

Draft Statute for an International Criminal Court
with commentaries
1994

Text adopted by the International Law Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 91). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1994*, vol. II, Part Two.



on a draft statute for an international criminal court annexed to the report of the Commission to the General Assembly on the work of its forty-fifth session;⁶² the eleventh report of the Special Rapporteur, Mr. Doudou Thiam, on the topic "Draft Code of Crimes against the Peace and Security of Mankind";⁶³ the comments of Governments on the report of the Working Group on a draft statute for an international criminal court (A/CN.4/458 and Add.1-8); section B of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session prepared by the Secretariat on the report of the International Law Commission on the work of its forty-fifth session (A/CN.4/457); the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) of 22 February 1993;⁶⁴ the rules of procedure and evidence adopted by the International Tribunal⁶⁵ as well as the following informal documents prepared by the secretariat of the Working Group: (a) a compilation of draft statutes for an international criminal court elaborated in the past either within the framework of the United Nations or by other public or private entities; (b) a compilation of conventions or relevant provisions of conventions relative to the possible subject-matter jurisdiction of an international criminal court; and (c) a study on possible ways whereby an international criminal court might enter into relationship with the United Nations.

81. The Working Group proceeded to re-examine part by part, and article by article the draft statute for an international criminal court annexed to the Commission's report at the forty-fifth session bearing in mind, *inter alia*: (a) the need to streamline and simplify the articles concerning the subject-matter jurisdiction of the court, while better determining the extent of such jurisdiction; (b) the fact that the court's system should be conceived as complementary to national systems which function on the basis of existing mechanisms for international cooperation and judicial assistance; and (c) the need for coordinating the common articles to be found in the draft statute for an international criminal court and in the draft Code of Crimes against the Peace and Security of Mankind.

82. The draft statute prepared by the Working Group is divided into eight parts: part one on establishment of the court; part two on composition and administration of the court; part three on jurisdiction of the court; part four on investigation and prosecution; part five on the trial; part six on appeal and review; part seven on international cooperation and judicial assistance; and part eight on enforcement.

83. The commentaries to the draft articles explain the special concerns which the Working Group has addressed in considering a provision on a given subject-matter and the various views to which it gave rise or the reservations which it aroused.

84. In drafting the statute, the Working Group did not purport to adjust itself to any specific criminal legal system but rather, to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an international court or tribunals and relevant provisions in national criminal justice systems within the different legal traditions.

85. Careful note was also taken of the various provisions regulating the International Tribunal.

86. It is also to be noted that the Working Group has conceived the statute for an international criminal court as an attachment to a future international convention on the matter and has drafted the statute's provisions accordingly.

87. At its 2374th to 2376th meetings held on 21 and 22 July 1994, the Commission considered the revised report of the Working Group which contained the complete text of a draft statute consisting of 60 articles with commentaries thereto.

88. At its 2374th and 2375th meetings, the Commission adopted the draft statute. At the 2375th and 2376th meetings, the Commission adopted the commentaries to the 60 articles comprising the draft statute.

(d) *Tribute to the Chairmen of the successive Working Groups*

89. The Commission expressed gratitude to the Chairmen of the Working Groups it established at its forty-fourth and forty-fifth sessions, Mr. Doudou Thiam and Mr. Abdul G. Koroma. It paid a special tribute to the Chairman of the Working Group at the present session, Mr. James Crawford, for the outstanding contribution he made to the preparation of the draft statute by his tireless efforts and devoted work.

(e) *Recommendation of the Commission*

90. At its 2376th meeting, on 22 July 1994, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.

(f) *Draft statute for an international criminal court*

91. The text of, and commentaries to, draft articles 1 to 60 and the annex thereto as well as three appendices are reproduced below.

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

The States Parties to this Statute,

Desiring to further international cooperation to enhance the effective prosecution and suppression of

⁶² See footnote 48 above.

⁶³ See footnote 41 above.

⁶⁴ Document S/25704 and Corr.1 and Add.1.

⁶⁵ See footnote 57 above.

crimes of international concern, and for that purpose to establish an international criminal court;

Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole;

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective;

Have agreed as follows:

Commentary to the Preamble

(1) The preamble sets out the main purposes of the statute, which is intended to further cooperation in international criminal matters, to provide a forum for trial and, in the event of conviction, to provide for appropriate punishment of persons accused of crimes of significant international concern. In particular it is intended to operate in cases where there is no prospect of those persons being duly tried in national courts. The emphasis is thus on the court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements.

(2) The international criminal court envisaged by the draft statute is intended to exercise jurisdiction only over the most serious crimes, that is to say, crimes of concern to the international community as a whole. Its jurisdiction is stated exhaustively in the draft statute (see part three below), and the circumstances in which it should exercise that jurisdiction are also carefully circumscribed.

(3) The purposes set out in the preamble are intended to assist in the interpretation and application of the statute, and in particular in the exercise of the power conferred by article 35.

(4) Some members believed the preamble should be an operative article of the statute, given its importance.

PART ONE

ESTABLISHMENT OF THE COURT

Article 1. The Court

There is established an International Criminal Court ("the Court"), whose jurisdiction and functioning shall be governed by the provisions of this Statute.

Commentary

(1) Part one of the draft statute deals with the establishment of the court. Article 1 formally establishes an

international criminal court (hereinafter referred to as "the court").

(2) The purpose of the establishment of the court, as indicated in the preamble, is to provide a venue for the fair trial of persons accused of crimes of an international character, in circumstances where other trial procedures may not be available or may be ineffective.

(3) The question of the title to be given to the jurisdictional structure was the subject of some debate. In the draft articles proposed by the Working Group at the forty-fifth session in 1993,⁶⁶ the entity as a whole was referred to as the "tribunal", with the term "court" reserved for the judicial organs. However some members thought that it was unusual to have a "court" within a "tribunal", and others preferred not to use the word "tribunal" at all in relation to a permanent body intended to exercise criminal jurisdiction. The Commission agreed that the term "court" should be used to refer to the entity as a whole, and that where specific functions are intended to be exercised by particular organs (such as the Presidency, the Procuracy, the Registry), this would be specifically stated. References to "the court" as a whole are made in a number of articles: these confer powers, functions or obligations on all the organs of the court as described in article 5, or in the case of judicial powers, on the Presidency, a trial chamber, or the appeals chamber, as the case may be: see articles 4, 18, 24, 33, 43 and 51, paragraph 1.

Article 2. Relationship of the Court to the United Nations

The President, with the approval of the States Parties to this Statute ("States Parties"), may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.

Commentary

(1) Divergent views were expressed in the Commission on the relationship of the court to the United Nations. Several members of the Commission favoured the court becoming a subsidiary organ of the United Nations by way of resolutions of the Security Council and General Assembly, without the need for any treaty. Others strongly preferred that it be created as an organ of the United Nations by amendment to the Charter of the United Nations. Still others thought such an amendment unrealistic and even undesirable at this stage, and advocated another kind of link with the United Nations such as the Agreement governing the relationship between the United Nations and the International Atomic Energy Agency⁶⁷ (see article XVI of the IAEA statute).⁶⁸

(2) One view that was strongly advanced favoured a jurisdictional structure based on resolutions of the General Assembly and Security Council, on the ground that this would reflect the will of the international commu-

⁶⁶ See footnote 48 above.

⁶⁷ General Assembly resolution 1145 (XII), annex.

⁶⁸ United Nations, *Treaty Series*, vol. 276, p. 3.

nity as a whole, would be more flexible, and would bring the court within the framework of the United Nations without the need for an amendment of the Charter. Adoption of the statute by a treaty to which only some States would be parties would be an unsatisfactory alternative, since the States on whose territory terrible crimes were committed would not necessarily be parties to the statute; in some cases, such States were the least likely to become parties. To adopt the statute by treaty could give the impression of a circle of "virtuous" States as between whom, in practice, cases requiring the involvement of the court would not arise.

(3) However the Commission concluded that it would be extremely difficult to establish the court by a resolution of an organ of the United Nations, without the support of a treaty. General Assembly resolutions do not impose binding, legal obligations on States in relation to conduct external to the functioning of the United Nations itself. In the present case important obligations—for example the obligation of a State to transfer an accused person from its own custody to the custody of the court—which are essential to the court's functioning could not be imposed by a resolution. A treaty commitment is essential for this purpose. Moreover, a treaty accepted by a State pursuant to its constitutional procedures will normally have the force of law within that State—unlike a resolution—and that may be necessary if that State needs to take action *vis-à-vis* individuals within its jurisdiction pursuant to the statute. And, finally, resolutions can be readily amended or even revoked: that would scarcely be consistent with the concept of a permanent judicial body.

(4) Between the solution of a treaty and an amendment of the Charter, the majority preferred the former, and it is reflected in the text of article 2. This envisages a relationship agreement accepted by the competent organs of the United Nations and on behalf of the court, but with the States parties to the statute creating the court assuming the responsibility for its operation. This relationship agreement would be concluded between the Presidency, acting on behalf of and with the prior approval of States parties, and the United Nations, and it would provide, *inter alia*, for the exercise by the United Nations of the powers and functions referred to in the statute.

(5) On the other hand, some members felt strongly that the court could only fulfil its proper role if it was made an organ of the United Nations by amendment of the Charter. In their view, the court is intended as an expression of the concern about and desire of the organized international community to suppress certain most serious crimes. It is logical that the court be organically linked with the United Nations as the manifestation of that community. They would therefore prefer article 2 to provide simply that "The court shall be a judicial organ of the United Nations".

(6) If this alternative were to be adopted it would have substantial implications for the operation and financing of the court. For example, election of judges and other officers would naturally become a matter for Member States acting through the competent political organs of the United Nations. The Commission envisages that such a solution would require amendment or reconsideration

of, *inter alia*, articles 3 (Seat of the Court), 4 (Status and legal capacity), 6 (Qualification and election of judges) and 19 (Rules of the Court).

(7) Despite this disagreement at the level of technique, it was agreed that the court could only operate effectively if it were brought into a close relationship with the United Nations, both for administrative purposes, in order to enhance its universality, authority and permanence, and because in part the exercise of the court's jurisdiction could be consequential upon decisions by the Security Council (see art. 23). The issue of budgetary obligations will also need to be resolved.

(8) Some of the links with the United Nations are provided for in the draft statute. Other important questions (such as budgetary arrangements) will need to be worked out as part of the process of adoption of the statute. The Commission has not sought to elaborate the latter group of questions, which can only satisfactorily be worked out in the context of an overall willingness of States to proceed to the establishment of a court. See appendix I on covering clauses and also appendix III for a review of the various options for relating an entity such as the court to the United Nations.

Article 3. *Seat of the Court*

1. The seat of the Court shall be established at ... in ... ("the host State").

2. The President, with the approval of the States Parties, may conclude an agreement with the host State establishing the relationship between that State and the Court.

3. The Court may exercise its powers and functions on the territory of any State Party and, by special agreement, on the territory of any other State.

Commentary

(1) An agreement will need to be entered into on behalf of the court with the State which agrees to act as its host. This agreement should be formally entered into by the President acting with the prior approval of the States parties.

(2) It is envisaged that the State in whose territory the court is to be located should also provide prison facilities for the detention of persons convicted under the statute, in the absence of other arrangements under article 59. This is without prejudice to the question of meeting the costs of detention, for which provision will need to be made.

(3) Although trials will be held at the seat of the court, unless otherwise decided (see art. 32), other powers and functions of the court and its various organs may have to be exercised elsewhere, whether in the territory of States parties pursuant to cooperation arrangements with the court (see art. 51), or even in the territory of States not parties to the statute, by special arrangement (see art. 56).

Article 4. Status and legal capacity

1. The Court is a permanent institution open to States Parties in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Court shall enjoy in the territory of each State Party such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Commentary

(1) Paragraph 1 of article 4 reflects the goals of flexibility and cost-reduction set out in the report of the Working Group in 1992 which laid down the basic parameters for the draft statute.⁶⁹ While the court is a permanent institution, it shall sit only when required to consider a case submitted to it. Some members of the Commission continued to feel that this was incompatible with the necessary permanence, stability and independence of a true international criminal court.

(2) The court should benefit in the territory of each State party from such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

PART TWO

COMPOSITION AND ADMINISTRATION
OF THE COURT**Article 5. Organs of the Court**

The Court consists of the following organs:

- (a) A Presidency, as provided in article 8;**
- (b) An Appeals Chamber, Trial Chambers and other chambers, as provided in article 9;**
- (c) A Procuracy, as provided in article 12;**
- (d) A Registry, as provided in article 13.**

Commentary

(1) Article 5 specifies the structure of the international judicial system to be created and its component parts. Strictly judicial functions are to be performed by the Presidency (see art. 8), and various chambers (see art. 9). The crucial function of the investigation and prosecution of offenders is to be performed by an independent organ, the Procuracy (see art. 12). The principal administrative organ of the court is the Registry (see art. 13). For conceptual, logistical and other reasons, the three organs are to be considered as constituting an international judicial system as a whole, notwithstanding the necessary inde-

pendence which has to exist, for ethical and fair trial reasons, between the judicial organ and the Prosecutor.

(2) Care has been taken throughout the draft statute to refer, as the case may be, to the court as a whole, or to particular organs intended to perform particular functions. So far as judicial functions are concerned, in the pre-trial phase these are largely of a preliminary or procedural character and are entrusted to the Presidency (see art. 8, para. 4). Once a trial chamber or the appeals chamber is seized of a case, that chamber will exercise the various powers and functions attributed to the court as a whole (see art. 38, paragraph 5, and art. 49, paragraph 1).

Article 6. Qualification and election of judges

1. The judges of the Court shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices, and have, in addition:

- (a) Criminal trial experience;**
- (b) Recognized competence in international law.**

2. Each State Party may nominate for election not more than two persons, of different nationality, who possess the qualification referred to in paragraph 1 (a) or that referred to in paragraph 1 (b), and who are willing to serve as may be required on the Court.

3. Eighteen judges shall be elected by an absolute majority vote of the States Parties by secret ballot. Ten judges shall first be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (a). Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (b).

4. No two judges may be nationals of the same State.

5. States Parties should bear in mind in the election of the judges that the representation of the principal legal systems of the world should be assured.

6. Judges hold office for a term of nine years and, subject to paragraph 7 and article 7, paragraph 2, are not eligible for re-election. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.

7. At the first election, six judges chosen by lot shall serve for a term of three years and are eligible for re-election; six judges chosen by lot shall serve for a term of six years; and the remainder shall serve for a term of nine years.

8. Judges nominated as having the qualification referred to in paragraphs 1 (a) or 1 (b), as the case may be, shall be replaced by persons nominated as having the same qualification.

⁶⁹ See footnote 49 above.

Commentary

(1) Article 6 lays down the basic requirement that judges be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. It also addresses the difficult issue of the balance of qualifications required of the judges as between criminal law and criminal trial experience (the importance of which was stressed in many comments by States and during the debate in the Sixth Committee) and expertise in the field of international law.

