as a court of appeal against decisions of national courts.[24] That view was supported by many members of the Commission (although there were doubts whether such a provision was necessary, since an international review jurisdiction would not exist unless specifically created).

32. In the view of the Working Group, the case for an international criminal court is essentially a case for a trial court, rather than an appellate or review body. Controversies surrounding allegations of serious international crimes are likely to be controversies about the facts—especially if the offences in question have already been carefully defined by international treaties in force. In criminal cases, facts are essentially found at trial rather than on appeal or review—especially if such appeal or review is to occur after existing national procedures have been exhausted, that is to say at third or fourth remove from the trial itself.

(b) *The arguments against a court*

33. On the other hand, some members of the Commission expressed serious reservations about the possibility of any form of international criminal court. Those reservations were shared, to varying degrees, by certain members of the Working Group.

34. One important motive for such reservations is simply scepticism. According to this view, international agreement on a court, other than on a purely ad hoc basis, is most unlikely. The factors weighing against such agreement are the very factors which underlie the comparative failure of the system of universal jurisdiction over crimes such as genocide. States are unwilling to take the responsibility for prosecuting offences under a principle of universal jurisdiction, except in very special cases. In the exceptional cases where they do wish to assert jurisdiction, this is because their interests (or those of their nationals) are involved, and it is precisely in those cases that they will be unwilling to accept the jurisdiction of an international tribunal in place of their own courts.

35. In support of their position, these members point to the meagre record of international trials. Such trials have only occurred in the quite exceptional circumstance of the unconditional defeat of an enemy State whose officials had committed crimes, including crimes against humanity, on an appalling scale. That situation is most unlikely to recur: if it does recur, it can be dealt with through an ad hoc tribunal. In all other cases, States will not agree to the trial of officials, or former officials, in circumstances which may reflect badly on the State or even engage its international responsibility. The most that can usefully be done in advance would be to produce some form of draft treaty, or draft guidelines, which could be used in that (unlikely) eventuality. To go further than that would distract attention from more important tasks, including the prevention or settlement of the disputes which may bring in their wake serious crimes against humanity.

36. Another argument against an international court is based on the sheer number of technical difficulties involved. Such problems arise at every stage of the process, from the apprehension and handing over of suspects to theimplementation of sentences. Particular problems, taken individually, may be soluble; taken together they may present a substantial barrier to the establishment of a court, and involve the risk that, even if such a court is constituted, it will not function as intended.

(c) *Other possibilities*

37. So far the focus has been on the possibility of an international criminal jurisdiction in the form of a trial court, but another possibility was raised by one member of the Working Group. According to this view, it is unrealistic to seek to establish a duplicate form of trial court at the international level, with all the difficulties this entails. Instead there is a need to strengthen national courts, to enable them to deal more effectively with crimes of an international character. The present system of treaties defining international crimes is defective in that it merely confers concurrent universal jurisdiction on State courts without doing anything more to assist them in handling what will, often, be highly charged accusations, difficult to establish and with serious implications for the international relations of the forum State.

38. Thus, it was suggested that the focus should be on reinforcing national criminal justice systems to meet the responsibilities envisaged, but often not fulfilled, by the relevant international treaties. In addition to the general mechanisms of international judicial assistance in criminal cases, a number of other possibilities were suggested. One example was a form of preliminary ruling procedure, analogous to that under article 177 of the Treaty establishing the European Economic Community.[25] This would allow a body such as ICJ to give its opinion on issues of international law or treaty interpretation arising, or likely to arise, in the course of a trial in a national court for an offence of an international character.

(d) *The Working Group's general approach*

39. These other possibilities will be considered in more detail in section 4 below (see paras. 81-95), in the course of its discussion of the possibilities for an international

[24] Paragraph 3 of the draft provision read:

"The court shall not be competent to hear appeals against decisions rendered by national jurisdictions."

In his commentary, the Special Rapporteur expressed the view that a right of appeal against decisions rendered by the highest national jurisdictions would be incompatible with State sovereignty.

[25] *Treaties establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1987), vol. I, p. 377.

criminal trial mechanism other than a court, but there is no denying that the focus of international concern so far has been on some fully international system of criminal trial jurisdiction. In the cases envisaged, the problem is not that national courts are working improperly or are misconstruing the provisions of international treaties or the meaning of general international law. The problem is that such courts, and the system of national jurisdiction generally, seem ineffective to deal with an important class of international crime, especially State-sponsored crime or crime which represents a fundamental challenge to the integrity of State structures. Reinforcing national criminal justice systems is not likely to address this need.

40. So far as the more general argument based on scepticism is concerned (see paras. 33-35 above), the majority of the Working Group does not deny that there are grounds for scepticism, or that the operation of an international criminal court is likely to be an exceptional rather than a regular occurrence. But the task of constructing an international order, an order in which the values which underlie the relevant rules of international law are respected and are made effective, must begin somewhere. Although the solution to these problems cannot rely solely, or even mainly, on a system of individual criminal responsibility, it is a necessary part of an overall solution. Unless responsibility can be laid at the door of those who decide to commit heinous crimes of an international character, the suppression of those crimes will be that much more difficult. As to the technical problems referred to in paragraph 36, while it cannot be denied that such problems exist, the analysis in this report suggests that they can be solved, and the view of most members of the Working Group is that it is worthwhile trying to do so.

41. There is thus a case for some form of international criminal process going beyond what exists at present. But while affirming that this is so, the Working Group also believes that any attempt to establish a workable international trial system must start from a modest and realistic base. Criminal justice systems at national level are expensive and complex, and it would be difficult and very expensive to replicate such systems at the international level. This is particularly so since the assertion of international criminal jurisdiction has so far been extremely rare. There is no body of international experience of the exercise of criminal jurisdiction to call on, such as was available in the field of international arbitration when PCIJ and its successor, ICJ, were set up. In these circumstances it is better to seek to establish a flexible facility at the international level, available in case of need. It should not involve creating an expensive apparatus which may, in the event, be little used.

42. For these reasons, the Working Group was in general agreement that a court would be essentially a facility for States parties to its statute (and possibly, on defined terms, for other States). Certain conclusions follow from this basic approach. Thus, an international court should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the statute is obliged to accept *ipso facto* and without further agreement. Nor would it have exclusive jurisdiction, in the sense of a jurisdiction which excludes the concurrent jurisdiction of States in criminal cases.[26] It should not be a full-time body, but rather an established structure which could be called into operation when required. It would thus have the advantage of existing as a legal entity, able to function if and when needed, without having the disadvantage of being a costly body with a permanent staff which might not be called upon to act from one year to the next.

43. The discussion in the following sections of the report proceeds on this basis. According to this approach, the facility which the court is to provide is at the lower end of the scale of possibilities or of the proposals that have been made. This is not because more far-ranging proposals lacked attraction, at least for some members of the Working Group. It is because most members of the Working Group were convinced that the effective choice is between a court which is a flexible and supplementary facility for States, and no court at all. More far-ranging proposals may be made at a later stage, if and when a modest and flexible entity has been established and has proved its worth in practice.

3. Structural and jurisdictional issues

44. This section of the report deals with the basic structural and jurisdictional issues that need to be addressed if an international criminal court is to be established. The main issues identified by the Working Group, which will be dealt with in turn, are as follows:

(*a*) The method by which a court is to be established;

(*b*) The composition of a court;

(*c*) The ways by which a State might accept the jurisdiction of a court;

(*d*) The jurisdiction *ratione materiae* of a court;

(*e*) The jurisdiction *ratione personae* of a court;

(*f*) The relationship between a court and the Code;

(*g*) Possible arrangements for the administration of a court (and in particular its relationship to the United Nations system).

(a) *The method by which a court is to be established*

45. Although other methods have sometimes been proposed for the establishment of an international criminal court, such as by resolution of the General Assembly or the Security Council, the normal method of setting up an international institution is by a treaty agreed to by States parties. Where that institution is to be part of the United Nations system, additional steps may have to be taken, but initially the necessary structure needs to be agreed on by States. This should apply here: an international criminal court should have its own statute in treaty form. No other method would ensure a sufficient degree of international support for it to work effectively.

[26] This leaves open the question whether in the case of certain very special offences (for example, aggression) trial in an international criminal court should be the only option (see para. 74 below).

(b) *The composition of a court*

46. The Working Group believes that a court should not be a full-time body, but an established structure which can be called into operation when required. Thus the court would be constituted according to a procedure determined by its statute, on each occasion that it was required to act. This would substantially reduce the costs, and also help to ensure that suitably qualified people were available to act as judges.

47. Some members of the Working Group stressed that to be fully effective in the long term an international court should be composed of full-time judges. This enables the formation of a committed and knowledgeable group with a collective understanding of the aims and working methods of the court. It is also the best way of achieving genuine independence. Indeed, that view is shared by the Working Group as a whole. However, all members of the Working Group acknowledge that the costs which would be involved would not justify the appointment of full-time judges, especially in the first phase of operation of a court. It is necessary to ensure in other ways that the judges of a court possess the necessary qualities.

48. In the Working Group's view, there are two main requirements for judges of an international criminal court. The first is independence and impartiality. The second is the possession of appropriate qualifications and experience, specifically experience in the administration of criminal justice and knowledge of international criminal law (that is to say, knowledge of the provisions of international law relating to criminal jurisdiction, and of the various treaties defining crimes of an international character). In any selection process it needs to be borne in mind that, while substantive legal issues will arise, at trial level factual and procedural issues will be preponderant. Any system for the selection of judges to conduct a trial should be such as to ensure both their impartiality and their competence in this sense.