(2) In order to strike an appropriate balance between these two needs, article 6 provides for separate elections of persons nominated with qualifications in criminal law and procedure or international law. The requirement of criminal trial experience is understood to include experience as a judge, prosecutor or advocate in criminal cases. The requirement of recognized competence in international law may be met by competence in international humanitarian law and international human rights law. Three of the ten judges elected from nominees with criminal trial experience will serve on each trial chamber (see art. 9, para. 5). The eight judges elected from nominees with recognized competence in international law will ensure the degree of competence in international law which the court will undoubtedly need. This does not exclude the possibility of persons being nominated with both criminal trial experience and recognized competence in international law. In such cases, it will be a matter for the nominating States to specify whether a person is nominated as having criminal trial experience or recognized competence in international law.

(3) Elections will be by absolute majority of the States parties: thus a nominee must obtain votes of 50 per cent plus one of the total number of States parties in order to be elected. Successive votes may have to be taken before that majority can be obtained.

(4) The 1993 draft statute⁷⁰ provided a relatively long period of 12 years for the term of office of the judges. This was criticized by some States as too long, and has been reduced to nine years, the same term as judges of ICJ. By contrast the Commission reaffirmed its view that judges should not be eligible for re-election. The special nature of an international criminal jurisdiction militates in favour of that principle, even on the basis of a nine-year term. However, it is necessary to provide limited exceptions to this principle to cope with transitional cases and casual vacancies (see art. 6, para. 7, and art. 7, para. 2).

(5) Some members believed that the distinction drawn by article 6 between persons with criminal trial experience and recognized competence in international law was too rigid and categorical. In their view it would be sufficient to require persons nominated for election to have either or both of those qualifications and to leave the issues of the balance of qualifications of the judges to the good sense of the States parties.

Article 7. Judicial vacancies

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 6.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and if that period is less than five years is eligible for re-election for a further term.

Commentary

(1) Vacancies in judicial office may be caused by death, resignation or, in accordance with article 15, loss of office. Replacement judges are to be elected in accordance with article 6 for the balance of their predecessor's term. If that term is less than five years measured from the day of taking up office, they are eligible for re-election.

(2) In accordance with article 6, paragraph 8, a replacement judge should have similar qualifications to the judge's predecessor. Thus, for example, a judge elected from nominees with criminal trial experience will be replaced by another such judge, in order to maintain the overall balance of the court.

Article 8. The Presidency

1. The President, the first and second Vice-Presidents and two alternate Vice-Presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier.

2. The first or second Vice-President, as the case may be, may act in place of the President in the event that the President is unavailable or disqualified. An alternate Vice-President may act in place of either Vice-President as required.

3. The President and the Vice-Presidents shall constitute the Presidency which shall be responsible for:

(a) The due administration of the Court;

(b) The other functions conferred on it by this Statute.

4. Unless otherwise indicated, pre-trial and other procedural functions conferred under this Statute on the Court may be exercised by the Presidency in any case where a chamber of the Court is not seized of the matter.

5. The Presidency may, in accordance with the Rules, delegate to one or more judges the exercise of a power vested in it under article 26, paragraph 3, 27, paragraph 5, 28, 29 or 30, paragraph 3, in relation to a case, during the period before a trial chamber is established for that case.

⁷⁰ See footnote 48 above.

Commentary

(1) The President and the two Vice-Presidents (with two alternates) have to perform important functions in the administration of the court, in particular as members of the Presidency. They are elected for a term of three years, to coincide with new elections for one third of the judges. After each triennium the Presidency and the appeals chamber will be reconstituted (see art. 8, para. 2). Alternates to the Vice-Presidents will also be elected to ensure that there are always three persons available to constitute the Presidency.

(2) Some members of the Commission argued strongly that the court should have a full-time President, who would reside at the seat of the court and be responsible under the statute for its judicial functioning. Others stressed the need for flexibility, and the character of the court as a body which would only be convened as necessary: in their view a requirement that the President serve on a full-time basis might unnecessarily restrict the range of candidates for the position. It was agreed that the provision would not prevent the President from becoming full time if circumstances should so require.

(3) In addition to its overall responsibility for administration, the Presidency has pre- and post-trial functions of a judicial character under the statute. The manner in which these functions are exercised will be subject to more detailed regulation in the rules.

(4) In the case of some of the pre-trial functions, the Presidency may delegate them to a judge or judges under paragraph 5. This raises the question whether the involvement of any one judge in a case might prevent that judge sitting as a member of a trial or appeals chamber, on the basis of an appearance of lack of impartiality.

(5) The European Court of Human Rights has had to face the problem on a number of occasions of whether prior involvement in a particular case disqualifies a judge from hearing the case under article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms which entitled an accused to a hearing "by an impartial tribunal".⁷¹ The European Court of Human Rights has held that "the mere fact that a judge has already taken decisions before the trial cannot in itself be regarded as justifying anxieties about his impartiality. What matters is the scope and nature of the measures taken by the judge ...".⁷² Thus a judge who had to determine on the basis of the file whether a case, including the Prosecutor's charges, amounted to a *prima facie* case such as to justify making the accused go through the ordeal of a trial did not infringe article 6, paragraph 1, of the Convention by subsequently sitting at the trial, since the issues to be decided were not the same as those at the trial and there was no pre-judgement

of guilt.⁷³ Similarly with a decision to leave an accused in pre-trial detention, which was a decision not "capable of having a decisive influence on [the judge's] opinion of the merits".⁷⁴ The position is different where the judge is required to form a provisional view about the actual guilt of the accused.⁷⁵

(6) In the exercise of its functions under the statute and in particular of its power of delegation under paragraph 5, the Presidency will need to take these principles carefully into account. However, in the Commission's view the functions actually conferred by the statute in the pre-trial phase are consistent with the involvement of members of the Presidency in chambers subsequently dealing with that case. The one exception is the indictment chamber which may hear evidence in the absence of the accused. See the commentary to article 37, paragraph (5), below.

Article 9. Chambers

1. As soon as possible after each election of judges to the Court, the Presidency shall in accordance with the Rules constitute an Appeals Chamber consisting of the President and six other judges, of whom at least three shall be judges elected from among the persons nominated as having the qualification referred to in article 6, paragraph 1 (b). The President shall preside over the Appeals Chamber.

2. The Appeals Chamber shall be constituted for a term of three years. Members of the Appeals Chamber shall, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. Judges may be renewed as members of the Appeals Chamber for a second or subsequent term.

4. Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and other chambers required by this Statute, and to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified.

5. The Presidency shall nominate in accordance with the Rules five such judges to be members of the Trial Chamber for a given case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6, paragraph 1 (a).

6. The Rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial.

⁷¹ See also article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

⁷² European Court of Human Rights, *Saraiva de Carvalho v. Portugal*, Series A: Judgments and Decisions, vol. 286-B, Judgment of 22 April 1994 (Registry of the Court, Council of Europe, Strasbourg, 1994), para. 35; and *Nortier v. The Netherlands*, *ibid.*, vol. 267, Judgment of 24 August 1993, referring to the earlier cases.

⁷³ *Saraiva de Carvalho v. Portugal* (see footnote 72 above), para. 37.

⁷⁴ *Ibid.*, para. 38.

⁷⁵ See European Court of Human Rights, *Hauschildt case*, Series A: Judgments and Decisions, vol. 154, Decision of 26 September 1988 (Registry of the Court, Council of Europe, Strasbourg, 1989) ("particularly confirmed suspicion").

7. No judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a chamber dealing with the case.

Commentary

(1) In order to allow for specialization, an appeals chamber is to be established, consisting of the President and six judges, at least three of whom are to be drawn from judges nominated as having recognized competence in international law. This ensures that a majority of judges with criminal trial experience will be available to serve on trial chambers. If the President is not available to preside over the appeals chamber, a Vice-President shall do so (see art. 8, para. 2).

(2) A relatively strict separation of trial and appellate functions is envisaged. But for practical and logistic reasons that separation cannot be complete. For example, the other judges may have to act as members of the appeals chamber if a member of that chamber is unavailable or disqualified (see art. 9, para. 4).

(3) In long trials, problems can arise if one or more members of the court become unavailable (e.g. through ill-health). Paragraph 6 allows for alternate judges to be nominated to attend a trial and to replace judges who become unavailable. The purpose of alternate judges is to ensure that five judges should be available at the end of a trial to decide on the case and the sentence. In particular, it is important to avoid the possibility of a divided chamber of four judges, leading to the possibility of a retrial (see art. 45, para. 3).

(4) It was agreed that the importance of maintaining impartiality dictated that a judge having the nationality of a complainant State or of the State of which the accused is a national should not be a member of a chamber dealing with that case (see para. 7).

(5) The modalities of constituting a trial chamber will be laid down in the rules. As to their content on this point, some members believed that it would be appropriate for the Presidency to appoint the judges who would serve in a chamber. Others believed that the membership of the chambers should be predetermined on an annual basis and should follow the principle of rotation to ensure that all judges have the opportunity to participate in the work of the court. On balance the Commission thought this was a matter which could be left to the rules, taking into account experience in the working of the statute. It was noted that a number of trial chambers could be constituted at a given time, although due to the limited number of judges available it would only be possible for two trial chambers actually to sit at the same time.

Article 10. Independence of the judges

1. In performing their functions, the judges shall be independent.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to

affect confidence in their independence. In particular, they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes.

3. Any question as to the application of paragraph 2 shall be decided by the Presidency.

4. On the recommendation of the Presidency, the States Parties may by a two-thirds majority decide that the workload of the Court requires that the judges should serve on a full-time basis. In that case:

(a) Existing judges who elect to serve on a full-time basis shall not hold any other office or employment;

(b) Judges subsequently elected shall not hold any other office or employment.

Commentary

(1) Article 10 states the basic rule of the independence of the judges. In drafting it, the Commission took into account the requirement that judicial independence be effectively ensured and also the fact that the court will not—or not at first—be a full-time body. Thus, in accordance with article 17, judges are not paid a salary but a daily allowance for each day in which they perform their functions. Article 10, without ruling out the possibility that the judge may perform other salaried functions (as also contemplated in art. 17, para. 3), endeavours to define the activities which might compromise the independence of the judges and which are accordingly precluded.

(2) For instance, it was clearly understood that a judge could not be, at the same time, a member of the legislative or executive branch of a national Government. The reference to the executive branch is not intended to cover persons who do not perform ordinary executive functions of government but have an independent role or office. Similarly, a judge should not at the same time be engaged in the investigation or prosecution of crime at the national level. On the other hand, national judges with experience in presiding over criminal trials would be most appropriate persons to act as judges.

(3) Some members of the Commission would strongly prefer a permanent court, believing that only permanence will give full assurance of independence and impartiality. Other members accept that the workload of the court might become such that full-time judges will be required. In such a case, paragraph 4 provides that, on the recommendation of the Presidency, the States parties by a two-thirds majority may decide that the judges should serve on a full-time basis. In that case, existing judges may elect to serve on a full-time basis. Judges subsequently elected will necessarily do so. In such cases, judges must not hold any other office or employment (see also art. 17, para. 4).

Article 11. Excusing and disqualification of judges

1. The Presidency at the request of a judge may excuse that judge from the exercise of a function under this Statute.

2. Judges shall not participate in any case in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.

3. The Prosecutor or the accused may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the members of the Chamber concerned. The challenged judge shall not take part in the decision.

Commentary

(1) The Presidency may, at the request of any judge, excuse that judge from the exercise of a function under the statute and may do so without giving any reason. Judges have a general obligation to be available to sit on the court (see art. 6, para. 2), but circumstances might arise where it is necessary for good reason to excuse a judge from sitting and where the interests of justice will not be served by disclosing the reason. This might be so in the case of grave security risks to the person or family of a judge. These matters are left to the good sense of the Presidency and the judge concerned.

(2) In addition, a judge who has previously been involved in a case in any capacity or whose impartiality might reasonably be doubted is disqualified from sitting. The words “in any case in which they have previously been involved in any capacity” are intended to cover, for example, the judge’s participation in the same case as Prosecutor or defence lawyer. An issue of disqualification may be raised by the Prosecutor or the accused. The decision rests with the chamber concerned.

Article 12. The Procuracy

1. The Procuracy is an independent organ of the Court responsible for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions. A member of the Procuracy shall not seek or act on instructions from any external source.

2. The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, who may act in place of the Prosecutor in the event that the Prosecutor is unavailable. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character and have high competence and experience in the prosecution of

criminal cases. They shall be elected by secret ballot by an absolute majority of the States Parties, from among candidates nominated by States Parties. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of five years and are eligible for re-election.

4. The States Parties may elect the Prosecutor and Deputy Prosecutors on the basis that they are willing to serve as required.

5. The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor.

7. The staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor.

Commentary

(1) Articles 12 and 13 deal with the two other organs which compose the international judicial system to be established.

(2) The Procuracy is an independent organ composed of the Prosecutor, one or more Deputy Prosecutors and such other qualified staff as may be required. The importance of the independence of the Procuracy is underlined by the provision that the election of the Prosecutor and Deputy Prosecutors be carried out not by the court but by an absolute majority of the States parties. The Prosecutor must not seek or receive instructions from any Government or any other source.

(3) Paragraph 4 allows the Prosecutor or a Deputy Prosecutor to be elected on a stand-by basis, that is to say, that they would be available to act as may be required. Like article 10, it is intended to maintain the flexibility of the system of the statute, while allowing for full-time involvement of the Prosecutor in case of need.

(4) As with the judges, the Prosecutor or Deputy Prosecutor cannot act as such in relation to a complaint involving a person of the same nationality.

(5) Paragraph 6 allows the Presidency to excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a given case: in this regard it parallels article 11, paragraph 1. It also provides for the Presidency to decide any issue that might arise as to the disqualification of the Prosecutor or a Deputy Prosecutor, whether under paragraph 5 or otherwise. Such cases are likely to be rare, since the Prosecutor acts in an essentially adversarial role and is not subject to the same requirement of independence as are the judges under article 10. Indeed, some members of the Commission thought that this provision was unnecessary and in conflict with the internal independence of the Procuracy from the judges. A majority of the Working Group, however, felt it should be retained to deal with any difficulties that might arise.

(6) An earlier version of this article provided for consultation with the Presidency in connection with the appointment by the Prosecutor of the staff of the Procuration. This was deleted because the Commission felt that it might compromise or be seen to compromise the Prosecutor's independence.

Article 13. The Registry

1. On the proposal of the Presidency, the judges by an absolute majority by secret ballot shall elect a Registrar, who shall be the principal administrative officer of the Court. They may in the same manner elect a Deputy Registrar.

2. The Registrar shall hold office for a term of five years, is eligible for re-election and shall be available on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on, and may be elected on the basis that the Deputy Registrar is willing to serve as required.

3. The Presidency may appoint or authorize the Registrar to appoint such other staff of the Registry as may be necessary.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar.

Commentary

(1) The Registrar, who is elected by the court, is the principal administrative officer of the court and is eligible for re-election. The Registrar has important functions under the statute as a depositary of notifications and a channel for communications with States. A Deputy Registrar may also be elected if required.