49. The precise details of such a system do not have to be worked out here. The selection system could be based simply on nomination by a State party to the statute, or could require an election among nominees, presumably an election by the States parties to the statute, or one held under the auspices of the General Assembly. The Working Group simply suggests the following as one possible and workable arrangement. It does so in order to demonstrate that the various problems can be overcome without having to create an expensive full-time judiciary in the initial stages of the establishment of a court.

50. It is suggested that each State party to the statute would nominate, for a prescribed term, one qualified person to act as a judge of the court. To qualify, candidates would have to hold or have held judicial office on the highest criminal trial court of a State party, or be otherwise experienced in penal law (including, where possible, international penal law). States parties would undertake to make judges reasonably available to serve on the court. The States parties would elect by secret ballot, from among the judges so nominated, a person to act as president of the court for a prescribed term, and four other judges who, with the president, would constitute a "bureau" for the court. When a court was required to be constituted, the "bureau" would choose five judges to constitute the court, and in so doing would take into account prescribed criteria, such as the nationality of the accused. Under the statute, judges of the court would, of course, act independently of any direction or control of their State of origin.

51. One suggestion that was made involved a slight qualification to this basic idea, without departing from the proposition that a court of full-time judges is impractical and unnecessary at this stage. According to this idea, the president of the court alone would act in a full-time capacity, since it would fall to the president to oversee such administrative tasks as had to be performed, to head the "bureau" and generally to represent the court. Associated with this idea is the possibility that the "bureau" could play a role in drawing up, with the agreement of the other judges, procedural rules of court, and possibly also rules of evidence, just as the judges of ICJ make and modify the rules of that Court.

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

52. As noted above, the Working Group believes that such an international court should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the statute is obliged to accept *ipso facto* and without further agreement. By becoming a party to the statute a State would accept certain administrative obligations (for example, to contribute to the budget of the court; to nominate a judge to the court and to make that judge available when required; and to hold in its custody and place at the disposal of the court for trial an accused person over whom the court is to exercise jurisdiction). Becoming a party to the statute would not in itself involve acceptance of the jurisdiction of the court over particular offences or classes of offence. That should be done by a separate juridical act, analogous to acceptance of the Optional Clause of the Statute of ICJ, or by a process of ad hoc acceptance or unilateral declaration.

53. Again the details of such a system do not have to be worked out here. The Working Group simply suggests the following as one possible arrangement.

54. Each State party to the statute would be free to accept the court's jurisdiction. This could be done either ad hoc in relation to a particular offence alleged to have been committed by specified persons, or in advance for a specified category of offences against one or more of the treaties which fall within the jurisdiction *ratione materiae* of the court, to the extent that the treaty is in force for the State concerned. This acceptance would, of course, relate only to persons within the jurisdiction of the State concerned, and the effect of acceptance would depend on the rules governing the competence of the court outlined in the next two sections of this report. The acceptance could be unlimited in time, or could relate only to alleged offences committed after the declaration is made.

55. The Working Group notes that this idea is closer to the possible draft provision on jurisdiction of the court proposed by the Special Rapporteur in his ninth report[27] than the more extensive proposals for exclusive jurisdiction contained in his tenth report.[28] In the debate at the present session on this aspect of the tenth report, most of the members of the Commission who expressed an opinion on the issue were opposed to an extensive system of exclusive jurisdiction (although some members did support it). The Working Group envisages that the jurisdiction of the court would be predominantly or entirely concurrent with that of national courts, and that acceptance of the court's jurisdiction would not be a necessary aspect of participation in the statute.

56. Another issue requiring consideration is whether States not parties to the statute should be able to accept the court's jurisdiction on an ad hoc basis, and if so, on what terms. Since the basic purpose of a court is to assist States in finding solutions to problems involving serious offences of an international character (see para. 42 above), the Working Group believes that the court should be widely available. It should thus be available to States not parties to the statute on an ad hoc basis, provided that they accept the obligations of the statute for the purposes of the specific case, and meet all (or a defined proportion) of the costs so incurred.

(d) *The jurisdiction* ratione materiae *of a court*

57. In the Working Group's view, the court's jurisdiction should extend to specified existing international treaties defining crimes of an international character. These should include, but should not be limited to, the draft Code (subject to its adoption and entry into force). It is not necessary to reach agreement at this stage on the precise list of international criminal law treaties: they would certainly include those dealing with serious war crimes, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the various conventions on hostage-taking, hijacking of ships and aircraft, and the like.

58. In the case of some conventions defining offences which are frequently committed and very broad in scope, it may be necessary to limit further the range of offences which fall within the court's jurisdiction *ratione materiae*. Otherwise there may be a risk of the court being overwhelmed with less serious cases, whereas it is intended that it should only exercise jurisdiction over the most serious offences, namely those which themselves have an international character. For example, the conventions dealing with illicit trafficking in narcotic drugs are very broad in scope, extending to trafficking of certain quantities of drugs by people at the very end of the distribution chain, whose activities are entirely local. This problem is dealt with in the relevant provision of the draft Code (draft article 25) by limiting it to those who engage in "large scale" trafficking, with emphasis on those who organize and finance the drug trade.[29]

59. Another issue to be considered is whether the jurisdiction *ratione materiae* of a court should extend to crimes against general international law which have not or not yet been incorporated into or defined by treaties in force. It may be that States would be reluctant to accept such a jurisdiction in advance, since the list of crimes which are, or may become, crimes under general international law is not definitive. On balance the Working Group believes that, at the first stage of the establishment of a court, its jurisdiction should be limited to crimes defined by treaties in force. A strong factor supporting this conclusion is that the only significant cases of international crimes not so defined (especially aggression) are actually included in the draft Code. There is no doubt that the Code will be included in the list of treaties falling within the court's jurisdiction, subject to its conclusion and entry into force. In the Working Group's view this is the most certain and satisfactory way of bringing this range of crimes within the jurisdiction of a court.

(e) *The jurisdiction* ratione personae *of a court*

60. This is one of the most difficult technical issues to be faced, partly because the potential range of circumstances is so wide, and partly because the assertion of jurisdiction *ratione personae* in criminal matters has a different basis under different national legal systems. For example, some national legal systems emphasize territoriality as a basis for criminal jurisdiction, and correspondingly have few inhibitions about the extradition of their own nationals to a State where the offence was committed. Others, while relying also on territoriality, assert criminal jurisdiction over acts of their nationals wherever committed, and will not extradite them. The Special Rapporteur submitted several different proposals on this issue in his ninth and tenth reports,[30] including a proposal that optional jurisdiction should require the consent of the territorial State and of the victim State (s), and in each case widely differing views were expressed by members of the Commission.

61. Before discussing the issue of jurisdiction *ratione personae* it is necessary to distinguish it from the ques-

[27] For text, see *Yearbook ... 1991*, vol. II (Part Two), footnote 283.

[28] The possible draft provision proposed by the Special Rapporteur read as follows:

"1. All States Parties to this Statute shall recognize the exclusive and compulsory jurisdiction of the Court in respect of the following crimes:

"Genocide;

"Systematic or mass violations of human rights;

"Apartheid;

"Illicit international trafficking in drugs;

"Seizure of aircraft and kidnapping of diplomats or internationaliy protected persons.

"2. The Court may take cognizance of crimes other than those listed above only if jurisdiction has been conferred on it by the State(s) in whose territory the crime is alleged to have been committed and by the State which has been the victim or whose nationals have been the victims.

"3. The Court shall not be competent to hear appeals against decisions rendered by national jurisdictions."

[29] See paragraph (4) of the Commission's commentary on article X, which became draft article 25 (*Yearbook ... 1990*, vol. II (Part Two), p. 30).

[30] See foonotes 27 and 28 above.

tion of the right of a State (whatever its relationship may be to the alleged offence) to seek extradition of a suspect under existing treaties containing a "try or extradite" clause. In other words, the issue arises of how to resolve potential conflict between the jurisdiction *ratione personae* of an international criminal court and that of a State requesting extradition. That State may or may not be a party to the statute of the court, and may or may not have accepted its jurisdiction in relation to the offence in question. This issue can, however, only arise if the international criminal court actually has jurisdiction over the offence. It raises the question of how competing claims to exercise jurisdiction are to be resolved, and is discussed in section 6 below (see paras. 163-165). The issue presently under discussion is the prior issue, namely what are the prerequisites for an international court to have jurisdiction *ratione personae* in the first place.

62. The most straightforward case is that of an alleged offence committed on the territory of a State party to the statute (State A) by a person who was at the time a national of that State. Since very many crimes against humanity are committed within a single State, this may even be the most common case. In such a case, the court should have jurisdiction *ratione personae* over the alleged offender, provided that the State concerned has accepted the jurisdiction of the court with respect to the particular offence. The Working Group does not think that the consent of any other State should be required. In particular, it does not think that in this case the special consent of a State whose nationals were victims of the offence should be required.

63. Another case which may create no difficulty is that of an alleged offence committed wholly in State A by a person, whether or not a national of State A, who was at all relevant times (including when the trial process commences) present on the territory of State A, and who is accordingly available to stand trial. The issue this example raises is whether, notwithstanding State A's undoubted jurisdiction over the offence and its lawful custody of the accused, the consent of the State of nationality should none the less still be required for trial in an international criminal court. The Working Group does not think that it should be, since it is difficult to contest the primary jurisdictional claim of State A: moreover, in this case many States do not claim jurisdiction on the basis of nationality. However, the matter requires more detailed consideration.

64. It will also require further detailed consideration to establish precisely the range of situations, going beyond the cases dealt with in paragraphs 62 and 63 above, which should be within the court's jurisdiction *ratione personae*. The broadest approach would be to build on the existing principle of universal jurisdiction under the various treaties. Thus, a provision could be included to the effect that the court has jurisdiction *ratione personae* in any case where a State party to the statute has lawful custody of an alleged offender and has jurisdiction to try the offender under the relevant treaty or under general international law, but it consents to the international court exercising jurisdiction instead. This can be described as a system of "ceded jurisdiction". It relies on the argument that other States cannot complain if a State which is entitled under international law to exercise jurisdiction over a person for an offence cedes that jurisdiction to an international criminal court established by multilateral treaty—at least, if all other concerned States are parties to the treaty. On the other hand, under a treaty establishing universal jurisdiction over a crime of an international character, all States may be said to be "concerned" and have rights, or potential rights of jurisdiction which cannot be affected without their consent. Unless the treaty establishing the court had quasi-universal acceptance therefore, the "ceded jurisdiction" argument would not seem to work.

65. In the Working Group's view, it is undesirable to seek to rely on broader arguments of this kind to support the jurisdiction of a court. In the first phase of its operations especially, the essential requirement is to establish and reinforce the confidence of States in the court as a possible means of dealing with certain special cases. This requirement can only be met if careful attention is paid to the legitimate jurisdictional claims of States.

66. The Working Group does not think it necessary to set out in detail a regime of jurisdiction *ratione personae*. Various options could be considered. For example, there could be a requirement (in cases going beyond those envisaged in paras. 62 and 63 above) that both the territorial State and the State of nationality should consent. Alternatively, it could be provided that the State of nationality may only prevent the court from exercising jurisdiction if that State is prepared to prosecute the accused before its own courts (the converse of the *aut dedere aut judicare* principle). For present purposes suffice it to say that the Working Group believes a solution can be found which respects the existing jurisdictional systems of States in criminal matters, and which none the less caters for most of the situations which are likely to arise (in particular, the situations dealt with in paras. 62 and 63 above).

67. To summarize subsections (*c*) to (*e*) of this report, the Working Group envisages a system under which three conditions would have to be met for an international criminal court to have jurisdiction over a case:

(*a*) the case must involve an alleged crime falling within its jurisdiction *ratione materiae*;

(*b*) the State or States which under the provisions dealing with jurisdiction *ratione personae* are required to accept the court's jurisdiction must have done so, either in advance or ad hoc;

(*c*) the alleged crime must fall within the terms of their acceptance of the jurisdiction (for example, as to subject-matter, time, and so on).

(f) *The relationship between a court and the Code*

68. On the instructions of the General Assembly, the work of the Commission on the possible establishment of an international criminal court has been done within the framework of the draft Code. There are clearly important links between the two projects. An international criminal court, duly established, would ensure the most objective and uniform interpretation of the Code. It would be unfortunate if some States did not ratify the Code because of the lack of appropriate means of imple-

mentation. Similarly, it would be unfortunate if States did not adhere to the statute of a court because of a perceived lack of objective jurisdiction in the absence of the Code.

69. Conversely, the possibility also exists that States which have reservations about the Code may none the less be prepared to accept the statute of a court as a jurisdictional facility, one which would usefully supplement the existing range of international treaties defining offences of an international character. If the court is useful in relation to the crime of genocide as defined in the Code, for example, it must be equally useful in relation to that crime as defined in the Convention on the Prevention and Punishment of the Crime of Genocide itself, which the relevant provision of the Code simply repeats. If a court is to become a reality, it is essential to maximize the potential for support from States.

70. Thus, when drafting the statute of a court, the possibility should be left open for a State to become a party to the statute without thereby becoming a party to the Code, or for a State to confer jurisdiction on the court with respect to the Code, or with respect to one or more crimes of an international character defined in other conventions, or on an ad hoc basis. The criterion should be that of maximum flexibility as regards the jurisdiction *ratione materiae* of a court, and this is most readily achieved if the Code and the statute of a court are separate instruments.

71. For these reasons, the Working Group concludes that the statute of a court and the draft Code may constitute separate instruments, with the statute of the court providing that its jurisdiction *ratione materiae* extends to the Code in addition to other instruments. In other words, a State should be able to become a party to the statute without thereby becoming a party to the Code, although the Code, once it has been finally adopted, would be one of the international instruments defining offences of an international character which would fall within the jurisdiction of the court.

72. This substantive conclusion is without prejudice to the question of how the subject should be dealt with in the Commission, bearing in mind the link the General Assembly has made between this matter, the draft Code and the proposal of Trinidad and Tobago (see para. 12 above).

73. Of course, to exercise such jurisdiction it will be necessary for the statute to give proper guidance on the law to be applied, on applicable penalties, and so forth, so as to ensure that any gaps which may exist in the various treaties are filled. The principle *nullum crimen sine lege* requires no less. Subject to this essential qualification, the Working Group concludes that it could be useful to establish a court with jurisdiction over offences defined in the various treaties referred to in paragraph 57, as well as with jurisdiction over the Code.

74. It should be stressed that the question whether the Code itself should depend on the establishment of an international criminal jurisdiction, at least for certain offences, for example, aggression, is a separate issue. Some members of the Commission believe that the draft Code can only be satisfactorily implemented if there also exists an international criminal court with jurisdiction over some of the offences defined in the Code. Others believe that while this link is desirable, it does not mean that the proposed court should be limited to offences contained in the Code. A court could have an independent utility, especially if it was widely supported by States. This suggests that it should be established under its own statute.

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

75. Only the briefest outline of administrative issues needs to be given here. One important issue (which the 1953 Committee left open) is whether a court should be part of the United Nations system or should operate as an independent entity. The Working Group notes below (see para. 95) that some of the expressed needs for an international criminal court could perhaps be met by some form of regional criminal court, which could function independently, or in conjunction with the relevant regional organization. But in so far as any court is worldwide in scope and jurisdiction, it should clearly, in the Working Group's view, be associated with the United Nations.

76. In the first phase, at least, it is not necessary to seek to do this by formally incorporating the court within the United Nations structure. It has already been concluded that a court should be established under its own constituent treaty, but this does not prevent the court from being brought into relationship with the United Nations, either through a relationship agreement pursuant to Articles 57 and 63 of the Charter of the United Nations or otherwise. A possible model in this respect is the Human Rights Committee established under the International Covenant on Civil and Political Rights, or the Committee on the Elimination of Racial Discrimination, established under the International Convention on the Elimination of All Forms of Racial Discrimination. Depending on what choice is made, it will of course be necessary to comply with United Nations administrative and budgetary procedures, and no doubt to obtain the approval of the General Assembly.

77. On other administrative matters, the Working Group has already stressed that the court should not have a permanent judicial staff. It should, by the same token, have few or no permanent administrative staff, although this depends to a degree on the details of the prosecution system to be established. It may be possible for registry services to be performed by arrangement with the Registrar of ICJ, or possibly by the United Nations Legal Counsel, except in cases where the court is called into action. Those registry functions are not likely to be extensive.

78. Wherever the administrative functions associated with the court are carried out, the Working Group believes that where possible the court should sit in the State where the alleged offence was committed, or at least within the same region, while it is actually hearing a case. But this may not always be possible, especially where there are perceived security problems: the issue of where the court should sit is not one that can be determined in advance by any rule.

79. In cases where the court does not sit in the locality of the alleged crime, arrangements would need to be made for it to sit at an appropriate place, perhaps at the seat of ICJ at The Hague.

80. Since the Working Group envisages a modest structure rather than a standing institution with a substantial staff, the ordinary costs of the suggested court should be modest, and could be borne by the parties to the statute, or, possibly, by the United Nations regular budget. However, any actual trial, depending on its length and complexity, could be an expensive matter—as criminal trials increasingly are at national level. Detailed arrangements for meeting these additional costs do not need to be discussed here, but the Working Group envisages that these additional costs would be borne substantially by the States making use of the court, according to some agreed formula.

4. An international criminal trial mechanism other than a court

81. General Assembly resolution 46/54 requested the Commission to examine, *inter alia*, "proposals for the establishment of an international criminal court or other international criminal trial mechanism" (see para. 10 above). This language reflects the fact that in searching for answers to the problems facing their criminal justice systems, some States have wondered whether a mechanism other than an international criminal court might be possible. Moreover, other language versions of the resolution are not so explicit in referring to an international "trial": the French version, for example, refers to *un autre mécanisme juridictionnel pénal de caractère international*, and does not use the word *procès* (trial). It thus seems to envisage some form of international jurisdictional structure in aid of a criminal trial, which might be a trial before a national court.