(2) Article 13 regulates not only the election of the Registrar but also the appointment of the Registry staff and the rules which apply to the latter. As with article 12, financial arrangements for the employment of staff will have to be made in connection with the adoption of the statute.

Article 14. Solemn undertaking

Before first exercising their functions under this Statute, judges and other officers of the Court shall make a public and solemn undertaking to do so impartially and conscientiously.

Commentary

This undertaking is to be made by the judges but also by the other officers of the court, that is to say, the Prosecutor and Deputy Prosecutors, the Registrar and the Deputy Registrar.

Article 15. Loss of office

1. A judge, the Prosecutor or other officer of the Court who is found to have committed misconduct or a serious breach of this Statute, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office.

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

(a) In the case of the Prosecutor or a Deputy Prosecutor, by an absolute majority of the States Parties;

(b) In any other case, by a two-thirds majority of the judges.

3. The judge, the Prosecutor or any other officer whose conduct or fitness for office is impugned shall have full opportunity to present evidence and to make submissions but shall not otherwise participate in the discussion of the question.

Commentary

(1) Article 15 deals both with loss of office by reason of misconduct or serious breach of the statute and by reason of illness or disability. It applies equally to the judges and other officers. In the case of the Prosecutor or a Deputy Prosecutor, removal is a matter for a majority of States parties, again emphasizing the importance attached to the independence of the Procuration.

(2) It is envisaged that procedures ensuring due process to the judge or officer in question should be established in the rules, subject to paragraph 3.

(3) Some members observed that this provision differed from the corresponding article of the Statute of ICJ (Art. 18) which required the unanimous opinion of the other members of the court that the judge had ceased to fulfil the necessary conditions. The prevailing view was that a two-thirds majority was a sufficient guarantee, and that a requirement of unanimity was too stringent.

Article 16. Privileges and immunities

1. The judges, the Prosecutor, the Deputy Prosecutors and the staff of the Procuration, the Registrar and the Deputy Registrar shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.

2. The staff of the Registry shall enjoy the privileges, immunities and facilities necessary to the performance of their functions.

3. Counsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

4. The judges may by an absolute majority decide to revoke a privilege or waive an immunity con-

ferred by this article, other than an immunity of a judge, the Prosecutor or Registrar as such. In the case of other officers and staff of the Procuracy or Registry, they may do so only on the recommendation of the Prosecutor or Registrar, as the case may be.

Commentary

(1) Article 16 refers to the privileges, immunities and facilities to be extended to judges, officers and staff of the court as well as to counsel, experts and witnesses appearing before it. It may be compared with Article 19 of the Statute of ICJ and article 30 of the statute of the International Tribunal.⁷⁶ In the case of the judges, the Prosecutor, the Deputy Prosecutors and staff of the Procuracy, and the Registrar and Deputy Registrar, the need for free exercise of their functions is very great, and they are expressly given the privileges, immunities and facilities of a diplomatic agent. Reference is made here to the Vienna Convention on Diplomatic Relations as that Convention contains the most widely accepted and elaborated rules on the subject.

(2) The position of the Registry staff is governed by the principle of functional immunity. It can be expected that much of their work will be done at the seat of the court. The issue of facilities there will need to be regulated in the agreement with the host State under article 3, paragraph 2.

(3) Counsel, experts and witnesses are given the same privileges, immunities and facilities as those accorded to counsel, experts and witnesses involved in proceedings before ICJ under article 42, paragraph 3, of the Statute of ICJ.

(4) There is provision for waiver of an immunity by the judges, but this does not apply to acts or omissions of a judge, the Prosecutor or Registrar as such, that is to say, while acting in the performance of their office. The Prosecutor and the Registrar must consent to any waiver affecting their respective staff.

Article 17. Allowances and expenses

1. The President shall receive an annual allowance.

2. The Vice-Presidents shall receive a special allowance for each day they exercise the functions of the President.

3. Subject to paragraph 4, the judges shall receive a daily allowance during the period in which they exercise their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 10.

4. If it is decided under article 10, paragraph 4, that judges shall thereafter serve on a full-time basis, existing judges who elect to serve on a full-time basis,

and all judges subsequently elected, shall be paid a salary.

Commentary

(1) Article 17 reflects the fact that, while the court will not be a full-time body, its President, as explained in the commentary to article 8, should be available on a day-to-day basis if required. Hence the distinction between the daily or special allowance proposed for the judges and the Vice-Presidents and the annual allowance proposed for the President.

(2) As noted in the commentary to article 10, it can subsequently be decided by States parties, having regard to its workload, that the court should move to a full-time basis. Paragraph 4 provides for the payment of full-time salaries instead of an allowance in such cases.

Article 18. Working languages

The working languages of the Court shall be English and French.

Commentary

English and French are to be the working languages of the court. But this is without prejudice to the possibility that a particular trial be conducted concurrently in the language of the accused and of the witnesses, together with the working languages (see art. 41, para. 1 (f)).

Article 19. Rules of the Court

1. Subject to paragraphs 2 and 3, the judges may by an absolute majority make rules for the functioning of the Court in accordance with this Statute, including rules regulating:

(a) The conduct of investigations;

(b) The procedure to be followed and the rules of evidence to be applied;

(c) Any other matter which is necessary for the implementation of this Statute.

2. The initial Rules of the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States Parties for approval. The judges may decide that a rule subsequently made under paragraph 1 should also be submitted to a conference of States Parties for approval.

3. In any case to which paragraph 2 does not apply, rules made under paragraph 1 shall be transmitted to States Parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States Parties have communicated in writing their objections.

4. A rule may provide for its provisional application in the period prior to its approval or confirmation. A rule not approved or confirmed shall lapse.

⁷⁶ See footnote 56 above.

Commentary

(1) Article 19 refers to rules of the court relating to pre-trial investigations as well as the conduct of the trial itself. It extends to matters concerning the respect of the rights of the accused, procedure, evidence, and so forth.

(2) In connection with paragraph 1 (b), one member of the Commission felt that the adoption of rules of evidence was too complex and might involve the enactment of substantive law. It should in principle not be part of the court's competence. Other members believed that it would be cumbersome and inflexible to contain all the rules of procedure and evidence in the statute itself, and that this was a matter which should be left to the judges, acting with the approval of the States parties.

(3) In order to involve States parties more closely in the formulation of the rules, article 19 envisages that the first set of rules will be drawn up by the judges but adopted by States parties themselves in conference. Thereafter, in order to preserve flexibility, the judges may initiate changes in the rules but these must only have definitive effect if approved by States parties, either at a meeting of States parties or by a special procedure of notification under paragraph 3. It is envisaged that this special summary procedure would be used for minor amendments, in particular changes not raising issues of general principle. Pending their approval by the States parties under either procedure, the rules could be given provisional effect.

(4) Some members of the Commission expressed concern at the prospect that rules might be provisionally applied to a given case, only to be subsequently disapproved by States parties. In their view, if the judges were not to be entrusted with the task of making rules without any requirement of subsequent approval, they should not be able to make rules having provisional effect. The idea of rules having provisional effect was particularly difficult to accept in penal matters. On the other hand the Commission felt that, although the power to give provisional effect to a rule should be exercised with care, there might be cases where it would be necessary, and that some flexibility should be available.

PART THREE

JURISDICTION OF THE COURT

Commentary

(1) Part three, dealing with jurisdiction, is central to the draft statute. Read in conjunction with certain provisions in parts three and five (in particular arts. 34, 35 and 37), it limits the range of cases which the court may deal with, so as to restrict the operation of the statute to the situations and purposes referred to in the preamble.

(2) Two basic ideas initially underlay the jurisdictional strategy envisaged for the statute, and were expressed in the 1992 Working Group's report.⁷⁷ The first was that

the court should exercise jurisdiction over crimes of an international character defined by existing treaties, and that—as a corollary—the statute itself would be primarily procedural and adjectival. The second was that the statute should distinguish, as the Statute of ICJ does, between participation and support for the structure and operation of the court on the one hand and acceptance of substantive jurisdiction in a particular case on the other. The process of acceptance would be a separate one (as under Art. 36 of the Statute of ICJ).

(3) To a great extent these premises continue to be reflected in the draft articles. Thus a major strand of jurisdiction continues to be in relation to crimes defined by a list of treaties in force (see art. 20, subpara. (e)) and jurisdiction in respect of such crimes is essentially based on the consent of affected States (this is sometimes referred to as the principle of “ceded jurisdiction”) (see commentary to art. 21 below). But the two principles have undergone some modification and development.

(4) The first modification relates to crimes under general international law. The distinction between treaty crimes and crimes under general international law can be difficult to draw. The crime of genocide provides an important example: it cannot be doubted that genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, is a crime under general international law.

(5) In 1993 a majority concluded that crimes under general international law could not be entirely excluded from the draft statute. Consequently the court was given jurisdiction over such crimes generically. They were defined as crimes

under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals.⁷⁸

Jurisdiction was limited by requirements of acceptance by the States on whose territory the alleged crime was committed and on whose territory the suspect was present. But this provision met with considerable criticism in the Sixth Committee and in the comments of States, on the grounds that a mere reference to crimes under general international law was highly uncertain and that it would give excessive power to the proposed court to deal with conduct on the basis that it constituted a crime under general international law.

(6) The Commission accepts that there is some point to these criticisms, and that in the context of a new and untried jurisdictional system, provisions of indeterminate reference should be avoided. It has therefore limited the court's jurisdiction over crimes under general international law to a number of specified cases, without prejudice to the definition and content of such crimes for other purposes (see the commentary to art. 20, subparas. (a) to (d), below).

(7) The second modification relates to the extent of any “inherent” jurisdiction of the court. One case of a crime under general international law that merits inclu-

⁷⁷ See footnote 49 above.

⁷⁸ Article 26, paragraph 2 (a), of the 1993 draft statute for an international criminal court (see footnote 48 above).

sion is the crime of genocide, authoritatively defined in the Convention on the Prevention and Punishment of the Crime of Genocide. Article II of the Convention provides:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

In the Commission's view, the prohibition of genocide is of such fundamental significance, and the occasions for legitimate doubt or dispute over whether a given situation amounts to genocide are so limited, that the court ought, exceptionally, to have inherent jurisdiction over it by virtue solely of the States participating in the statute, without any further requirement of consent or acceptance by any particular State. The draft statute so provides. The case for considering such "inherent jurisdiction" is powerfully reinforced by the Convention itself, which does not confer jurisdiction over genocide on other States on an *aut dedere aut judicare* basis, but expressly contemplates its conferral on an international criminal tribunal to be created (art. VI). The draft statute can thus be seen as completing in this respect the scheme for the prevention and punishment of genocide begun in 1948—and at a time when effective measures against those who commit genocide are called for.

(8) A number of other important changes are reflected in part three of the draft statute. The 1993 draft statute distinguished between two "strands" of jurisdiction in relation to treaty crimes: (a) jurisdiction over crimes of an international character⁷⁹ and (b) jurisdiction over crimes under what were referred to as "suppression conventions".⁸⁰ As the 1993 Working Group pointed out, a distinction could be drawn "between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law".⁸¹ Although the distinction reflects, *grosso modo*, a distinction between conduct specifically defined as a crime independently of any given system of national law and conduct which a treaty requires to be made criminally punishable under national law, it can be difficult to draw in the context of some of the treaties listed in the 1993 draft statute, and its retention would add an additional level of complexity. For these reasons the distinction has been abandoned (see art. 20, subpara. (e), and the list of treaty crimes contained in the annex. This does not suggest that all of the crimes referred to in the annex are of the same character, which is certainly not the case).

(9) But this has presented a further problem. Another characteristic of "suppression conventions" (such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which is by far the most important example of the category) is that they cover a wide range of conduct, much of which, taken in isolation in the context of a single prosecution for a breach, is not of any substantial international concern. If the court's jurisdiction is to be appropriately limited, either the treaties in question would have to be excluded altogether (which in the case of the Convention mentioned above would be undesirable) or other jurisdiction-limiting provisions need to be devised.

(10) The draft statute as now adopted takes the second course. The annex to the draft statute lists multilateral treaties in force, clearly defining as criminal specified conduct of international concern and extending the jurisdiction of States over such conduct. The court's jurisdiction extends to certain crimes defined by those treaties, whether or not they are "suppression conventions" as earlier defined. At the same time, in addition to requiring acceptance of the court's jurisdiction in respect of such crimes by relevant States, the draft statute seeks to limit the exercise of the court's jurisdiction by provisions giving effect to the policies set out in the preamble. Relevant provisions in this respect are:

(a) *Article 20, subparagraph (e)*: the court has jurisdiction over the treaty crimes only in cases which "having regard to the conduct alleged, constitute exceptionally serious crimes of international concern"; it will be a preliminary question under article 34 for the court to determine whether this is so in any case;

(b) *Article 25*: a complaint must be lodged by a State which has accepted the court's jurisdiction with respect to the crime;

(c) *Article 27*: the Presidency must determine whether the court should deal with the matter having regard to art. 35;

(d) *Article 34*: jurisdictional challenges may be made by the accused or an interested State at an early stage;

(e) *Article 35*: the court may be called on to decide whether, having regard to specific criteria related to the purposes of the Statute, a given case should be regarded as admissible.

(11) It is thus by the combination of a defined jurisdiction, clear requirements of acceptance of that jurisdiction and principled controls on the exercise of jurisdiction that the statute seeks to ensure, in the words of the preamble, that the court will be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.

(12) This having been said, some members of the Commission expressed their dissatisfaction at the restrictive approach taken to the jurisdiction of the court (other than in cases of genocide). In their view the various restrictions imposed on the court, and in particular the restrictive requirements of acceptance contained in article 21, were likely to frustrate its operation in many cases, and even to make the quest for an international criminal jurisdiction nugatory.

⁷⁹ *Yearbook ... 1993*, vol. II (Part Two), document A/48/10, annex, art. 22.

⁸⁰ *Ibid.*, art. 26, para. 2.

⁸¹ *Ibid.*, p. 110, commentary to art. 26, para. (5).

(13) By contrast, other members of the Commission thought that the draft statute went too far in granting “inherent” jurisdiction even over genocide, and that in the present state of the international community, the court’s jurisdiction should be entirely consensual. This issue arose also with respect to article 23, as recounted in the commentary to that article.

(14) Suggestions were made that the court should also have an advisory jurisdiction in matters of international criminal law, either on reference from United Nations organs or from individual States. The Commission has not made any provision for such a jurisdiction. The function of the court is to try persons charged under the statute for crimes covered by article 20, including crimes contrary to the treaties referred to in article 20, subparagraph (e). In doing so it will necessarily have to interpret those treaties, but it does not seem appropriate to give it additional jurisdiction of an inter-State character under them. Many of the treaties have their own jurisdictional provisions, for example referring disputes over their interpretation or application to ICJ. There is no reason to displace this jurisdiction.