82. Before discussing the various possibilities, one basic point needs to be made. The Working Group's concern is with serious criminal charges brought against the accused. In respect of such proceedings, essential minimum standards of due process are laid down both by the International Covenant on Civil and Political Rights (see especially arts. 14 and 15), and by the various regional human rights conventions.[31] It is possible to envisage national structures underpinning a criminal trial mechanism at the international level (such as in the proposed court), or conversely international provisions which are ancillary to and which reinforce a national criminal trial mechanism. Either way, a trial of the accused which meets internationally accepted standards must be at the core of the mechanism. There is no doubt that the procedural and other aspects of a criminal trial can vary considerably, and articles 14 and 15 of the Covenant were not intended to reflect any particular national system of criminal procedure. But the basic point remains: whether at the national or the international level, in relation to serious offences of an international character defined in the various treaties and in the draft Code, the only appropriate "criminal trial mechanism" (*mécanisme juridictionnel*) is a criminal court, duly constituted, that is to say a body exercising judicial functions with appropriate guarantees of independence.

83. On this point there is no disagreement within the Working Group, but from this point on, differences in emphasis emerge in the search for some "other international criminal trial mechanism" that could contribute to resolving the various problems.

84. One line of argument suggested that the intent of the wording was the establishment of a very flexible mechanism, albeit at the international level—a simple mechanism, essentially voluntary in nature, on which affected States could call in case of need. According to this view, what was envisaged at the level of criminal proceedings was something more like the Permanent Court of Arbitration than PCIJ or its successor, ICJ.

85. It will be apparent from what has been said in section 2 above, that the Working Group accepts much of the thinking which underlies this approach. The suggested outline for an international criminal court which is set out in this report is as flexible, as optional, and as voluntary as an international court could be. Yet, there must be some limit to flexibility. To be a facility to States, the court has to exist—and this means, in the Working Group's view, that it needs to be constituted as a legal mechanism in advance of the occasion for its possible use (see paras. 30 and 41-43 above). Beyond that minimum point, the proposals discussed here do provide for substantial flexibility. No doubt different conclusions may be reached on some of the particular issues discussed in this report: that is a matter for subsequent discussion, in the event that proposals for an international criminal jurisdiction are to be taken further. But the Working Group regards its approach as reflecting, and as far as possible integrating, both strands of the General Assembly's mandate to it to study "an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism", if it is assumed that the jurisdiction in question is to provide for the trial at the international level of those accused of the crimes in question.

86. According to the second line of argument, however, it is precisely this assumption that is called into question—what is needed is an international trial mechanism, as distinct from an international mechanism in aid of national trial systems in cases with an international element. This approach has already been outlined (see paras. 37 and 38 above), and some general comments on it have been made (see para. 39 above). Without repeating or detracting from what was said there, the Working Group believes it is important to explore some of the jurisdictional mechanisms which could be adopted to reinforce the exercise of national criminal jurisdiction. Such mechanisms might reduce the need for, supplement or provide an alternative to an international criminal trial mechanism as envisaged elsewhere in this report. In any event, they merit some discussion here.

[31] See African Charter of Human and Peoples' Rights (United Nations publication HR/PUB/90/1), art. 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 5-7; and American Convention on Human Rights, art. 8.

87. One possibility would be a mechanism which would help to ensure that a national court in dealing with a crime of an international character duly applied the relevant provisions of international law. An example of such a mechanism is the reference procedure established under article 177 of the Treaty establishing the European Economic Community.[32] Under that article, a national court can (and in certain cases must) seek a decision of the European Court of Justice on a matter of European law arising in a case before it. The reference procedure applies both to civil and criminal cases, and to trial courts as well as appeal courts (though references from a trial court are rare). Without an amendment to the Statute of ICJ a similar reference procedure would have to take place through the Court's advisory jurisdiction (perhaps channelled through a sub-committee of the General Assembly). Such a procedure would necessarily be optional, and the Court's opinion would not be formally binding. None the less it could be a way of helping to ensure conformity with international law in particular cases, including cases involving crimes of an international character.

88. Another suggestion, more closely focused on such crimes, would be some form of preliminary international procedure whereby certain State conduct could be qualified as fitting a given international category (for example, aggression, intervention), after which the trial of individuals for their involvement in the activity could take place at national level. In such a case the international procedure could be a prerequisite to trial, or it could be optional.

89. The last suggestion, in particular, responds to a real difficulty that has to be confronted in relation to the draft Code, and which has led many members of the Commission to believe that the satisfactory implementation of the Code will require some form of international criminal jurisdiction (see para. 74 above). The problem is that a national court does not seem an appropriate forum for the trial of individuals charged with crimes when the determination of the criminality of the individual conduct is essentially dependent on the question whether a foreign State has acted unlawfully. It may be very difficult for a national court, which may be a court of a party to the conflict in question, to determine in an impartial manner whether particular conduct constituted aggression, for example. The State against which that charge is made would not itself be a State party to the proceedings, so that the trial of an individual accused could become a surrogate for a broader range of issues arising at the international level. Such circumstances are not conducive to the proper administration of the criminal law.

90. In relation to the crime of aggression, for which provision is made in the draft Code, there is also the problem that the primary responsibility for disputes involving international peace and security is vested in a non-judicial body, the Security Council, under Chapter VII of the Charter of the United Nations.

91. Other suggestions include a system of international inquiry or fact-finding, in some way linked to the trial of the accused in a national court. Various international fact-finding bodies exist,[33] or have been proposed.[34] But these have so far not been envisaged as operating in conjunction with national trial courts. Another suggestion is an official system of observing national trials, an activity so far carried out by various international non-governmental organizations.

92. There are difficulties both in official international inquiries which parallel a national trial, and in the idea of a trial observer acting in an official international capacity. In particular, the level of international involvement may not be enough to provide full guarantees that the proceedings would be fairly conducted, but would tend to legitimize the proceedings anyway. Moreover, a trial is not like an election or an act of self-determination (in both of which official inquiries or observers have played a useful role). Once a person has been tried and a final verdict reached, no further criminal trial procedure is available. In the present context, it is hard to see how a hybrid system, whether involving observers or a commission of inquiry at the international level, could overcome this problem.

93. However valuable the suggestions discussed in paragraphs 87-91 above, a majority of the Working Group believes that these suggestions do not address the major concerns which underlie calls for an international criminal jurisdiction. As noted already (para. 39 above), those concerns do not relate to the inaccurate application of international law or treaty provisions in criminal trials otherwise duly conducted. They relate to egregious cases of international crimes which go unpunished for lack of an available forum, or to proposed trials in forums which could be thought to be partisan in relation to the issues at stake. In short, they relate to cases where the very existence or non-existence of a trial is the problem.

94. There are, no doubt, more flexible forms of international judicial assistance which might help some countries, especially smaller countries with limited legal and judicial resources. These might include the secondment of experienced judges from related neighbouring legal systems; cooperative regional courts of appeal (such as the arrangements for appeals in some of the smaller Pacific Islands); assistance with judicial education and training, and so forth. However, none of these ideas has any particular relevance to the problem addressed in this report.

95. One idea that may have real potential relates to the concern expressed about the trial of major drug-traffickers in smaller countries. Where this problem is specific to a particular region, it may be that a regional trial court, which the countries concerned would cooperate in establishing, would be one way of resolving it. Whether such a court should be part of the United Nations system, or whether technical and other assis-

[32] See footnote 25 above.

[33] For example, the International Fact-Finding Commission for which provision is made under article 90 of Additional Protocol I to the Geneva Conventions.

[34] For example, the ILA proposal for an International Commission of Criminal Inquiry on the Forms of Commission of Offences. See ILA, *Report of the Sixty-third Conference, Warsaw, 21-27 August 1988* (London, 1988).

tance should be furnished by the relevant United Nations programmes or other appropriate international organizations, should be further explored.

5. Applicable law, penalties and due process

96. In this section, the Working Group considers the issues of applicable law, penalties and due process in proceedings before an international criminal court.

(a) *The applicable law*

97. In drawing up provisions dealing with the law to be applied by an international criminal court, account must be taken of the specific nature of the proceedings before that body, which is, of course, judicial in character. The trial of an individual charged with committing a crime for which the court has jurisdiction is not an international dispute between two subjects of international law. Rather, the purpose of such an international mechanism would be to bring to trial those accused of a serious crime of an international character falling within the jurisdiction of the court. Such a court would not be set up to deal with minor matters or matters falling exclusively within the domestic jurisdiction of any State. Any clause dealing with applicable law will therefore have to be drafted to take into account this essential feature.

98. As noted above (para. 18), the tenth report of the Special Rapporteur discussed, *inter alia*, the question of the law to be applied by an international criminal jurisdiction and proposed alternative draft provisions on this issue, for the purpose of stimulating debate. The provisions attracted a rather diverse reaction from members of the Commission: the comments made have been taken into account in what follows.

99. In order to have a clear idea about the scope and wording of a provision on the applicable law, it is necessary to examine separately the issues relating to (*a*) the definition of the crimes falling within the jurisdiction of a court; (*b*) the general rules of criminal law (defences, extenuating circumstances, for example); and (*c*) the applicable procedure. In addition, the consequences of the fact that any such court will be operating at the international level must be considered.

(i) *The definition of crimes*

100. As to the crimes which may be tried before a court, it is necessary to limit the court's jurisdiction to offences which are genuinely of an international character. This issue has already been considered (see paras. 57-59 above), and the conclusion reached that the jurisdiction of a court should be limited to offences defined in treaties in force. Those treaties would be specified in the statute of a court.