Article 20. Crimes within the jurisdiction of the Court

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;**
- (b) The crime of aggression;**
- (c) Serious violations of the laws and customs applicable in armed conflict;**
- (d) Crimes against humanity;**
- (e) Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.**

Commentary

(1) Article 20 states exhaustively the crimes over which the court has jurisdiction under the statute. There are, in effect, two categories of such crimes, those under general international law (subparas. (a) to (d)) and those crimes under or pursuant to certain treaties (subpara. (e) and annex). The distinction is of particular importance for the purposes of article 39, which contains the *nullum crimen sine lege* principle.

(2) This in no way suggests that the two categories are mutually exclusive; on the contrary, there is considerable overlap between them. The conditions for the existence and exercise of jurisdiction of the two categories are essentially the same, subject to the obvious requirement that the relevant treaty should be properly applicable to the accused (see art. 39). The only exception is genocide, which is covered exclusively by subparagraph (a), and which, as already explained, is subject to its own jurisdictional regime under the statute.

(3) For the reasons stated above, the Commission concluded that it should not confer jurisdiction by reference to the general category of crimes under international law, but should refer only to the specific crimes warranting inclusion under that category. It has included four such crimes: genocide, aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity. It was guided in the choice of these in particular by the fact that three of the four crimes are singled out in the statute of the International Tribunal as crimes under general international law falling within the jurisdiction of the International Tribunal.⁸² The position of aggression as a crime is different, not least because of the special responsibilities of the Security Council under Chapter VII of the Charter of the United Nations, but the Commission felt that it too should be included, subject to certain safeguards. The inclusion of these four crimes represented a common core of agreement in the Commission, and is without prejudice to the identification and application of the concept of crimes under general international law for other purposes.

(4) As noted in the commentary to part three above, the statute is primarily an adjectival and procedural instrument. It is not its function to define new crimes. Nor is it the function of the statute authoritatively to codify crimes under general international law. With respect to certain of these crimes, this is the purpose of the draft Code of Crimes against the Peace and Security of Mankind, although the draft Code is not intended to deal with all crimes under general international law. To do so would require a substantial legislative effort. Accordingly the Commission has listed the four crimes without further specification in subparagraphs (a) to (d). The following commentary states the understanding of the Commission with respect to the four crimes, as a basis for the application of these paragraphs by the court.

(5) The least problematic of these, without doubt, is genocide. It is clearly and authoritatively defined in the Convention on the Prevention and Punishment of the Crime of Genocide which is widely ratified, and which envisages that cases of genocide may be referred to an international criminal court. For the reasons stated in the commentary to part three, the Commission believes that, exceptionally, the court should have inherent jurisdiction over the crime of genocide—that is to say, its jurisdiction should exist as between all States parties to the statute, and it should be able to be triggered by a complaint brought by any State party to the Convention, as expressly envisaged in article VI.

(6) The crime of aggression presents more difficulty in that there is no treaty definition comparable to genocide. General Assembly resolution 3314 (XXIX) deals with aggression by States, not with the crimes of individuals, and is designed as a guide for the Security Council, not as a definition for judicial use. But, given the provisions of Article 2, paragraph 4, of the Charter of the United Nations, that resolution offers some guidance, and a court must, at the present time, be in a better position to define the customary law crime of aggression than was

⁸² See document S/25704, annex, arts. 3 to 5.

the Nürnberg Tribunal in 1946. It would thus seem retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated with the waging of a war of aggression) 50 years after Nürnberg. On the other hand the difficulties of definition and application, combined with the Council's special responsibilities under Chapter VII of the Charter, mean that special provision should be made to ensure that prosecutions are brought for aggression only if the Council first determines that the State in question has committed aggression in circumstances involving the crime of aggression which is the subject of the charge (see art. 23, paragraph 2, and commentary).

(7) A number of members of the Commission took the view that not every single act of aggression was a crime under international law giving rise to the criminal responsibility of individuals. In their view the customary rule as it had evolved since 1945 covered only the waging of a war of aggression. They relied in particular on article 6, subparagraph (a), of the Charter of the Nürnberg Tribunal.⁸³ They also drew attention to the language of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,⁸⁴ the first principle of which states, *inter alia*: "A war of aggression constitutes a crime against the peace, for which there is responsibility under international law", and to the terms of article 5, paragraph 2, of the Definition of Aggression,⁸⁵ which states that "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility." In the view of these members, the language of these resolutions had to be taken into account notwithstanding doubts about whether they dealt with inter-State law or with the criminal responsibility of individuals.

(8) Article 20, subparagraph (c), refers to serious violations of the laws and customs applicable in armed conflict. This reflects provisions both in the statute of the International Tribunal⁸⁶ and in the draft Code of Crimes against the Peace and Security of Mankind as adopted at first reading.⁸⁷ Article 2 of the statute of the International Tribunal covers grave breaches of the Geneva Conventions of 1949, which were and remain in force in the territory of the former Yugoslavia. But in addition article 3 provides:

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

⁸³ Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

⁸⁴ General Assembly resolution 2625 (XXV), annex.

⁸⁵ General Assembly resolution 3314 (XXIX) 74, annex.

⁸⁶ See footnote 56 above.

⁸⁷ See footnote 7 above.

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

(9) This may be compared with the relevant provision of the draft Code of Crimes against the Peace and Security of Mankind as adopted at first reading,⁸⁸ article 22 of which reads as follows:

Article 22. Exceptionally serious war crimes

1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to . . .].

2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

(b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(c) use of unlawful weapons;

(d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) large-scale destruction of civilian property;

(f) wilful attacks on property of exceptional religious, historical or cultural value.

(10) The Commission shares the widespread view that there exists the category of war crimes under customary international law. That category overlaps with but is not identical to the category of grave breaches of the Geneva Conventions of 1949 and Additional Protocol I of 1977. Modern usage prefers to refer to the "rules applicable in armed conflict" rather than the "laws of war", given the uncertainties about the status of "war" since 1945 and the fact that in most armed conflicts even of an obvious international character there is no formal declaration of war. Reference is made here both to "the laws and customs" not only because the phrase is a hallowed one but also to emphasize its basis in customary (general) international law. On the other hand not all breaches of the laws of war will be of sufficient gravity to justify their falling within the jurisdiction of the court, and article 20, subparagraph (c) is accordingly limited by the use of the phrase "serious violations". The term "serious violations" is used to avoid confusion with "grave breaches" which is a technical term in the Geneva Conventions of 1949 and Additional Protocol I of 1977. It does not follow from the classification of conduct as a "grave breach" made in the Geneva Conventions of 1949 and Additional Protocol I of 1977 that the conduct

⁸⁸ *Ibid.*

will also constitute a “serious violation” although of course it may do so.

(11) With respect to the fourth category, crimes against humanity, this is by contrast a term of art, responding to the position under general international law. But there are unresolved issues about the definition of the crime. The view was expressed that the concept of “crimes against humanity” gave rise to the difficult question of determining, at the present stage of development in international law, when such crimes—in the absence of an applicable treaty regime—were triable as international crimes.

(12) An initial formulation of crimes against humanity was provided in article 6, subparagraph (c), of the Charter of the Nürnberg Tribunal,⁸⁹ although the Nürnberg Tribunal was very circumspect in applying it. The concept was taken up in subsequent texts and is contained in article 5 of the statute of the International Tribunal, which reads as follows:

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

(13) This formulation is to be compared with article 21 of the draft Code of Crimes against the Peace and Security of Mankind as adopted at first reading,⁹⁰ but which in substance covers the same field as article 5 of the statute of the International Tribunal. It provides as follows:

Article 21. Systematic or mass violations of human rights

An individual who commits or orders the commission of any of the following violations of human rights:

- murder
 - torture
 - establishing or maintaining over persons a status of slavery, servitude or forced labour
 - persecution on social, political, racial, religious or cultural grounds
- in a systematic manner or on a mass scale; or
- deportation or forcible transfer of population
- shall, on conviction thereof, be sentenced [to . . .].

⁸⁹ See footnote 83 above.

⁹⁰ See footnote 7 above.

(14) It is the understanding of the Commission that the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part. The hallmarks of such crimes lie in their large-scale and systematic nature. The particular forms of unlawful act (murder, enslavement, deportation, torture, rape, imprisonment, etc.) are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part. This idea is sought to be reflected in the phrase “directed against any civilian population” in article 5 of the statute of the International Tribunal, but it is more explicitly brought out in article 21 of the draft Code. The term “directed against any civilian population” should be taken to refer to acts committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The particular acts referred to in the definition are acts deliberately committed as part of such an attack.

(15) Some members of the Commission doubted the wisdom of including in article 20 crimes under general international law. In their view, the primary purpose of the draft statute was the setting up of a court to try such crimes as the parties to the statute could agree were international crimes triable by such a court. The annex to the statute listed such international crimes as had already been defined or identified by multilateral treaties widely adhered to and which were sufficiently clear and precise for a criminal court to apply. States becoming parties to the statute would agree that, subject to the preconditions in articles 21 and 22, such crimes could be referred to the court. Two of the four crimes now listed in article 20 (genocide and serious violations of the laws and customs applicable in armed conflict) were defined in whole or substantial part in multilateral treaties and listing them again as crimes under general international law was unnecessary. Also such a listing raised the difficult question of the relationship between multilateral treaty norms and customary international law. As to the two other crimes listed (aggression and crimes against humanity), serious questions as to their definition arose, which the statute as a procedural and adjectival instrument could not address. Moreover, any listing of crimes under general international law raised questions as to why other international crimes, such as apartheid and terrorism, were not also included.

(16) These members of the Commission also argued that, if any crimes under general international law were to be included in the jurisdiction of the court, the crime of apartheid should be among them. They pointed to the widespread ratification of the International Convention on the Suppression and Punishment of the Crime of Apartheid, to the even more widespread condemnation of the practice of apartheid as a crime, and to the need to guard against further outbreaks of the crime whether in southern Africa or elsewhere. Other members of the Commission pointed out that apartheid was included in the list of crimes pursuant to treaties in subparagraph (e) of article 20, that the reference in that Convention to apartheid “as practised in southern Africa” was now factually inaccurate, and that quite apart from the broad definition of the crime in the Convention, its status as a

crime under international law remained a disputed issue. On balance the Commission agreed that in the present international circumstances and given the advent of majority rule in South Africa, it was sufficient to include the International Convention on the Suppression and Punishment of the Crime of Apartheid under subparagraph (e) of article 20.

(17) In this context, it should be stressed again that article 20, subparagraphs (a) to (d), are not intended as an exhaustive list of crimes under general international law. It is limited to those crimes under general international law which the Commission believes should be within the jurisdiction of the court at this stage, whether by reason of their magnitude, the continuing reality of their occurrence or their inevitable international consequences.

(18) The remainder of the court's jurisdiction relates to what may be termed treaty crimes, that is to say, crimes of international concern defined by treaties. In the interests of certainty the Commission believes that these treaties should be exhaustively enumerated, and this was done in article 22 of the 1993 draft statute.⁹¹ The list of crimes defined by treaties, revised and with the addition of the few universal "suppression conventions", is contained in an annex to the statute. The criteria for inclusion in the annex were:

(a) That the crimes are themselves defined by the treaty so that an international criminal court could apply that treaty as law in relation to the crime, subject to the *nullum crimen sine lege* guarantee contained in article 39;

(b) That the treaty created either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility for an international criminal court to try the crime, or both, thus recognizing clearly the principle of international concern.

(19) The commentary to the annex gives reasons for the inclusion or exclusion of particular treaties.

(20) In addition, the Commission concluded that some further limitation was required over the court's jurisdiction under the treaties listed in the annex, on the ground that many of those treaties could cover conduct which, though serious in itself, was within the competence of national courts to deal with and which (in the context of an individual case) did not require elevation to the level of an international jurisdiction. This further limitation is achieved in subparagraph (e), which requires that the crime in question, having regard to the conduct alleged, should have constituted an exceptionally serious crime of international concern.

(21) The importance of the systematic factor was stressed by a number of members of the Commission, in particular in the context of crimes associated with terrorist activity. As yet, the international community has not developed a single definition of terrorism, although there are definitions of the term in some regional conventions. A systematic campaign of terror committed by some group against the civilian population would fall within

the category of crimes under general international law in subparagraph (d), and if motivated on ethnic or racial grounds also subparagraph (a). In addition, of the 14 treaties listed in the annex, 6 are specifically concerned with terrorist offences of one kind or another (such as hijacking or hostage-taking). Thus, as a number of members of the Commission stressed, terrorism, when systematic and sustained, is a crime of international concern covered by one or other of the crimes referred to in article 20. In addition, they noted that terrorism practised in any form is universally accepted to be a criminal act.

(22) In many cases terrorist activity is supported by large-scale drug-trafficking, which is of undeniable international concern. In such cases, as with those referred to in the previous paragraph, the requirements of subparagraph (e) in terms of the exceptionally serious character of the crime will readily be satisfied.

(23) As is pointed out above, the annex includes only treaties in force defining crimes of an international character and establishing a broad jurisdictional basis to try such crimes. It does not include a number of relevant instruments in the course of development: in particular, the draft Code of Crimes against the Peace and Security of Mankind, and the proposed instrument being elaborated within the framework of the General Assembly on the protection of peace-keepers. As to the draft Code, a number of members of the Commission reaffirmed their view that it was an essential complement to the draft statute and their hope that the two instruments would come to be linked in their operation.

Article 21. Preconditions to the exercise of jurisdiction

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:

(a) **In a case of genocide, a complaint is brought under article 25, paragraph 1;**

(b) **In any other case, a complaint is brought under article 25, paragraph 2, and the jurisdiction of the Court with respect to the crime is accepted under article 22:**

(i) **By the State which has custody of the suspect with respect to the crime ("the custodial State");**

(ii) **By the State on the territory of which the act or omission in question occurred.**

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

Commentary

(1) Article 21 spells out the States which have to accept the court's jurisdiction with regard to a crime

⁹¹ See footnote 48 above.

referred to in article 20 for the court to have jurisdiction. The modes of acceptance are spelt out in article 22.

(2) The general criterion recommended by the Commission is that contained in article 21, paragraph 1 (b). Acceptance is required by any State which has custody of the accused in respect of the crime (which it might have either because it has jurisdiction over the crime or because it has received an extradition request relating to it), and by the State on whose territory the crime was committed. This paragraph should be read in conjunction with article 53 on surrender of an accused to the court, in particular paragraph 2, and against the background of the strong presumption under article 37 that the court will have the accused before it when it tries a case.

(3) Article 21 differs from the equivalent provision of the 1993 draft statute (see art. 24) in a number of respects. First, it treats genocide separately (see para. (6) below). Secondly, it focuses in paragraph 1 (b) on the custodial State in respect of the accused, as distinct from any State having jurisdiction under the relevant treaty. Thirdly, that subparagraph requires acceptance by the State on whose territory the crime was committed, thus applying to all crimes, other than genocide, the requirement in the 1993 draft statute for crimes under general international law. Fourthly, it also requires, in such cases, the acceptance of a State which has already established, or eventually establishes, its right to the extradition of the accused pursuant to an extradition request (see para. 2).