101. The principle *nullum crimen sine lege* stated in article 15, paragraph 1, of the International Covenant on Civil and Political Rights, provides strong support for this approach. The principle that the act of which a person is accused should have been punishable at the time it was committed has to be understood quite literally. The rule in question must have created an obligation for the alleged wrongdoer. It is not sufficient that the rule existed in an inter-State relationship in the classical sense of international law which, in principle, creates rights and obligations for subjects of international law only. Rather, the rule must have directly bound the accused. In the context of the proposed statute, this can be achieved by limiting the jurisdiction of the court to specified crimes of an international character defined by treaties in force. It will be a matter for each State party to ensure that its internal law gives effect to those treaties, whether through their incorporation into the constitutional system of the State, or as a result of the passing of enabling legislation.

102. This is not to deny that there exist rules of general international law, for example, the prohibition of genocide, which directly bind the individual and make individual violations punishable. Thus, it would also have been possible to include in the jurisdiction *ratione materiae* of a court provision for the trial of offences against general international law which are not defined in any treaty. That possibility has already been rejected, for the reasons given in paragraph 59 above. In its work on the draft Code, the Commission is seeking to codify the gravest crimes against general international law, those which undermine the very foundations of the community of nations. Thus, provided that the Code (once it has been concluded and has entered into force) is included in the list of treaties coming within the jurisdiction of a court, it is not necessary to rely on the category of crimes under international law as a separate basis of jurisdiction.

(ii) *The general rules of criminal law*

103. As far as the general rules of criminal law are concerned, rather different considerations apply. Most treaties which deal with international crimes are silent about defences and extenuating circumstances. While various crimes under customary international law exist, no additional rules of international law on such matters as defences can be said to have evolved.[35] Even the Covenant (art. 15) confines itself to referring to the "general principles of law". Similarly, the United Nations War Crimes Commission draft[36] referred, in article 18 (*d*), to "the principles of criminal law generally recognized by civilized nations".

104. Alternatively, or additionally, reference could be made to the applicable national law. Normally, an individual is subject only to national law. In such instances, the relevant provisions of national criminal law are a necessary element of an orderly prosecution. So far as crimes defined by international treaties are concerned, provisions of national law may thus be relevant, but this presents potential problems at the international level, where national law is in principle only a question of fact.

[35] Of course, in dealing with issues of international law arising in the course of a trial (for example, questions of treaty interpretation, determining the nationality of the accused) the normal sources of international law indicated in Article 38 of the Statute of ICJ would have to be applied.

[36] Reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction*, memorandum by the Secretary-General (Sales No. 1949.V.8), p. 112, appendix 10.

As far as concerns the catalogue of applicable sources of law in the statute of a court, there seem to be two ways of dealing with this difficulty.

105. On the one hand, it is possible to refer directly to "domestic law", as was done in a number of earlier drafts. Thus, the revised draft statute for an international criminal court prepared by the United Nations 1953 Committee on International Criminal Jurisdiction provides, in an extremely succinct formulation that:

> The Court shall apply international law, including international criminal law, and where appropriate, national law (art. 2).[37]

106. On the other hand, another, perhaps more elegant, model brings in national law as a supplementary condition. An international court itself would only apply rules of international law, but it would have to be satisfied that the crime was punishable under national law as well. Thus, the 1943 London International Assembly draft Convention for the Creation of an International Criminal Court provides that:

> No act may be tried as an offence unless it is specified as a criminal offence either by the law of the country of the accused, or by the law of his residence at the time of the commission of the act, or by the law of the place where the act was carried out, provided in each case that such law is in accordance with the general principles of criminal law recognized by the United Nations (art. 27, para. 2).[38]

By virtue of this clause, national law would only be resorted to indirectly.

107. In his tenth report, the Special Rapporteur suggested two alternative provisions on the law to be applied, which, *inter alia*, used the "where appropriate" formula, drawn from the 1953 draft Statute, to allow a court to apply national law.[39] In the debate that proposal drew a rather mixed response. The matter is certainly one which warrants further study, but, for the reasons given, it may be difficult in practice to resolve issues of individual criminal responsibility without at least some form of reference back to applicable national law.

(iii) *Applicable procedure*

108. The statute of a court, or rules made thereunder, should specify to the greatest extent possible the procedural rules for trials. However, it may be necessary for the court to regulate its own procedure, in cases not covered by the statute or rules, by drawing on the principles common to the codes of procedure of the States parties. In this respect, no objection may be derived from the principle *nullum crimen sine lege*, whose scope is limited to substantive law.

(iv) *Conclusion*

109. It is not easy to condense these various considerations into one brief formula. In particular, a general clause, paralleling Article 38 of the Statute of ICJ, would not do justice to the complexity of the issues. None of the categories of rules listed in Article 38 can be dispensed with, but it may be necessary to add references to other sources such as national law, as well as to the secondary law enacted by organs of international organizations, in particular the United Nations, in order to supplement the primary rules contained in the treaties which define the jurisdiction of the court.

(*b*) *The penalties to be imposed*

110. Similar issues arise with regard to penalties. Even the Convention on the Prevention and Punishment of the Crime of Genocide confines itself to requiring States to provide "effective penalties for persons guilty of genocide" (art. V). An international court, which did not have the benefit of a rule in its statute setting forth the relevant penalties to be applied at the international level, would necessarily have to base the sentencing of convicted persons on the applicable national law, or perhaps on principles common to all nations. This latter formula raises serious problems, even as a recipe of last resort, since the guarantee of clarity and certainty of the law embodied in article 15 of the International Covenant on Civil and Political Rights applies also to penalties (*nulla poena sine lege*). This strongly suggests the need for a residual provision in the statute of a court, dealing with the question of penalties. That provision could apply in any case where no penalty was specified in the applicable law, or where the specified penalty fell outside the range of penalties which the statute allowed the court to impose.[40]

(c) *Ensuring due process*

111. No lengthy account is needed to clarify the issue of due process. The current standard of trial is embodied in article 14 of the International Covenant on Civil and Political Rights. Article 8 of the draft Code follows this model virtually word for word, and a similar provision should be included in the statute of a court.

6. PROSECUTION AND RELATED MATTERS

112. In this final section of its report, the Working Group outlines some possible solutions to the general question of how proceedings could be initiated before an international criminal court. This discussion proceeds on the basis that such a court would not try defendants *in absentia*. In this context it should be noted that article 14, paragraph 3 (*d*), of the International Covenant on Civil and Political Rights refers to the right of an accused person "to be tried in his presence". In the case of an international criminal court, the requirement that the defendant should be in the custody of the court at the time of trial is also important because otherwise such a trial risks being completely ineffective. On this assumption, the following issues are dealt with:

(*a*) The system of prosecution;

[37] See footnote 9 above.

[38] United Nations, *Historical Survey* ... (see footnote 36 above), p. 103, appendix 9 B.

[39] See *Yearbook* ... *1992*, vol. II (Part One), document A/CN.4/442, sect. A, for the texts proposed by the Special Rapporteur. See also chap. II above, paras. 68-80, for summary of the discussion thereon.

[40] The matter of penalties was considered by the Special Rapporteur in his ninth report in the context of an appropriate penal provision in the draft Code. See *Yearbook* ... *1991*, vol. II (Part One), document A/CN.4/435 and Add.1, paras. 4-34, and for the Commission's conclusions thereon see *Yearbook* ... *1991*, vol. II (Part Two), paras. 67-105, and 171.

(*b*) The initiation of a case;

(*c*) Bringing defendants before a court

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

(*e*) Implementation of sentences;

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

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

(a) *The system of prosecution*

114. A number of quite different proposals have been made to deal with these issues in earlier drafts for an international criminal court.[41] They have also been discussed in the reports of the Special Rapporteur.[42] Essentially there are three options: a complainant State as prosecutor; an independent standing prosecutorial organ; and an independent prosecutor appointed on an ad hoc basis. In the case of the second and third options, it might be possible to have a prosecution team appointed.

115. The first option has the virtue of helping to ensure a strong and vigorous prosecution, and it is also possible that the law and procedure of the prosecuting State could be imported into the court proceedings for the purposes of the trial. However, it may be that many smaller States which are entitled to initiate a case by complaint to the court would wish to distance themselves to some extent from the trial, and would therefore not be interested in providing the prosecutor.

116. Since the Working Group does not favour the establishment of a permanent, standing court, it may be inconsistent to establish a permanent prosecutorial organ, although conceivably there could be a permanent prosecutorial organ alongside an ad hoc court. But it is doubtful whether a permanent prosecutor would have enough work to justify that position, at least in the first phase of the establishment of a court.

117. For these reasons, an ad hoc independent prosecutorial system is recommended whereby a prosecutor would be appointed, on a basis to be agreed, when a trial was to take place. Careful consideration will have to be given as to how a prosecutor will be identified on an ad hoc basis. One option would be for the court to appoint a prosecutor, after consultations with the State making the complaint and any other State concerned. In the case of a complaint of aggression, for example, the prosecutor could be nominated by the Security Council.

(b) *The initiation of a case*

118. The prosecutor's functions would include the investigation, collection and production at the trial of all necessary evidence, the preparation of the formal accusation, as well as the role of prosecutor at the trial.

119. Since the prosecutor would necessarily have discretion as to whether to prosecute, it may be necessary to give States concerned the right to appeal to the court against a decision not to prosecute. This would help to assure those States that their complaints had been given thorough and impartial consideration, and (if there is to be only a single prosecutor) would comply with the principle that excessive discretion under an international judicial system should not be vested in one person.