(4) The term "custodial State" is intended to cover a range of situations, for example, where a State has detained or detains a person who is under investigation for a crime, or has that person in its control. The term would include a State which had arrested the suspect for a crime, either pursuant to its own law or in response to a request for extradition. But it would also extend, for example, to a State the armed forces of which are visiting another State and which has detained under its system of military law a member of the force who is suspected of a crime: in such a case the State to which the force belongs, rather than the host State, would be the "custodial State". (If the crime in question was committed on the territory of the host State, the acceptance of that State would, of course, also be necessary under subparagraph (b) (ii) for the court to have jurisdiction.)

(5) Another important feature of the draft statute is article 54, which imposes on a State party whose acceptance of the court's jurisdiction is required, but which does not accept the jurisdiction, an *aut dedere aut judicare* obligation, equivalent to the obligation included in most of the treaties listed in the annex. As between parties to the statute this, in effect, integrates the international criminal court into the existing system of international criminal jurisdiction and cooperation in respect of treaty crimes (see art. 54 and commentary below).

(6) Several members of the Commission would have preferred article 21, paragraph 1 (b), to have required acceptance by the State of the accused's nationality, as well as or instead of the State on whose territory the crime was committed. In their view the location of the crime could be fortuitous and might even be difficult to determine, whereas nationality represented a determinate

and significant link for the purposes of allegiance and jurisdiction. Some would also have preferred an express requirement for consent by the State which was also the victim of the act in question (see para. (9) of the commentary to art. 23).

(7) In light of the decision to confer "inherent" jurisdiction over genocide, article 21 treats that crime separately. Genocide is a crime under international law defined by the Convention on the Prevention and Punishment of the Crime of Genocide. Unlike the treaties listed in the annex, the Convention is not based on the principle *aut dedere aut judicare*, but on the principle of territoriality. Article VI of that Convention provides that persons charged with genocide or any of the other acts enumerated in the Convention shall be tried by a competent court of the State in which the act was committed. However, as a counterpart to the non-inclusion of the principle of universality in the Convention, article VI also provides for the trial of persons by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". This can be read as an authority by States parties to the Convention which are also parties to the statute to allow the court to exercise jurisdiction over an accused who has been transferred to the court by any State. The *travaux* of article VI support that interpretation.⁹² For the reasons already given, the Commission concluded that the court should have inherent jurisdiction over the crime of genocide, on a complaint being made by a party to the Convention, and the draft statute so provides (see para. 1 (a), and also arts. 25, para. 1, 51, para. 3 (a) and 53, para. 2 (a) (i)).

Article 22. Acceptance of the jurisdiction of the Court for the purposes of article 21

1. A State Party to this Statute may:

(a) At the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) At a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time.

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

⁹² See the report of the Ad Hoc Committee on Genocide, 5 April-10 May 1948 (*Official Records of the Economic and Social Council, Third Year, Seventh Session, Supplement No. 6* (E/794)).

4. If under article 21 the acceptance of a State which is not a party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the Court exercising jurisdiction with respect to the crime.

Commentary

(1) Article 21 identifies the States whose acceptance of the jurisdiction is required before the court entertains a case. Article 22 is concerned with the modalities of that acceptance, and is drafted so as to facilitate acceptance both of the statute as a whole and of the court's jurisdiction in individual cases.

(2) The system adopted can be characterized as an "opting in" system, whereby jurisdiction over certain crimes is not conferred automatically on the court by the sole fact of becoming a party to the statute but, in addition, by way of a special declaration, which can be made at the time of becoming a party to the statute, or subsequently. The Commission believed that this best reflected the considerations set out in the preamble, as well as its general approach to the court's jurisdiction.

(3) In its 1993 report, the Working Group had proposed three alternatives to this article, based on the idea of "opting out" rather than "opting in" to the jurisdiction.⁹³ On balance, the Commission considers that the "opting in" approach is the right one. Any other approach could prevent the court hearing a case, even though all States concerned are willing that it should do so. The reason is that it may not be clear, until after a complaint is brought, which specific States are required by article 21 to have accepted the jurisdiction of the court. If an opting-out regime were to be preferred, its effect would be to prevent a State from accepting jurisdiction in respect of a complaint which had already been brought. This would be undesirable. No doubt it would be possible to add to an initial "opting-out" provision a further capacity to opt back in, but this would be an artificial and complex system, and would, in practice, in the Commission's view add nothing in substance to article 22 as drafted.

(4) Consistent with this approach, paragraphs 1 to 3 deal with acceptance by State parties to the statute. Paragraph 1 provides for the possibility of a general declaration along the lines of the optional clause contained in Article 36 of the Statute of ICJ. Such a declaration may be general or subject to limitations *ratione materiae* or *ratione temporis*, and may be made for a limited period. It may be given in relation to a single case.

(5) In respect of the court's "inherent" jurisdiction over genocide (see para. (7) of the commentary to art. 20), acceptance of jurisdiction under article 22 will not be necessary. However, it is possible to envisage cases where the States concerned are not parties to the Convention on the Prevention and Punishment of the Crime of Genocide but none the less wish the court to

exercise jurisdiction over such a crime. The general reference in paragraph 1 to "the crimes referred to in article 20" is intended to cover such an exceptional case (see also arts. 21, para. 1 (b), and 25, para. 2, which are worded accordingly).

(6) Paragraph 4 deals with the acceptance of the court's jurisdiction by States which are not parties to the statute. This should be possible, consistent with the general approach to the court's jurisdiction outlined in the preamble. On the other hand a State not party should not be required—or for that matter permitted—to do more than consent to the exercise of jurisdiction in a given case by declaration lodged with the Registrar. If it wishes to take advantage of the existence of the court to accept its jurisdiction over crimes, bring complaints, and so forth, such a State should become a party to the statute. For judicial cooperation with States not parties see article 56.

(7) A number of members of the Commission would, however, prefer a system which would actively encourage States to accept the jurisdiction of the court in advance of any particular crime being committed. They accordingly favour an "opting out" system, so that States on becoming parties to the statute would have to publicly declare that they did not accept jurisdiction over specified crimes.

(8) One member of the Commission would go further, expressing profound reserve at a system of acceptance of jurisdiction which would in his view empty the statute of real content so far as the jurisdiction of the court is concerned. This prevented the member from joining the consensus of the Commission on the system of the draft statute.

(9) When States conclude a treaty by which they accept the jurisdiction of the court in relation to crimes listed in article 20, they are free to deposit that treaty with the Registrar, and this will constitute a sufficient declaration for the purposes of this article, provided that it is clear that all the parties to the treaty have consented to the deposit. Some members of the Commission would have preferred to make this clear beyond doubt by adding a paragraph specifically dealing with reference of crimes to the court by treaty.

Article 23. Action by the Security Council

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach

⁹³ Originally adopted as article 23 (see footnote 48 above).

of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

Commentary

(1) Paragraph 1 of article 23 does not constitute a separate strand of jurisdiction from the point of view of the kind of crimes which the court may deal with (jurisdiction *ratione materiae*). Rather, it allows the Security Council to initiate recourse to the court by dispensing with the requirement of the acceptance by a State of the court's jurisdiction under article 21, and of the lodging of a complaint under article 25. This power may be exercised, for example, in circumstances where the Council might have authority to establish an ad hoc tribunal under Chapter VII of the Charter of the United Nations. The Commission felt that such a provision was necessary in order to enable the Council to make use of the court, as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind. On the other hand it did not intend in any way to add to or increase the powers of the Council as defined in the Charter, as distinct from making available to it the jurisdiction mechanism created by the statute.

(2) The Commission understood that the Security Council would not normally refer to the court a "case" in the sense of an allegation against named individuals. Article 23, paragraph 1, envisages that the Council would refer to the court a "matter", that is to say, a situation to which Chapter VII of the Charter applies. It would then be the responsibility of the Prosecutor to determine which individuals should be charged with crimes referred to in article 20 in relation to that matter: see article 25, paragraph 4.

(3) Some members of the Commission expressed concern at the possibility of the Security Council referring a particular case to the court in any circumstances at all. Quite apart from the question of the extent of the powers of the Council under Chapter VII (as to which see para. (6) below), they were concerned that article 23, paragraph 1, might be read as endorsing detailed involvement by the Council in the prosecution of individuals for crimes, something which in their view should never be a matter for the Council.

(4) Concern was also expressed by some members of the Commission at the linkage between the Security Council as a principal organ of the United Nations and a treaty body established by a certain number of States. On the other hand it was pointed out that institutional links existed between the United Nations and a number of other such bodies (for example, the Human Rights Committee under the International Covenant on Civil and Political Rights), and that, in any event, the statute should require the participation of a significant proportion of States before coming into force.

(5) Some members were of the view that the power to refer cases to the court under article 23, paragraph 1, should also be conferred on the General Assembly, particularly in cases in which the Security Council might be hampered in its actions by the veto. On further consideration, however, it was felt that such a provision should

not be included as the General Assembly lacked authority under the Charter of the United Nations to affect directly the rights of States against their will, especially in respect of issues of criminal jurisdiction. The General Assembly would of course retain its power under the Charter to make recommendations with respect to matters falling within the jurisdiction of the court, and, depending on the terms of any relationship agreement under article 2, will have a significant role in the operation of the statute.

(6) In adopting article 23, paragraph 1, the Commission is not to be understood as taking any position as to the extent of the powers of the Security Council under Chapter VII of the Charter of the United Nations or otherwise, or as to the situations in which it is proper that these powers should be exercised. Different views were expressed on these issues during the debate in the Commission.

(7) The financial arrangements for the court will depend on the relationship to be established between the court and the United Nations, an issue discussed in the commentary to article 2. If the costs of proceedings under the statute are to be met by States parties rather than through the United Nations system, special provision will need to be made to cover the costs of trials pursuant to article 23, paragraph 1.

(8) Paragraph 2 of article 23 deals with the specific case of a charge of aggression. Any criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the Charter of the United Nations to make. The consequential issues of whether an individual could be indicted, for example, because that individual acted on behalf of the State in such a capacity as to have played a part in the planning and waging of the aggression, would be for the court to decide.

(9) Although a Security Council determination of aggression is a necessary preliminary to a complaint being brought in respect of or directly related to the act of aggression, the normal provisions of the draft statute with respect to acceptance of the jurisdiction and the bringing of a complaint apply, unless the Council also acts under article 23, paragraph 1, with respect to the aggression.

(10) One member of the Commission preferred that the jurisdiction of the court over crimes referred to in article 20, subparagraphs (a) to (d), should be dependent in all cases on the prior authorization of the Security Council, given the inevitable implications for international peace and security inherent in such situations. The Commission did not support this suggestion, although it recognized that, in the case where the Council had already taken action under Chapter VII of the Charter of the United Nations, issues of the relationship between that action and the court's jurisdiction could arise, a matter dealt with in paragraph 3.

(11) Another member pointed out that in paragraphs 1 and 2 of article 23 the exercise of the competences pertaining to the Security Council in its relationship with the exercise of the competences pertaining to the court

was envisaged as a "preliminary question", as known in some legal systems. By way of example, paragraphs 2 and 3 of article 177 of the Treaty Establishing the European Economic Community were mentioned.⁹⁴

(12) Paragraph 3 of article 23 prevents a prosecution from being commenced, except in accordance with a decision of the Security Council, in relation to a situation with respect to which action under Chapter VII of the Charter of the United Nations is actually being taken by the Council. It is an acknowledgement of the priority given by Article 12 of the Charter, as well as for the need for coordination between the court and the Council in such cases. On the other hand it does not give the Council a mere "veto" over the commencement of prosecutions. It is necessary for the Council to act to maintain or restore international peace and security or in response to an act of aggression. Once the Chapter VII action is terminated the possibility of prosecutions being commenced under the statute would revive.

(13) Several members of the Commission took the view that paragraph 3 was undesirable, on the basis that the processes of the statute should not be prevented from operating through political decisions taken in other forums.

(14) More generally, the view was also expressed by certain members that, although it was clear that provisions of the Charter of the United Nations might be paramount, it was unwise for the Commission to seek to provide in the statute for situations in which Charter provisions, such as Chapter VII, ought to apply. Charter interpretation or application—in politically sensitive situations—was a complex and difficult responsibility to be undertaken only in light of prevalent United Nations practice. Moreover, defining the role of the Security Council with respect to the statute was a matter for appropriate consultation, by appropriate representatives of the General Assembly with appropriate representatives of the Council.

(15) There was also the consideration that article 23 would introduce into the statute a substantial inequality between States members of the Security Council and those that were not members, and, as well, between the permanent members of the Security Council and other States. It was not likely to encourage the widest possible adherence of States to the statute. Thus, the preferable course, in this view, was for article 23 not to be included in the statute, but for a savings clause to be included as a preambular paragraph in the covering treaty, to which the statute would be an annex, which would provide for the paramountcy of the Charter of the United Nations. Such a savings clause is found in the preamble to the Definition of Aggression which states:

... nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations ...⁹⁵

⁹⁴ United Nations, *Treaty Series*, vol. 298, p. 11; for the official English text, see *Treaties Establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1973), p. 163.

⁹⁵ See footnote 85 above.

Article 24. Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

Commentary

This article is intended to spell out the duty of the court (and of each of its organs, as appropriate) to satisfy itself that it has jurisdiction in a given case. Detailed provisions relating to challenges to jurisdiction are contained in article 34. But even in the absence of a challenge there is an *ex officio* responsibility on the court in matters of jurisdiction.

PART FOUR

INVESTIGATION AND PROSECUTION

Article 25. Complaint

1. A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.

2. A State Party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.

3. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

4. In a case to which article 23, paragraph 1, applies, a complaint is not required for the initiation of an investigation.

Commentary

(1) The court is envisaged as a facility available to States parties to its statute, and in certain cases to the Security Council. The complaint is the mechanism that invokes this facility and initiates the preliminary phase of the criminal procedure. Such a complaint may be filed by any State party which has accepted the jurisdiction of the court with respect to the crime complained of. In the case of genocide, where the court has jurisdiction without any additional requirement of acceptance, the complainant must be a contracting party to the Convention on the Prevention and Punishment of the Crime of Genocide and thus entitled to rely on article VI of the Convention (see art. 25, para. 1). In this context it may be recalled that any State Member of the United Nations, and any other State invited to do so by the General Assembly, may become a contracting party to the Convention: see article XI of the Convention.

(2) On balance the Commission believes that resort to the court by way of complaint should be limited to States parties. This may encourage States to accept the rights and obligations provided for in the statute and to share in the financial burden relating to the operating costs of the court. Moreover in practice the court could only satisfactorily deal with a prosecution initiated by complaint if the complainant is cooperating with the court under part seven of the statute in relation to such matters as the provision of evidence, witnesses, and the like.

(3) As noted above in relation to article 23, in cases where the court has jurisdiction by virtue of a decision of the Security Council under Chapter VII of the Charter of the United Nations, the actual prosecution will be a matter for the Procuracy and there will be no requirement of a complaint (see art. 25, para. 4). The Procuracy should have equal independence in relation to cases initiated under article 23, paragraph 1, as to those initiated by a complaint.

(4) One member of the Commission suggested that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint if it appears that a crime apparently within the jurisdiction of the court would otherwise not be duly investigated. However, other members felt that the investigation and prosecution of the crimes covered by the statute should not be undertaken in the absence of the support of a State or the Security Council, at least not at the present stage of development of the international legal system.

(5) The complaint is intended to bring to the attention of the court the apparent commission of a crime. The complaint must as far as possible be accompanied by supporting documentation (see para. 3). The court is envisaged as a mechanism that should be available whenever necessary, but which should not be activated unless there is reason to do so. Given the personnel required for and the costs involved in a criminal prosecution, the jurisdiction should not be invoked on the basis of frivolous, groundless or politically motivated complaints. Moreover, the Prosecutor must have the necessary information to begin an investigation. This is not to suggest that the complaint must itself establish a *prima facie* case, but rather that it should include sufficient information and supporting documentation to demonstrate that a crime within the jurisdiction of the court has apparently been committed, and to provide a starting point for the investigation.

Article 26. Investigation of alleged crimes

1. On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23, paragraph 1, the Prosecutor shall initiate an investigation unless the Prosecutor concludes that there is no possible basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency.

2. The Prosecutor may:

(a) Request the presence of and question suspects, victims and witnesses;

(b) Collect documentary and other evidence;

(c) Conduct on-site investigations;

(d) Take necessary measures to ensure the confidentiality of information or the protection of any person;

(e) As appropriate, seek the cooperation of any State or of the United Nations.

3. The Presidency may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purposes of an investigation, including a warrant under article 28, paragraph 1, for the provisional arrest of a suspect.

4. If, upon investigation and having regard, *inter alia*, to the matters referred to in article 35, the Prosecutor concludes that there is no sufficient basis for a prosecution under this Statute and decides not to file an indictment, the Prosecutor shall so inform the Presidency giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

5. At the request of a complainant State or, in a case to which article 23, paragraph 1, applies, at the request of the Security Council, the Presidency shall review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision.

6. A person suspected of a crime under this Statute shall:

(a) Prior to being questioned, be informed that the person is a suspect and of the rights:

(i) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(ii) To have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the Court;

(b) Not be compelled to testify or to confess guilt;

(c) If questioned in a language other than a language the suspect understands and speaks, be provided with competent interpretation services and with a translation of any document on which the suspect is to be questioned.

Commentary

(1) The Prosecutor, upon receipt of a complaint is responsible for the investigation and the prosecution of the alleged crime. The Procuracy will investigate a complaint unless the Prosecutor on an initial review of the complaint and supporting documentation concludes that there is no possible basis for such an investigation. In the latter case, the Presidency is to be informed (see also para. 5).

(2) In conducting the investigation, the Procuracy should have the power to question suspects, victims and witnesses, to collect evidence, to conduct on-site investi-

gations, and so forth. The Prosecutor may seek the cooperation of any State and request the court to issue orders to facilitate the investigation. During the investigation, the Prosecutor may request the Presidency to issue subpoenas and warrants, since a chamber will not be convened until a later stage, when the investigation has produced sufficient information for an indictment and a decision has been made to proceed.

(3) Under some penal systems, a distinction is made between the phase of investigation of a complaint by the police and the subsequent more formal phase of preparation of the prosecution under the control of an examining magistrate. Although this system offers a number of guarantees of the integrity of the prosecution process, it has not been adopted in the draft statute, for a number of reasons. First, the statute offers its own guarantees of the independence of the prosecution process and of the rights of the suspect. Secondly, it is envisaged that complaints will not be brought before the court without preliminary investigation on the part of the complainant State, which may substitute for the process of initial inquiry an investigation to some degree. Thirdly, the intention of the statute is to create a flexible structure which does not involve undue expense or the proliferation of offices.

(4) Questions of cooperation on the part of States with the execution of subpoenas and warrants are dealt with in part seven of the statute (see especially arts. 51, 52 and 53).

(5) At the investigation phase, a person who is suspected of having committed a crime may be questioned, but only after being informed of the following rights: the right not to be compelled to testify or to confess guilt; the right to remain silent without reflecting guilt or innocence; the right to have the assistance of counsel of the suspect's choice; the right to free legal assistance if the suspect cannot afford a lawyer, and the right to interpretation during questioning, if necessary (see, for example, International Covenant on Civil and Political Rights, art. 14).

(6) There is some overlap between the provisions concerning the rights of a suspect, a person believed to have committed a crime but not yet charged, and the rights of the accused, a person formally charged with the crime in the form of an indictment confirmed under article 27. However, the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation, for example, the right not to be compelled to confess to a crime. Thus, the Commission felt that it was important to include a separate provision to guarantee the rights of a person during the investigation phase, before the person has actually been charged with a crime. It is also necessary to distinguish between the rights of the suspect and the rights of the accused since the former are not as extensive as the latter. For example, the suspect does not have the right at this stage to examine witnesses or to be provided with the prosecution evidence. The rights which are guaranteed to the accused in these respects are contained in article 41, paragraphs 1 (e) and 2.

(7) Following the investigation, the Prosecutor must assess the information obtained and decide whether or

not there is a sufficient basis to proceed with a prosecution. If not, the Prosecutor must so inform the Presidency which may at the request of the complainant State or (in a case initiated by it) the Security Council, review a decision of the Prosecutor not to proceed with a prosecution. This reflects the view that there should be some possibility of judicial review of the Prosecutor's decision not to proceed with a case. On the other hand, for the Presidency to direct a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties given that responsibility for the conduct of the prosecution is a matter for the Prosecutor. Hence paragraph 5 provides that the Presidency may request the Prosecutor to reconsider the matter, but leaves the ultimate decision to the Prosecutor. This procedure applies equally in the case of a decision of the Prosecutor under paragraph 1 not to proceed with a prosecution.

(8) Some members of the Commission would prefer that the Presidency also have the power to annul a decision of the Prosecutor not to proceed to an investigation or not to file an indictment in cases where it is clear that the Prosecutor has made an error of law in making that decision. Respect is due to decisions of the Prosecutor on issues of fact and evidence but like all other organs of the court the Prosecutor is bound by the statute and the Presidency should, in this view, have the power to annul decisions shown to be contrary to law.

(9) The phrase "sufficient basis" in paragraph 4 is intended to cover a number of different situations where further action under the statute would not be warranted: first, where there is no indication of a crime within the jurisdiction of the court; secondly, where there is some indication of such a crime but the Prosecutor concludes that the evidence available is not strong enough to make a conviction likely; thirdly, where there is *prima facie* evidence of a crime within the jurisdiction of the court, but the Prosecutor is satisfied that the case would probably be inadmissible under article 35.

Article 27. Commencement of prosecution

1. If upon investigation the Prosecutor concludes that there is a *prima facie* case, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

2. The Presidency shall examine the indictment and any supporting material and determine:

(a) Whether a *prima facie* case exists with respect to a crime within the jurisdiction of the Court; and

(b) Whether, having regard, *inter alia*, to the matters referred to in article 35, the case should on the information available be heard by the Court.

If so, it shall confirm the indictment and establish a trial chamber in accordance with article 9.

3. If, after any adjournment that may be necessary to allow additional material to be produced, the Presidency decides not to confirm the indictment, it shall so inform the complainant State or, in a case to

which article 23, paragraph 1, applies, the Security Council.

4. The Presidency may at the request of the Prosecutor amend the indictment, in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence.

5. The Presidency may make any further orders required for the conduct of the trial, including an order:

(a) Determining the language or languages to be used during the trial;

(b) Requiring the disclosure to the defence, within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence;

(c) Providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) Providing for the protection of the accused, victims and witnesses and of confidential information.

Commentary

(1) While the complaint is the document that initiates the investigation of an alleged crime, the indictment is the document on the basis of which a prosecution is commenced. If after investigation the Prosecutor concludes that there is a *prima facie* case against the suspect in respect of a crime within the court's jurisdiction, and that it is desirable having regard to article 35 for the prosecution to be commenced, the Prosecutor is to prepare an indictment including a concise statement of the facts alleged and of the crime or crimes alleged to have been committed. A *prima facie* case for this purpose is understood to be a credible case which would (if not contradicted by the defence) be a sufficient basis to convict the accused on the charge.

(2) The Prosecutor then submits the indictment and any necessary supporting documentation to the Presidency, which reviews the indictment and decides whether there is indeed a *prima facie* case of crime alleged to have been committed by the person named, and whether, having regard to the matters referred to in article 35, the case is apparently one over which the court should exercise jurisdiction. If the answer to both questions is in the affirmative, it should confirm the indictment and convene a chamber, in accordance with article 9, to conduct the trial. It is at this point in time, when the indictment is affirmed by the court, that the person is formally charged with the crime and a "suspect" becomes an "accused".

(3) Before deciding whether to confirm an indictment, the Presidency may wish to ask the Prosecutor to provide further information, and may suspend consideration of whether to confirm an indictment while it is being

sought, provided that, having regard to article 9, paragraph 3, of the International Covenant on Civil and Political Rights, the procedure is not unnecessarily delayed. Delay may be a consideration especially where the accused is in custody (see arts. 28, para. 2, and 41, para. 1 (c)). The procedure will take place in private, and without notification to the suspect. It will not require examination of witnesses as distinct from examination of the case file presented by the Prosecutor, which should fully reflect the case as prepared at this stage of the proceedings (see the special procedure of an indictment chamber under art. 37, para. 4).

(4) Although this form of review of the indictment is necessary in the interests of accountability and in order to ensure that the court only exercises jurisdiction in circumstances provided for by the statute, it must be emphasized that confirmation of the indictment is in no way to be seen as a pre-judgement by the court as to the actual guilt or innocence of the accused. The confirmation occurs in the absence of and without notice to the accused, and without any assessment of the defence as it will be presented at the trial.

(5) In some legal systems, an indictment is a public document, unless for some special reason it is ordered to be "sealed". By contrast, under the statute the court will only publish an indictment at the beginning of the trial (see art. 38, para. 1 (a)), or as a result of a decision of an indictment chamber in the special circumstances envisaged by article 37, paragraph 4.

(6) At a later stage it may be necessary to amend an indictment, and the court has power to do so on the recommendation of the Prosecutor under paragraph 4, ensuring at the same time that the accused is notified of the amendment and has any necessary additional time to prepare a defence. Such an amendment may involve changes in the particular allegations made, provided that they fall within the scope of the original complaint and of the jurisdiction of the court. If the changes amount to a substantially different offence, a new indictment should be filed, and if the conditions laid down in the statute for the court's jurisdiction have materially altered, a new complaint may have to be lodged.

(7) Once the indictment has been affirmed, the Presidency may issue an arrest warrant (as to which see art. 28) and other orders required for the prosecution and conduct of the trial, including the particular orders referred to in paragraph 5. It is intended, however, that the chamber should assume responsibility for subsequent pre-trial procedures once it is convened.

(8) If, after any necessary adjournment, the indictment is not confirmed, the procedure is at an end and the suspect, if in custody in relation to the complaint, would normally be entitled to be released. This is of course without prejudice to any other lawful basis for the detention of the suspect, for instance, under national law. The complainant State and, in a case initiated by the Security Council under article 23, paragraph 1, the Council, should be informed of any decision not to confirm the indictment.

Article 28. Arrest

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the provisional arrest of a suspect if:

(a) There is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

(b) The suspect may not be available to stand trial unless provisionally arrested.

2. A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow.

3. As soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest and transfer of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

(a) The accused will voluntarily appear for trial; or

(b) There are special circumstances making it unnecessary for the time being to issue the warrant.

4. A person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges.

Commentary

(1) Provisions dealing with the arrest and detention of an accused person are drafted so as to ensure compliance with relevant provisions of the International Covenant on Civil and Political Rights, especially article 9 (see paras. 2 and 4, and arts. 29 and 30).

(2) Prior to the confirmation of the indictment, the Presidency may order the arrest or detention of a suspect on the basis of a preliminary determination that there are sufficient grounds for doing so and a real risk that the suspect's presence at trial cannot otherwise be assured (see para. 1). This is referred to here as provisional arrest, following the language commonly used in extradition agreements and contained in article 9 of the Model Treaty on Extradition.⁹⁶ In some legal systems it is referred to as provisional detention, but for the purposes of the statute it is desirable to distinguish between the arrest of a person and that person's subsequent detention.

(3) Provisional arrest is intended as a rather exceptional remedy, since it would occur prior to any determination by the court that the necessary conditions for the exercise of its jurisdiction appear to exist. By contrast, once the indictment has been confirmed, every effort should be made to ensure that the accused is taken into custody so as to be available for trial. Normally the Presidency will grant a warrant for arrest of an accused unless it is clear that the accused will appear, or there are

special circumstances (such as the fact that the accused is detained by a State party, or is serving a sentence for some other crime) making it unnecessary for the time being to issue the warrant.

(4) Article 28 deals only with the issue of a warrant of arrest. Judicial assistance on the part of States with respect to execution of warrants is dealt with in articles 52 and 53.

Article 29. Pre-trial detention or release

1. A person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused have been respected.

2. A person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial.

3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation.

4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State.

Commentary

(1) Article 29 deals with the issue of pre-trial detention or release on bail. It is drafted so as to ensure conformity with article 9 of the International Covenant on Civil and Political Rights. It requires that any person arrested pursuant to a warrant issued under article 28 should be brought promptly before a judicial officer of the State in which the arrest occurred, who should determine, in accordance with the procedures applicable in that State, whether the warrant has been duly served and that the rights of the accused have been respected. The Commission acknowledges that there is some risk in entrusting these powers to a State official (usually a magistrate or some similar person exercising similar functions under national law) rather than before an organ of the court. However, it is essential under article 9, paragraph 3, of the International Covenant that this preliminary opportunity for review of the arrest be provided promptly, and in practice it can only be done in this way. Since *ex hypothesi* the arresting State will be cooperating with the court, there is no reason to expect that this preliminary procedure will cause difficulties.

(2) On the other hand, release whether unconditionally or on bail pending trial is a matter for the Presidency. In conformity with article 9, paragraph 4, of the International Covenant on Civil and Political Rights, it is provided that a person arrested pursuant to a warrant

⁹⁶ General Assembly resolution 45/116, annex.

issued under article 28 may apply to the court for a determination of the lawfulness under the statute of the arrest or detention (see para. 3). The court must decide whether the arrest and detention were lawful, and if not it shall order the release of the accused. In the case of wrongful arrest it may award compensation accordingly, as required by article 9, paragraph 5, of the International Covenant, which provides that "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". The Commission believes that the full range of guarantees to suspects and accused persons should be provided in the statute. Issues of compensation to an accused unlawfully detained are of such a character as compared with the different problem of the restitution of property rights of victims (as to which, see the commentary to article 47).

(3) Article 9, paragraph 3, of the International Covenant on Civil and Political Rights provides, in particular, that "It shall not be the general rule that persons awaiting trial shall be detained in custody", and this is the position under the statute. On the other hand charges under the statute are by definition brought only in the most serious cases, and it will usually be necessary to detain an accused who is not already in secure custody in a State. Article 9, paragraph 3, of the International Covenant also provides that an accused "shall be entitled to trial within a reasonable time or to release". The right of an accused under the statute to a prompt trial is contained in article 41, paragraph 1 (c). The court should take this into account in exercising its powers under article 29. But having regard to the gravity of the offences concerned, the Commission decided against including specific time-limits within which a prosecution should be brought or the accused released.