120. Many of the earlier drafts for an international criminal court have provided for a formal preliminary investigation, at which the adequacy of the evidence against the accused would be tested. If a system of prosecution on the complaint of a State party was adopted, that is to say without an independent prosecutorial role, there would be a strong case for a preliminary investigation, perhaps before a small chamber of the court. On the other hand, if an independent prosecutor is to be nominated, the Working Group inclines to the view that there would be no need for a formal preliminary hearing. The court will have the power to dismiss frivolous or unsubstantiated charges at the trial.

121. So far as concerns the initiation of a case by complaint, it will be necessary to identify an official or body to whom such complaint is to be made in the first place. This could be the president of the court or the registrar. The complaint would trigger a possible prosecution. Plainly, in the absence of a permanent independent prosecutorial office, it could not be envisaged that cases would be brought before the court other than on a complaint from a State party (or of the Security Council in the case of a complaint of aggression). The Working Group does not believe that, in the first phase of the operation of the court, it is necessary to confer an independent power to prosecute, although in the longer term such a power would, at the very least, be desirable.

122. The question is whether the power of complaint should be limited to a State whose consent is a prerequisite for the court's jurisdiction in the particular case.[43] Certainly such States should have the right to bring a complaint. But in the Working Group's view the right to bring a complaint should extend to any State party which has accepted the court's jurisdiction with respect to the offence in question (including, but not limited to, a State which is a victim). Consideration could also be given to allowing a victim State party to the court's statute to initiate a case by complaint, even though that State has not accepted the jurisdiction of the court with respect to the offence.

123. The right to initiate complaints could also be granted to a State which has custody of the suspect and would have jurisdiction under the relevant treaty to try the accused for the offence in its own courts. Again, there is a good case for involving such a State, having regard to the Working Group's general approach to a court as a facility (see para. 42 above), and to the fact

[41] For a summary, see the appendix to this report.

[42] See, in particular, *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/435 and Add.1, paras. 56-59.

[43] The identification of the States which should be required to consent is discussed in paras. 60-66 above.

that the cooperation of that State would necessarily be required if a trial was to proceed.

124. If States other than those whose consent is required for the court to have jurisdiction are empowered to bring a complaint, some preliminary procedure will need to be instituted to ensure that the necessary consent has been or will be given before further steps are taken. This would be a registry function. Provided the jurisdictional rules are clear, that function should not involve significant difficulties, but the court could be empowered to resolve difficulties or uncertainties by some form of *in camera* proceeding at which the relevant States would be represented.

125. When the complaint is lodged, it will be examined by an independent prosecutor appointed on an ad hoc basis. The prosecutor will, if appropriate, issue a formal accusation charging the alleged offender with the commission of a specific crime which falls within the jurisdiction *ratione materiae* and *ratione personae* of the court.

(c) *Bringing defendants before a court*

126. Since a court will not try an accused person *in absentia* (see para. 112 above), in the case where the accused is not in the custody of the State which initiated the complaint it will be necessary to take steps to bring the accused before the court. Inevitably, the nature of those steps will differ depending on whether the accused is present in a State party to the statute, whether or not it has accepted the jurisdiction of the court with respect to the offence, or in a third State. The present discussion is a preliminary one, and in drafting a statute further attention will need to be given to each of these situations, taking into account any guidance received from the General Assembly in relation to the various issues.

127. In his tenth report, the Special Rapporteur recommended that the statute of a court should provide that the handing over of the subject of criminal proceedings to the court was not to be regarded as extradition.[44] This was on the basis that, since that State is a party to the statute, the international court is not to be equated to a foreign court, but can be treated for these purposes as if it were a court of the transferring State. This approach is appealing since it would facilitate the court's obtaining jurisdiction over the accused in the simplest and most direct manner possible. It would also avoid the need for any provisions dealing with the issue of extradition.

128. That approach had previously been adopted in the 1943 London International Assembly draft Convention for the Creation of an International Criminal Court,[45] and implicitly in the revised statute for an international criminal court, prepared by the 1953 United Nations Committee on International Criminal Jurisdiction.[46]

129. However, it would present difficulties, at least for some countries, for two kinds of reasons. The first relates to the problem of securing the fundamental rights which are protected, for example, by standard extradition arrangements. Although an international court might not be a foreign court, at least *vis-à-vis* the parties to its statute, it would not be a domestic court of a State either. Thus the arrangements that might be appropriate when transferring cases or handing over subjects within a single judicial system would not necessarily be appropriate for an international court. Moreover, the primary need is to gain and maintain the confidence of States in a court. To do this, it would need to be shown that the standard safeguards provided for in extradition treaties were complied with, one way or another, in relation to the court.

130. In the case of extradition, the requested State generally needs to be able to assure itself (*a*) that a punishable offence is involved (double criminality); (*b*) that there are no substantial grounds for believing that the request has been made for the purpose of punishing a person on account of race, religion, nationality, political opinion, sex or social status; (*c*) that the principle of double jeopardy would not be violated by the extradition; (*d*) that the person has not become immune from prosecution for any reason (lapse of time, amnesty); (*e*) that the person will only be charged with the offence in respect of which the extradition is granted (specificity); and (*f*) that if the accused has already been tried *in absentia* sufficient notice was given of the trial and a sufficient opportunity for the defence.

131. In the case of an international criminal court such as is envisaged, requirements (*a*) and (*e*) with respect to double criminality and specificity will be irrelevant, because the person will be charged with a specified crime or crimes falling within the jurisdiction of the court, as defined by treaties in force. Requirement regarding trials *in absentia* will also not be relevant, since the court will not be empowered to try persons *in absentia* (see para. 112 above). Provided that a satisfactory rule about double jeopardy is contained in the court's statute, no problem is likely to be created by requirement (*c*). The remaining two requirements (*b*) and (*d*) could safely be left to be determined by the requested State, as it would not undermine the idea of mutual support for a court on the part of the States parties to its statute.

132. The second difficulty is that in some States it might be constitutionally difficult, or even impossible, to consider an international court as a domestic court, or to seek to equate the two, because local constitutional requirements would simply not be met. Rather than risking additional difficulties by such a provision, it seems best to treat the court for these purposes as *sui generis*, that is to say neither foreign nor domestic, and to deal with the particular problems of transfer on their merits.

133. In other words, it seems that it will be necessary for the statute of a court to include provisions on the minimum requirements for transfer. *Vis-à-vis* the parties to the statute, these arrangements could be set out in an annex or an associated agreement, which would be binding *ipso facto* on such States. *Vis-à-vis* third parties, it may have to be done by way of something equivalent to an extradition agreement, or by agreement in the particular case. The parties to the statute could also be encour-

[44] See alternative A of the possible draft provision, *Yearbook . . . 1992*, vol. II (Part One), document A/CN.4/442, sect. E.

[45] See footnote 38 above.

[46] See footnote 9 above.

aged to make provision in their own bilateral extradition treaties for the handing over of the accused to the court.

134. The handing over arrangements to be included in an annex could be drafted in positive, negative or the more traditional "mixed" form:

(*a*) The positive approach would involve listing the grounds for handing over, and would exclude all or most grounds for refusal since adequate procedural safeguards would be built into the statute itself;

(*b*) Alternatively, the negative approach could be limited to a broad obligation to assist in handing over the subjects of criminal proceedings, together with a list of grounds which could not be cited for denying transfer. Such a list of unacceptable grounds would include the requested State regarding the offence for which transfer is sought as a political offence; and the nationality of the person whose hand-over is requested. This is essentially the approach taken in the United Nations draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes.[47]

(*c*) Finally, it would be possible, and may be prudent, to draft standard extradition-type provisions, including a list (as in subpara. (*b*) above) of grounds for refusal which are specifically excluded.

135. The means by which transfer could be requested will in part depend on the nature of the prosecution arrangements. At the least, such a request must be from an authority expressly designated in the statute, must be in writing, must contain as accurate a description as possible of the person sought, and must specify the offence and the evidence, which must be *prima facie* sufficient to justify putting the accused on trial. The requested State would be empowered, and if necessary required, to place an accused person under provisional arrest pending completion of the process of transfer.

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

136. In the normal preparation, investigation and prosecution of a criminal case with transnational elements there is a need for mutual assistance between States to facilitate the judicial process. Thus, there exists a network of mutual assistance arrangements and many treaties between States on a bilateral, regional and multilateral level. The term "mutual assistance" or "mutual legal assistance" is preferred to "judicial assistance" since the assistance is wider than assistance in judicial matters. However, the assistance in the case of an international criminal court would be, as it were, "one-way" assistance to the court rather than reciprocal assistance, and it would always be related to proceedings, actual or proposed, before the court. The term "international judicial assistance" is accordingly used here.

137. If there is a need for a regime of mutual legal assistance between States in the prosecution of a criminal case, that need is even stronger in the case of a new international judicial body such as is envisaged. Apart from its novelty, the court will lack many of the features present in the criminal justice systems of States, and not least the institutional machinery which facilitates mutual assistance between States.

138. The assistance the court will require of States parties to its statute will include matters such as (*a*) locating and providing the addresses of those involved; (*b*) taking testimony or statements in the requesting State or elsewhere; (*c*) producing or preserving judicial and other documents, records or pieces of evidence; (*d*) serving judicial and administrative documents and (*e*) authenticating documents. Such assistance may also be required from States which are not parties, although obviously this will have to be dealt with on a separate, and possibly case-by-case, basis.

139. There are three options in relation to international judicial assistance: a general facilitating provision in the statute; a general provision supplemented by a non-exclusive list of matters with respect to which assistance could be sought; or a full-scale treaty on judicial assistance, annexed to the statute of a court.

140. The first approach is general and simply calls for a provision in the court's statute based on an article found in most international conventions dealing with the suppression of a particular crime. For example, article 11, paragraph 1, of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention) provides:

Article 11

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases...

141. The virtue of a formulation such as this is its simplicity and generality. It imposes a simple obligation to grant "the greatest measure of assistance" without specifying the particular types of assistance. It would therefore be open to a court to seek any type of assistance from a State party, provided it is in connection with criminal proceedings brought in respect of offences within the court's jurisdiction. The term "proceedings" is not confined to the trial itself. Having regard to the generality of the phrase "in connection with", it would also cover investigations leading up to the trial. The Montreal Convention has been so interpreted in practice. However, if there is any doubt about this matter, the formulation could be amended to read "in connection with criminal investigations relating to and proceedings in respect of crimes within the court's jurisdiction."

142. Another advantage of the general approach is that it avoids the need specifically to list the kinds of assistance being sought, and the establishment of a regime to govern the granting of such assistance, including difficult questions such as the grounds for refusing assistance.

[47] See "Study on ways and means of ensuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the Convention", document E/CN.4/1426, p. 21.

143. The greatest drawback in the simple, general approach is that its lack of detail and its failure to deal with nuances may be exploited by a requested State which is unwilling to cooperate with the court. This could happen because, in the Montreal Convention formulation, the second sentence makes the law of the requested State applicable in relation to all matters pertaining to a request. Thus, such a State could deny a request for assistance on the ground that its law does not provide for the granting of the assistance sought, or that even if its law does so provide, some particular condition for the granting of the request has not been fulfilled. However, while it is true that in a treaty regime for mutual assistance the law of the requested State is dominant, there will inevitably be treaty provisions which qualify the operation of that law.

144. The second option would involve supplementing a general provision (such as art. 11 of the Montreal Convention) by listing non-exhaustively the matters in respect of which assistance may be sought from States parties, and possibly—though no obligation could be imposed in this respect—from non-parties. The list could be drafted so as to include both specified matters and also "any other matter agreed upon by the court and a State party".

145. While this approach would ensure agreement between the court and States parties on certain identified matters in respect of which assistance may be sought, it has the same disadvantage as the first option of yielding unqualified application to the law of the requested State.

146. The third option is the most difficult to draft but may be the best, certainly in the longer term. It would involve the adoption of a treaty on mutual assistance between States parties, which could form an annex or protocol to the statute. It is not the purpose of this report to deal with the detailed content of such a treaty. However, some comments may be made on the issues that would have to be faced in drawing it up.

147. In the first place, the treaty would identify the matters in respect of which assistance could be sought. For example, it could provide as follows:

"Assistance shall include, but not be limited to:

"(*a*) locating and providing the addresses of those involved;

"(*b*) taking testimony or statements in the requesting State or elsewhere;

"(*c*) producing or preserving judicial and other documents, records or pieces of evidence;

"(*d*) serving judicial and administrative documents;

"(*e*) authenticating documents."

148. The utility of such a treaty or protocol, however, would be primarily that it defined the parameters of assistance, and in particular that it would limit the possible excuses for not giving assistance. For example, there is usually a provision in mutual assistance treaties on their non-applicability to military offences and, sometimes, political offences. Such a provision would obviously be inappropriate in the present context.

149. The most difficult issue would be to identify the circumstances in which requests can be refused by the requested State, in other words, the circumstances in which the requested State would have discretion as to the granting of the assistance.

150. In normal bilateral mutual assistance treaties, the grounds on which a requested State may deny a request include (*a*) when the person to whom the request relates has already been convicted or acquitted by a final judgement of a court in the requested State, and (*b*) when it considers that the execution of the request is likely to prejudice its sovereignty, security or similar essential interests. No doubt the former provision might be appropriate (although the *non bis in idem* provision in the statute should be drafted in such a way that the problem would not arise). Having regard to the purposes and potential jurisdiction proposed for a court, the latter provision is less appropriate. If some "safety-valve" is required allowing a refusal of judicial assistance, it should be on much more limited grounds, for example, the security of the State concerned.

151. Mutual assistance treaties quite often include other matters in respect of which a requested State reserves the right not to grant assistance. It would, however, be necessary to confine such matters to a minimum.

152. Other provisions in the treaty could relate to:

(*a*) the identification of a central authority in the requested State and of an officer of the court (presumably the registrar or a prosecutor) to whom and by whom requests for assistance would be made;

(*b*) the execution of the request for assistance, and the law governing execution. Generally speaking, that law would be the law of the requested State, since it will be necessary for various steps, including legal steps, to be taken by the authorities of that State. However, the treaty or protocol could provide a particular method for executing the request, which would become part of the law of the requested State through its accession to the statute or through enabling legislation;

(*c*) the content of the request;

(*d*) the circumstances in which a person who is in custody in the requested State may appear as a witness at the court;

(*e*) costs;

(*f*) confidentiality of information in the request and provided pursuant to the request;

(*g*) whether there should be rules to make the giving of testimony compulsory in either the requested State or in the court, that is to say, whether a witness would be obliged to give testimony which he or she would have a right to refuse to give under the law of the requested State. Of course proceedings in the court would comply with the guarantee against self-incrimination in article 14, paragraph 3 (*g*), of the International Covenant on Civil and Political Rights, so that problems of this kind would be reduced, if not eliminated;

(*h*) the language in which requests are to be made;

(*i*) safe conduct or immunity from prosecution of persons who give testimony before the court pursuant to the treaty.

153. In relation to some of these matters, for example, items (*d*), (*f*) and (*i*), there will need to be a concordance between the provisions in the treaty or protocol and the arrangements for the court to be located in a host country. Thus, it may be that the best option for international judicial assistance in the first phase of the court's existence would be the second option discussed (see paras. 144 and 145 above), on the basis that the third option could be dealt with once the administrative arrangements for the court had been concluded and implemented.

(e) *Implementation of sentences*

154. The central issue here is who will be responsible for the monitoring and implementation of sentences. In principle, the monitoring authority should be the court. However, there is a difficulty with that choice if the court is not a standing body, and arrangements would need to be made, perhaps in rules made under the statute, for applications to the court to adjust the penalty, for example by the granting of parole or compassionate release in appropriate circumstances. In any event, the statute would no doubt provide that States parties should do their utmost to assist the court in the implementation of sentences, including in the pursuit of the proceeds of crime which were the subject of confiscation.

155. The most common form of sentence will be imprisonment, and this raises the question of the place where sentence will be served. The most obvious solution would be for sentences to be served in the penal institutions of the complaining State, under conditions not less favourable to the prisoner than those provided in the United Nations Standard Minimum Rules for the Treatment of Prisoners.[48]

156. It may be that smaller States will be concerned that such a provision would simply postpone to the stage of implementation of sentences the very problems which have led them to call for an international criminal court in the first place. Other alternatives would be for sentences to be served in the penal institutions of another State party, or in a facility of the host State made available for the purpose. The idea of establishing a specifically international prison facility is unacceptable on the grounds that it would be too costly and would not be justified by the number of prisoners.

157. Even if the court does not have its own prison facility, the issue arises whether it should maintain some staff to supervise the implementation of sentences—a form of international control commission, which might be a very small entity. An alternative would be for the entire implementation of sentences to be assigned to a particular State, such as the State which has initiated proceedings before the court. Again, however, certain States support an international criminal court out of a desire to distance themselves from the offence, the offender or the trial proceedings, and it may be doubtful whether they would accept such an approach.

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

158. The issues raised under this heading relate to the right of States parties to extradition treaties which adopt the *aut dedere aut judicare* approach, to demand extradition and, in the alternative, to have the accused handed over to their competent authorities for prosecution. To take an example, article 7 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation provides that:

Article 7

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. . . . .

159. This provision has to be read in conjunction with article 5, which provides that each Contracting State must:

> . . . take such measures as may be necessary to establish its jurisdiction over [the offence in question]... in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8. . .

160. The two questions that arise with respect to such provisions are, first, that of their relationship to the jurisdiction of the suggested international criminal court and, secondly, that of multiple requests for extradition.

161. According to the approach taken in this report, an international criminal court would be complementary to the existing system of national courts. As between States parties to the statute of a court, the system for handing over the accused could be made complementary to the existing "try or extradite" regime. That is to say, States parties which had accepted the jurisdiction of the court with respect to a given offence would accept that the court was a valid third alternative to extradition or prosecution before its own courts. The statute could go further and provide that a State which had accepted the jurisdiction of the court with respect to an offence is obliged to hand over the accused to the court, at the request of another State party which had accepted the same obligation. Unless the General Assembly were to indicate some other preference, the Working Group would be inclined to recommend such a provision.

162. However, it seems clear that States parties to the statute which have not accepted the jurisdiction of an international court with respect to an offence could not compel trial in the court, and it may be that with respect to such States the existing extradition arrangements should be left to operate in accordance with the terms laid down. Certainly this must be the position *vis-à-vis*

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

States not parties to the statute. Such States would remain free to insist on the application of the "try or extradite" regime as at present, although they would retain the option of consenting ad hoc to the jurisdiction of the international court in the particular case. To avoid difficulty, it should be provided that such consent needs to be given expressly and in writing.