(4) Unless released under article 29, a person arrested is to be held pending trial, either in an appropriate place of detention in the arresting State, in the State in which the trial is to be held, or, if necessary and as a last resort in the host State. Paragraph 4 is based on the assumption that detention will usually occur on the territory of the arresting State, but there may be good reasons (for instance, in terms of the secure detention of the accused, or even, the accused's physical safety) for another location.

Article 30. Notification of the indictment

1. The Prosecutor shall ensure that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, in a language understood by that person:

(a) In the case of a suspect provisionally arrested, a statement of the grounds for the arrest;

(b) In any other case, the confirmed indictment;

(c) A statement of the accused's rights under this Statute.

2. In any case to which paragraph 1 (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

3. If, 60 days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 28, paragraph 3, or for some reason the requirements of paragraph 1 cannot be complied with, the Presidency may on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

Commentary

(1) As soon as an accused has been arrested on a warrant, the Prosecutor is required to take all necessary steps to notify the accused of the charge by serving the documents mentioned in paragraph 1. Subject to paragraph 3, discussed below, there is no obligation to inform a person of a charge prior to arrest, for the obvious reason that to do so may prompt the suspect to flee.

(2) The same principle applies to provisional arrest of a suspect, except that in this case a statement of the charges approved by the Presidency should be served, since the indictment may not yet exist and in any event will not have been confirmed. In the event the indictment is not confirmed the suspect is entitled to be released, although again this would be without prejudice to any valid ground for arrest and detention that may otherwise exist.

(3) There is provision for some alternative form of notice if the accused is not under arrest 60 days after the issue of the warrant (see paragraph 3). This is most likely to occur as a precursor to a hearing before a special indictment chamber under article 37, paragraph 4. Other forms of notice could make use of various forms of media, or in the case of persons in the control of a Government, by communication to that Government.

(4) As with article 28, article 30 deals only with the required notification by the court. Issues of judicial assistance on the part of States are dealt with in part seven. It is envisaged that the rules will make provision for the due authentication of documents contained in requests under these articles.

Article 31. Persons made available to assist in a prosecution

1. The Prosecutor may request a State Party to make persons available to assist in a prosecution in accordance with paragraph 2.

2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor, and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to their exercise of functions under this article.

3. The terms and conditions on which persons may be made available under this article shall be approved by the Presidency on the recommendation of the Prosecutor.

Commentary

(1) This article is intended to facilitate investigations and prosecutions by making qualified and experienced personnel available on request to the Prosecutor. States parties may, at the request of the Prosecutor, designate persons available to assist in the investigation or prosecution of a case, either a particular case or in general. Arrangements for the terms and conditions on which such persons will work should be approved in advance by the Presidency, which will have overall financial responsibility to the States parties for the operation of the court. They may or may not involve the persons becoming temporary employees of the Procuracy: if they do, the staff regulations referred to in article 12, paragraph 7, will apply.

(2) States should be prepared to make persons available for the duration of the prosecution. Any such persons would serve under the direction of the Prosecutor and would be prohibited from seeking or receiving instructions from their Government or any other source.

(3) At least in the initial stages of the establishment of the court and subject to the provisions of the relationship agreement foreshadowed in article 2, consideration could be given to seconding personnel from the United Nations Secretariat to serve in the Procuracy.

(4) Some members of the Commission felt that despite the safeguards provided in paragraph 2, any system of secondment of State personnel to the Procuracy involved the danger of undermining the independence and impartiality of that organ, and could result in the Procuracy being little more than an extension of the prosecution power of a single State for the purposes of a given case. However expensive an international prosecution service might be, in their view it was essential to provide for such a service without possibility of dilution if the statute was to operate with the necessary guarantee of integrity.

PART FIVE

THE TRIAL

Article 32. Place of trial

Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court.

Commentary

(1) Trials will normally take place at the seat of the court. Alternatively, the court may decide, in the light of the circumstances of a particular case, that it would be more practical to conduct the trial closer to the scene of the alleged crime, for example, so as to facilitate the attendance of witnesses and the production of evidence.

(2) Proximity of the trial to the place where the crime was allegedly committed may cast a shadow over the proceedings, raising questions concerning respect for the defendant's right to a fair and impartial trial or it may

create unacceptable security risks for the defendant, the witnesses, the judges or the staff of the court. Thus, trials may take place in a State other than the host State only when it is both practicable and consistent with the interests of justice to do so. The chamber may request the views of the Prosecutor or the defence on this question, without unnecessarily delaying the commencement of the trial.

(3) Trials taking place in States other than the host country would be conducted pursuant to an arrangement with the State concerned which may or may not be a State party to the statute. This arrangement would need to address matters similar to those to be provided for the agreement with the host State under article 3, and possibly other matters if the trial is to be held in a State which is not a party to the statute.

Article 33. Applicable law

The Court shall apply:

(a) This Statute;

(b) Applicable treaties and the principles and rules of general international law;

(c) To the extent applicable, any rule of national law.

Commentary

(1) In the draft statute adopted in 1993,⁹⁷ the Commission had placed this article in the part dealing with jurisdiction. However, there is a distinction between jurisdiction and applicable law, and it seems appropriate to place the article in part five, dealing with the primary function of the court, the exercise of jurisdiction through a trial chamber. But article 33 applies in relation to all actions taken by the court at any stage.

(2) The first two sources of applicable law mentioned by the draft article are the statute itself and applicable treaties. It is understood that, in cases of jurisdiction based on treaties under article 20, subparagraph (e), the indictment will specify the charges brought against the accused by reference to the particular treaty provisions, which will, subject to the statute, provide the legal basis for the charge. The principles and rules of general international law will also be applicable. The expression "principles and rules" of general international law includes general principles of law, so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.

(3) The mention in the draft articles of rules of national law acquires special importance in the light of the inclusion in the annex of treaties which explicitly envisage that the crimes to which the treaty refers are none the less crimes under national law. The dictates of the *nullum crimen sine lege* principle (see art. 39) require

⁹⁷ See footnote 48 above.

that the court be able to apply national law to the extent consistent with the statute, applicable treaties and general international law. This is in any event desirable, as international law does not yet contain a complete statement of substantive criminal law. The court will need to develop criteria for the application of rules of national criminal law, to the extent to which they are properly applicable to a given situation. In the event of a conflict between national and international law, the latter (including the *nullum crimen sine lege* principle, itself part of international law) will prevail.

(4) In relation to article 33, as in relation to article 20, several members of the Commission recalled the links to be established between the draft statute and the draft Code of Crimes against the Peace and Security of Mankind, and reaffirmed their view that the law to be applied by the court should result from the Code.

(5) Certain members expressed substantial reservations about the possibility of the court applying national law as such in cases brought before it. Although these members accepted that it would be necessary for the court to refer to national law for various purposes, they thought that this would always be pursuant to a *renvoi* or authorization given by international law, including applicable treaties; in other cases, resort to the general principles of law would resolve any difficulties.

Article 34. Challenges to jurisdiction

Challenges to the jurisdiction of the Court may be made, in accordance with the Rules:

(a) Prior to or at the commencement of the hearing, by an accused or any interested State; and

(b) At any later stage of the trial, by an accused.

Commentary

(1) This is, as explained in the introduction in part three above, an important provision, which is intended to ensure that the court adheres carefully to the scope of jurisdiction defined by the statute. The court can be called on to exercise its powers under article 34 either by the accused or by any interested State. The term "interested State" is not defined but is intended to be interpreted broadly. For example a State which has lodged an extradition request with respect to an accused would be an "interested State" for this purpose, as also a State whose cooperation had been sought under part seven of the statute.

(2) Challenges under article 34 may be made, in accordance with procedures laid down in the rules, at any time after confirmation of an indictment up to the commencement of the hearing. In addition the accused may challenge the jurisdiction at any later stage of the trial, in which the court would have the discretion to deal with the challenge as a separate issue or to reserve it to be decided as part of its judgement at the conclusion of the trial.

Article 35. Issues of admissibility

The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:

(a) Has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;

(b) Is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or

(c) Is not of such gravity to justify further action by the Court.

Commentary

(1) Article 35 allows the court to decide, having regard to certain specified factors, whether a particular complaint is admissible and in this sense it goes to the exercise, as distinct from the existence, of jurisdiction. This provision responds to suggestions made by a number of States, in order to ensure that the court only deals with cases in the circumstances outlined in the preamble, that is to say where it is really desirable to do so. Issues arising under article 35 should normally be dealt with as soon as possible after they are made. After the commencement of a trial they can only be dealt with on the court's own motion, on the basis that there will usually be no point in questioning at that time the exercise of a jurisdiction that has already begun to be exercised.

(2) The grounds for holding a case to be inadmissible are, in summary, that the crime in question has been or is being duly investigated by any appropriate national authorities or is not of sufficient gravity to justify further action by the court. In deciding whether this is the case the court is directed to have regard to the purposes of the statute as set out in the preamble. Where more than one State has or may have jurisdiction over the crime in question, the court may take into account the position of each such State.

(3) Some members of the Commission believed that it was not necessary to include article 35, as the relevant factors could be taken into account at the level of jurisdiction under article 20, in particular subparagraph (e), and article 21. Others pointed out that the circumstances of particular cases could vary widely and could anyway be substantially clarified after the court assumed jurisdiction so that a power such as that contained in article 35 was necessary if the purposes indicated in the preamble were to be fulfilled.

Article 36. Procedure under articles 34 and 35

1. In proceedings under articles 34 and 35, the accused and the complainant State have the right to be heard.

2. Proceedings under articles 34 and 35 shall be decided by the Trial Chamber, unless it considers, having regard to the importance of the issues involved, that the matter should be referred to the Appeals Chamber.

Commentary

(1) Articles 34 and 35 must be read in conjunction with article 36, which lays down certain aspects of the procedure to be followed in the case of challenges under those provisions. More detailed aspects of the procedure will be laid down in the rules.

(2) It is envisaged that, as far as possible, all challenges under articles 34 and 35 should be heard together as soon as possible. The aim should be to resolve the issue one way or the other by the commencement of the trial. Thus, if a State makes a challenge under article 34 or 35, both the accused and the complainant State have a full right to be heard but should not subsequently be allowed to re-litigate the question. These questions are to be dealt with by the trial chamber, as provided in paragraph 2, subject to the possibility of referral of any case raising issues of general principle to the appeals chamber.

Article 37. Trial in the presence of the accused

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) The accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;

(b) The accused is continuing to disrupt the trial; or

(c) The accused has escaped from lawful custody under this Statute or has broken bail.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) That all reasonable steps have been taken to inform the accused of the charge; and

(b) That the accused is legally represented, if necessary by a lawyer appointed by the Court.

4. In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) Recording the evidence;

(b) Considering whether the evidence establishes a *prima facie* case of a crime within the jurisdiction of the Court; and

(c) Issuing and publishing a warrant of arrest in respect of an accused against whom a *prima facie* case is established.

5. If the accused is subsequently tried under this Statute:

(a) The record of evidence before the Indictment Chamber shall be admissible;

(b) Any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

Commentary

(1) The question whether trial *in absentia* should be permissible under the statute has been extensively discussed in the Commission, in the Sixth Committee and in the written comments of Governments. One view, quite widely held, was that trial *in absentia* should be excluded entirely, on the ground, *inter alia*, that the court should only be called into action in circumstances where any judgement and sentence could be enforced, and that the imposition of judgements and sentences *in absentia* with no prospect of enforcement would bring the court into disrepute. Another view would allow such trial only in very limited circumstances. On the other hand some members of the Commission and some Governments were strongly supportive of trial *in absentia*.

(2) The 1993 draft statute,⁹⁸ in article 44, paragraph 1 (h), provided only that an accused should have the right "to be present at the trial, unless the court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate". As a reflection of the right to be present at one's trial, which is contained in article 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights, this was regarded as striking a satisfactory balance by many Governments: others were opposed to it.

(3) There was, however, a problem with the formulation in article 44, paragraph 1 (h), of the 1993 draft statute in that it did not regulate the consequences of the absence of the accused. By contrast international human rights bodies dealing with article 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights, and its equivalent have held that trial *in absentia*, to be consistent with human rights standards, must be carefully regulated, with provisions for notification of the accused, for setting aside the judgement and sentence on subsequent appearance, and so forth.⁹⁹ The statute of the International Tribunal, in article 20, paragraph 2, evi-

⁹⁸ Ibid.

⁹⁹ See, for example, *Daniel Monguya Mbenge v. Zaire* (communication No. 16/1977 of 25 March 1983, views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, United Nations, *Selected Decisions of the Human Rights Committee under the Optional Protocol* (1990), vol. 2, p. 76; and the judgments and decisions of the European Court of Human Rights in *Colozza and Rubinat*, Series A: *Judgments and Decisions*, vol. 89, *Decision of 26 December 1984* (Registry of the Court, Council of Europe, Strasbourg, 1985); *F.C.B. v. Italy*, *ibid.*, vol. 208-B, *Judgment of 28 August 1991*; *T. v. Italy*, *ibid.*, vol. 245-C, *Judgment of 12 October 1992*; *Poirimol v. France*, *ibid.*, vol. 277, *Judgment of 23 November 1993*. See also the rather elaborate guidelines in Council of Europe Resolution (75) 11, of 21 May 1975, on the criteria governing proceedings held in the absence of the accused.

dently contemplates that the accused will be present at the trial. The rules of procedure and evidence of the International Tribunal,¹⁰⁰ while not providing for trial *in absentia* as such, do provide for a form of public confirmation of the indictment in cases where the accused cannot be brought before it, and this procedure would fulfil some of the purposes of a trial *in absentia* (see rule 61). For example, the procedure allows for the public issue of "an international arrest warrant" and could make the accused in a certain sense a fugitive from international justice.

(4) The Commission believes that it is right to begin (as did the Council of Europe in its resolution of 1975) with the proposition that the presence of the accused at the trial is "of vital importance", not only because of article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights but in order to establish the facts and, if the accused is convicted, to enable an appropriate and enforceable sentence to be passed. Exemptions to this principle should be allowed only in exceptional cases.

(5) The principle itself is stated in the form of a "general rule" in paragraph 1. Three exceptions are allowed for in paragraph 2: ill-health or security risks to an accused who is in custody or has been released pending trial; continued disruption to the trial (for example, after an initial warning has been given to the accused of the consequences of such disruption); and the fact that the accused has escaped from custody under the statute or has broken bail. It will be a matter for the chamber to decide whether to proceed to a trial in the absence of the accused in any of these circumstances.

(6) In any case if it does so decide, the chamber must ensure that the rights of the absent accused under the statute are respected. Of particular importance is the right to legal representation by a court-appointed lawyer. The minimum steps to be taken are spelt out in paragraph 3.