163. In the event of multiple requests from States, including from States which have accepted the jurisdiction of an international court, or from the court itself, the requested State would presumably remain free, as at present, to choose which request to accept. However, it would be possible to modify this position so far as States parties to the statute are concerned.

164. For example, consideration should be given to the provision of non-binding guidelines to assist requested States in choosing among multiple and conflicting requests.[49] Such guidelines would not impose obligations on the requested State and, in addition to any intrinsic usefulness, they could provide support for a State acting in accordance with them *vis-à-vis* a State with other priorities.

165. It is not necessary to explore in detail the content of such guidelines at this stage, except to say that a State party to the statute should at least be under an obligation to give "special consideration" to trial in the international court at the request of another State party.

[49] See art. 6, para. 2, of the draft Code, as provisionally adopted on first reading (*Yearbook . . . 1991*, vol. II (Part Two), which provides that "special consideration" should be given, in the case of multiple requests, to the State in whose territory the offence was committed. That provision does not of course regulate priorities *vis-à-vis* a request for handing over the subject for trial by an international criminal court, see art. 6, para. 3.

Appendix

TABLE OF SELECTED PROPOSALS FOR THE PROSECUTION/COMPLAINTS MECHANISM OF AN INTERNATIONAL CRIMINAL COURT

1. ILA draft statute of the International Penal Court (1926)[a]	Only States parties may be prosecutors (art. 24). The leave of the Court is required for service of a charge, with the Court having power to dismiss cases of an unsubstantial character, etc. (art. 25).
2. International Association for Penal Law, draft Statute for the Creation of a Penal Chamber of the International Court of Justice (1928, revised 1946)[b]	The draft Statute provides for a preliminary inquiry by selected judges of the court (arts. 16-17); proceedings may be commenced by the Security Council, or by a State acting under the authority of the Security Council (art. 20). Only States may bring a complaint to the Security Council (arts. 21-22). The Security Council can appoint its own prosecutor or leave the presentation of the case to the State concerned (art. 25).
3. Convention for the Creation of an International Criminal Court, Geneva, 16 November 1937[c]	States parties are entitled to commit an accused to trial before the International Criminal Court rather than their own courts (art. 2). The committing State is to conduct the prosecution unless the victim State or, failing that, the State where the crime was committed elects to prosecute (art. 25, para. 3). Provision is made for intervention by any State entitled to seize the Court (art. 26).
4. London International Assembly, Draft Convention for the Creation of an International Criminal Court (1943)[d]	States parties are entitled to commit an accused to trial before the International Criminal Court rather than their own courts (art. 4, para. 1). A State party which is or whose national is the victim of a war crime may request the prosecuting authority of the Court to summon the accused (art. 4, para. 2). That authority is the United Nations Procurator General, chosen by the Court (art. 21, para. 1); The Procurator General may be assisted in respect of specific cases by an officer appointed by the State party concerned (art. 21, para. 3). The Procurator General's functions include the power to commence prosecutions "on his own authority" (art. 22, para. 1 (*f*)). In the case of an accused committed to trial at the request of a State party under art. 4, para. 2, there is a form of committal proceeding before the Court (art. 31), in which the Procurator General participates and gives advice (art. 31, para. 4). Thereafter the prosecution is conducted by the Procurator General (art. 31, para. 6). States have rights of intervention, including participation in oral proceedings (art. 32).

5. France, draft proposal for the establishment of an international criminal court (1947)[e]	The French draft envisaged, for State crimes, a prosecution (*parquet*) responsible for instituting proceedings, in liaison with the Security Council, although with some (undefined) power of initiative left to States parties concerned. For crimes other than State crimes, the system of the 1937 Convention (see item 3 above) was suggested.
6. United Nations Secretary-General, draft Convention on the Crime of Genocide (1947)[f]	Annex I. *Establishment of a Permanent International Criminal Court for the Punishment of Acts of Genocide.* This is largely based on the 1937 Convention (see item 3 above). A State may request the trial for genocide of an individual in its custody (art. 2, para. 1); either the Economic and Social Council or the Security Council is to decide on committal and to designate a prosecutor(s) (art. 2, para. 3) and the same body may withdraw the prosecution (art. 25). Annex II. *Establishment of an ad hoc International Criminal Court for the Punishment of Acts of Genocide.* The prosecution system is essentially the same as under annex I.
7. France, draft Convention on Genocide submitted to the Sixth Committee of the General Assembly (1948)[g]	The International Criminal Court includes an International Prosecutor's Office (art. 5), the composition of which is defined in an annex. Indictments are addressed to that Office, which, after inquiry, may commence proceedings before one or more judge-rapporteurs (art. 6).
8. United Nations Committee on International Criminal Jurisdiction, Report and revised statute for an international criminal Court (1953)[h]	The Committee rejected the right of the General Assembly or other international organizations to commence proceedings. It discussed (without agreeing on) a system of political screening of cases (paras. 110-113). It proposed a preliminary investigation procedure before some members of Court (on the Belgian model) (para. 120). The accused would have the right to be heard at the preliminary investigation, but not to present evidence (para. 121). The Committing Chamber would have the power to order further inquiries (para. 122). A Belgian proposal enabling the complainant State to appoint a prosecutor was narrowly adopted (paras. 123-125). It should be noted that all proposals were tentative: the Committee "did not wish to give its proposals any appearance of finality" (para. 154). In the Committee's revised draft statute for an international criminal court, article 29 dealt with access to the Court (and contained alternative provisions relating to political screening). Article 33 dealt with the Committing Chamber, article 34 with the role of Prosecuting Attorney. Article 43 empowered the Court to decide on application by the Prosecuting Attorney on the withdrawal of prosecutions.
9. Foundation for the Establishment of an International Criminal Court and International Criminal Law Commission, draft Statute for an International Criminal Court (Wingspread Conference, September 1971; Bellagio, 1972)	Established both a Procurator and a Prosecution (art. 16). It would be the duty of the Prosecution to initiate proceedings (art. 28, para. 1), subject to the administrative supervision of the Procurator (ibid., para. 2). The Procurator would present cases to the Court, after they had been certified for trial by the Commission of Inquiry (art. 29). Before certifying a case for trial, the Commission of Inquiry would first conduct a full preliminary hearing (art. 30). Dismissal of case required the consent of the Court (art. 39, para. 1).
10. United Nations draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other International Crimes (1981)[i]	The Tribunal itself was responsible for prosecution (art. 5, para. 1). Complaints were to be made to or initiated by the Procuracy (art. 8, para. 1). Its Investigative Division would determine whether a complaint was "manifestly unfounded" (ibid., para. 2), but no complaint by a State party or a United Nations organ could be deemed manifestly unfounded (ibid., para. 3). Another State or intergovernmental organization could appeal to the Court against a finding that a complaint was manifestly unfounded (ibid.). If it was decided that the case should proceed, a "Prosecutorial Division" would assume responsibility (art. 8, para. 5). A Procurator would submit the case to the Court; but the complainant State party or the relevant United Nations organ had certain independent rights in case of delay (ibid., para. 6). The draft Convention provided for the office of Procurator (to be elected by States parties) (art. 15, para. 2).
11. ILA, draft Statute for an International Criminal Court (Paris, 1984)[j]	The draft Statute provided for proceedings to be commenced by an International Commission of Criminal Inquiry, on the complaint of a State party which had conferred jurisdiction on the court (art. 24). It established the offices of Public Prosecutor (art. 25) and Deputy Public Prosecutors (art. 26). Under article 27, the International Commission of Criminal Inquiry would conduct a preliminary examination, before deciding whether to commence a prosecution (art. 31

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12. Committee of Experts on International Criminal Policy for the Prevention and Control of Transnational and International Criminality and for the Establishment of an International Criminal Court, revised draft Statute for the Creation of an International Criminal Court (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990)[k]

Article IV established a Procuracy, headed by a Procurator. Under article XVIII, para. 1, a complaint was to be made to or initiated by the Procuracy; its Investigative Division would then determine whether the complaint was "manifestly unfounded" (ibid., para. 2), but no complaint by a State party or a United Nations organ could be deemed manifestly unfounded (ibid., para. 3).

Another State or intergovernmental organization could appeal a finding that a complaint was manifestly unfounded (ibid.). If the case proceeded, the Procurator would submit the case to the Court; but the complainant State party or relevant United Nations organ would have certain independent rights in case of delay (art. XVIII, para. 6). Under article XIX, a pre-trial investigation would then take place before a Chamber of the Court. The Procurator was to be elected by States parties (art. XXV).

[a] United Nations, Historical survey of the question of international criminal jurisdiction, memorandum by the Secretary-General (Sales No. 1949.V.8), p. 61, appendix 4.

[b] Ibid., p. 75, appendix 7.

[c] Ibid., p. 88, appendix 8.

[d] Ibid., p. 97, appendix 9 B.

[e] Ibid., p. 119, appendix 11.

[f] Ibid., p. 120, appendix 12.

[g] Ibid., p. 145, appendix 15.

[h] See annex, footnote 9.

[i] See annex, footnote 47.

[j] ILA, *Report of the Sixty-first Conference, Paris, 26 August-1 September 1984* (London, 1985), p. 257, appendix A 1.

[k] See papers submitted to the Congress by the International Institute of Higher Studies in Criminal Sciences (documents A/CONF.144/NGO 5 and 7).