(7) In addition, the Commission was attracted to the solution adopted in the rules of procedure and evidence of the International Tribunal, referred to above. Thus paragraph 4 allows for the rules of the court to establish an analogous procedure before an indictment chamber, which would hear and record the available evidence, determine publicly whether it amounted to a *prima facie* case against the accused, and take any available steps to have the accused brought before the court for trial. Since the members of the chamber would actually hear the witnesses and would publicly pronounce on their credibility (although to the level of a *prima facie* case only), it seems desirable, having regard to the considerations discussed in the commentary to article 8, paragraph (4), to disqualify members of an indictment chamber from sitting at a subsequent trial of the accused (see the commentary to art. 8, para. (5)).

Article 38. Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

(a) Have the indictment read;

(b) Ensure that articles 27, paragraph 5 (b), and 30 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

(c) Satisfy itself that the other rights of the accused under this Statute have been respected; and

(d) Allow the accused to enter a plea of guilty or not guilty.

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. The Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

4. The trial shall be held in public, unless the Chamber determines that certain proceedings be in closed session in accordance with article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence.

5. The Chamber shall, subject to this Statute and the Rules have, *inter alia*, the power on the application of a party or of its own motion, to:

(a) Issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;

(b) Require the attendance and testimony of witnesses;

(c) Require the production of documentary and other evidentiary materials;

(d) Rule on the admissibility or relevance of evidence;

(e) Protect confidential information;

(f) Maintain order in the course of a hearing.

6. The Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

Commentary

(1) Article 38 deals with the general powers of the trial chamber with respect to the conduct of the trial. The trial chamber has a full range of powers in respect of the proceedings. It is envisaged that once the trial chamber is established it will take over all pre-trial matters in order to establish continuity in the handling of the case (see para. 5).

¹⁰⁰ See footnote 57 above.

(2) The overriding obligation of the trial chamber is to ensure that every trial is fair and expeditious, and is conducted in accordance with the statute, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Before proceeding to the trial, the chamber must satisfy itself that the rights of the accused have been respected, and in particular that the provisions relating to pre-trial disclosure of evidence by the prosecution have been complied with in time to allow a proper preparation of the defence (see para. 1 (b) and articles 27, paragraph 5 (b), and 30).

(3) Details of the procedure of the court should be laid down in the rules, and will no doubt evolve with experience. It is intended that the court should itself have the right to call witnesses and ask questions, although it may also leave that task to the Prosecutor and defence counsel, and the right of the accused to present a defence must not be impaired.

(4) Paragraph 1 (d) provides that an accused is to be allowed to enter a plea of guilty or not guilty. In some legal systems there is no provision at all for such a plea; in some others, an accused is actually required to plead. In some legal systems a guilty plea substantially shortens the trial, and avoids the need for any evidence to be called on the question of culpability; in others it makes very little difference to the course of the proceedings. In line with the precedent of the statute of the International Tribunal, paragraph 1 (d) allows an accused who wishes to do so to enter a plea of guilty or not guilty, but does not require this. In the absence of a plea the accused will be presumed not guilty, and the trial will simply proceed. The court should ascertain in advance whether an accused does wish to enter a plea: if not, the matter would simply not be raised at the trial.

(5) But the fact that the accused has decided to plead, and has entered a plea of guilty, will not mean a summary end to the trial or an automatic conviction. It will be a matter for the chamber, subject to the rules, to decide how to proceed. It must, at a minimum, hear an account from the Prosecutor of the case against the accused and ensure for itself that the guilty plea was freely entered and is reliable. In many cases it may be prudent to hear the whole of the prosecution case; in others, only the key witnesses may need to be called to give evidence, or the material before the court combined with the confession will themselves be certain proof of guilt. If the accused elects not to be legally represented, it will usually be prudent to ignore the plea and to conduct the proceedings as far as possible in the same way as if they were being vigorously defended.

(6) Paragraph 3 makes provision for joinder of charges against more than one accused in a single proceeding, although it should be open to an accused to object to joinder for sufficient reason, under procedures provided by the rules (see the rules of procedure and evidence of the International Tribunal, rules 48, 73A (iv) and 82).

(7) As a general rule trials should be held in public, but the trial chamber may decide to hold all or part of a trial in closed session in order, for example, to protect the accused, victims or witnesses from possible intimidation or for the purpose of protecting confidential or sen-

sitive information which is to be given in evidence (see art. 43).

(8) Paragraph 7 requires a complete record of proceedings to be kept. By this the Commission understands a full transcript of the trial, which could take the form of a tape or video recording. The record of the trial will be of particular importance in the event of an appeal or revision under articles 48 or 50.

Article 39. Principle of legality (*nullum crimen sine lege*)

An accused shall not be held guilty:

(a) In the case of a prosecution with respect to a crime referred to in article 20, subparagraphs (a) to (d), unless the act or omission in question constituted a crime under international law;

(b) In the case of a prosecution with respect to a crime referred to in article 20, subparagraph (e), unless the treaty in question was applicable to the conduct of the accused;

at the time the act or omission occurred.

Commentary

(1) The principle *nullum crimen sine lege* is a fundamental principle of criminal law, recognized in article 15 of the International Covenant on Civil and Political Rights. Article 39 gives direct effect to this principle in the particular context of the statute.

(2) The application of the principle varies according to whether the crime in question is a crime under general international law (see art. 20, subparas. (a) to (d)) or whether it involves a crime under or in conformity with a treaty provision listed in the annex (see art. 20, subpara. (e)). As to the former, subparagraph (a) merely ensures that the relevant crime will not be applied to conduct which was not a crime under international law at the time it was committed. In this context it constitutes a specific application of the principle prohibiting the retrospective application of the criminal law.

(3) By contrast, in the case of treaty crimes the principle has an additional and crucial role to play, since it is necessary that the treaty in question should have been applicable in respect of the conduct of the accused which is the subject of the charge. Whether this requirement, contained in subparagraph (b), is satisfied in any case will be a matter for the court to decide. In principle non-compliance with the *litera verba* of a treaty will not be sufficient to constitute a crime if the treaty did not apply to the accused, whether in accordance with its terms or—perhaps more importantly—because the treaty did not apply as law to the conduct of the accused. For example, an act by a national of State A on the territory of State A may not be regarded as governed by a treaty if State A was not at the time of the conduct a party to the treaty and it was not part of its law. On the other hand the *nullum crimen sine lege* principle does not presuppose an exclusively territorial system of the application of treaty provisions. If the treaty was properly applicable

to the conduct of the accused in accordance with its terms and having regard to the link between the accused and the State or States whose acceptance of the jurisdiction is required for the purposes of article 21, the accused should not be able to deny the applicability of the treaty merely because some third State was not at the time a party to the treaty or because it was not part of the law of that third State. For example, if a person commits a crime on the territory of State X, a party on whose territory the treaty is in force, the fact that the State of the accused's nationality is not a party to the treaty would be irrelevant.

(4) Having regard to subparagraph (a), there may be circumstances in which an individual could be convicted for a crime under international law in an international court although the same person could not be tried in a national court—although these cases will be rare. The position is different in the case of treaty crimes under subparagraph (b), since the mere existence of a treaty definition of a crime may be insufficient to make the treaty applicable to the conduct of individuals. No doubt such cases (which are also likely to be rare, and may be hypothetical) might raise issues of the failure of a State to comply with its treaty obligations, but that is not a matter which should prejudice the rights of an individual accused.

Article 40. Presumption of innocence

An accused shall be presumed innocent until proved guilty in accordance with the law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt.

Commentary

Article 40 recognizes that in a criminal proceeding the accused is entitled to a presumption of innocence and that the burden of proof rests with the prosecution. The presumption of innocence is recognized in article 14, paragraph 2, of the International Covenant on Civil and Political Rights, which reads "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". Since the statute is the basic law which governs trials before the court, it is the statute which gives content to the words "according to law". In the Commission's view, the Prosecutor should have the burden of proving every element of the crime beyond reasonable doubt, and article 40 so provides.

Article 41. Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees:

(a) To be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;

(b) To have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing;

(c) To be tried without undue delay;

(d) Subject to article 37, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court, without payment if the accused lacks sufficient means to pay for such assistance;

(e) To examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

(f) If any of the proceedings or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) Not to be compelled to testify or to confess guilt.

2. Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.

Commentary

(1) Paragraph 1 of article 41 states the minimum guarantees to which an accused is entitled in relation to the trial. It reflects as closely as possible the fundamental rights of the accused set forth in article 14 of the International Covenant on Civil and Political Rights, which reads as follows:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

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

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

(2) In connection with paragraph 1 (d), the question of the possibility of holding trials *in absentia* gave rise to conflicting views in the Commission in its debates at the forty-fifth session. The position is at present dealt with by article 37, but the right of an accused to be present at the trial has been retained as one of the guarantees of a fair trial since it is included in article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights (see also art. 37, para. 2, and commentary thereto).

(3) Paragraph 2 lays down a general duty of disclosure on the Prosecutor in relation to exculpatory evidence that becomes available at any time prior to the conclusion of the trial, whether or not the Procurator chooses to adduce that evidence itself. In case of doubt (for example, as to whether the information would be admissible as evidence), the Prosecutor should seek direction from the trial chamber. On the other hand there is no obligation to disclose incriminating evidence if it is not going to be used by the Prosecutor during the trial.

Article 42. Non bis in idem

1. No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 20 for which that person has already been tried by the Court.

2. A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:

(a) The acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or

(b) The proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served.

Commentary

(1) The maxim *non bis in idem* means that no person shall be tried for the same crime twice. It is an important principle of criminal law, recognized as such in article 14, paragraph 7, of the International Covenant on Civil and Political Rights.

(2) Article 14, paragraph 7, of the International Covenant has been interpreted as limited to trials within a single jurisdiction. The Commission believes that a greater degree of protection against double jeopardy is required under the statute and article 42 gives effect to this view, drawing heavily on article 10 of the statute of the International Tribunal,¹⁰¹ with minor modifications to take account of the possibility of a previous trial in another international court or tribunal.

(3) The *non bis in idem* principle applies both to cases where an accused person has been first tried by the international criminal court, and a subsequent trial is proposed before another court, and to the converse situation of a person already tried before some other court and subsequently accused of a crime under the statute. In both situations, the principle only applies where the first court actually exercised jurisdiction and made a determination on the merits with respect to the particular acts constituting the crime, and where there was a sufficient measure of identity between the crimes which were the subject of the successive trials. As to the requirement of identity, article 42 uses the phrase "crime of the kind referred to in article 20". The *non bis in idem* prohibition does not extend to crimes of a different kind, notwithstanding that they may have arisen out of the same fact situation. For example, an accused might be charged with genocide but acquitted on the ground that the particular killing which was the subject of the charge was an isolated criminal act and was not carried out with intent to destroy a national, ethnical, racial or religious group as such, as required by article II of the Convention on the Prevention and Punishment of the Crime of Genocide. Such an acquittal would not preclude the subsequent trial of the accused before a national court for murder.

(4) Where the first trial was held under the statute and the court reached a decision either convicting or acquitting the accused of the crime, that decision should be final, and the accused should not be subsequently tried by another court for that crime.

¹⁰¹ See footnote 56 above.

(5) Article 42, paragraph 2, deals with subsequent trial before the international criminal court in relation to a crime which has already been the subject of trial before another court. It does not in all cases bar the second trial. Instead, two exceptions are envisaged: (a) where the first trial was for an "ordinary crime"; and (b) where the first trial was a sham, that is to say it was intended to protect the accused from international criminal responsibility.

(6) As to the first exception, the phrase "characterized as an ordinary crime" in paragraph 2 (a) requires explanation. Many legal systems do not distinguish between "ordinary" and other crimes, and in many cases "ordinary crimes" include very serious crimes subject to the most serious penalties. The Commission understands that the term "ordinary crime" refers to the situation where the act has been treated as a common crime as distinct from an international crime having the special characteristics of the crimes referred to in article 20 of the statute. For example, the same act may qualify as the crime of aggravated assault under national law and torture or inhuman treatment under article 147 of the fourth Geneva Convention of 1949. The prohibition in article 42 should not apply where the crime dealt with by the earlier court lacked in its definition or application those elements of international concern, as reflected in the elements of general international law or applicable treaties, which are the basis for the international criminal court having jurisdiction under article 20.

(7) As to the second exception, paragraph 2 (b) reflects the view that the court should be able to try an accused if the previous criminal proceeding for the same acts was really a "sham" proceeding, possibly even designed to shield the person from being tried by the court. The Commission adopted the words "the case was not diligently prosecuted" on the understanding that they are not intended to apply to mere lapses or errors on the part of the earlier prosecution, but to a lack of diligence of such a degree as to be calculated to shield the accused from real responsibility for the acts in question. Paragraph 2 (b) is designed to deal with exceptional cases only.

(8) In the event that the court convicts a person under either of the situations contemplated in paragraph 2, it must take into consideration in the determination of the appropriate penalty the extent to which the person has actually served a sentence imposed by another court for the same acts (see para. 3).

(9) One member of the Commission would have preferred not to deal at all with subsequent trial in national courts, on the basis that the court's jurisdiction is of an exceptional character, and that the general principles of the relevant national law can be relied on to avoid injustices arising from more than one trial of a person arising out of particular conduct.

Article 43. Protection of the accused, victims and witnesses

The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow

the presentation of evidence by electronic or other special means.

Commentary

(1) The court should throughout take the necessary steps to protect the accused, as well as victims and witnesses. The non-exhaustive list of such measures provided in this article include ordering that the trial should be conducted in closed proceedings or allowing the presentation of evidence by electronic means such as video cameras.

(2) While the court is required to have due regard for the protection of victims and witnesses, this must not interfere with full respect for the right of the accused to a fair trial. Thus while the court may order the non-disclosure to the media or the general public of the identity of a victim or witness, the right of an accused to question the prosecution witnesses must be respected (see art. 41, para. 1 (e)). On the other hand, such procedures as giving testimony by video camera may be the only way to allow a particularly vulnerable victim or witness (such as a child who has witnessed some atrocity) to speak.

(3) The security of the record of proceedings is vital, and should be a matter for regulation under the rules.

Article 44. Evidence

1. Before testifying, each witness shall, in accordance with the Rules, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. States Parties shall extend their laws of perjury to cover evidence given under this Statute by their nationals, and shall cooperate with the Court in investigating and where appropriate prosecuting any case of suspected perjury.

3. The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility.

4. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

5. Evidence obtained by means of a serious violation of this Statute or of other rules of international law shall not be admissible.

Commentary

(1) While some members of the Commission felt that the issue of the rules of evidence should not be covered in the statute itself (see art. 19, para. 1 (b)), others felt that basic provisions should be included. Article 44 is a *via media*, dealing only with certain more important aspects on the basis that most issues can be appropriately dealt with in the rules (see rules 89-106 of the rules of procedure and evidence of the International Tribunal).

(2) To help ensure that testimony given is reliable, witnesses should undertake to tell the truth, in a form prescribed by the rules. In the legal systems of some States the accused is not required to take an oath before testifying; it will be a matter for the rules to take account of such situations. The statute does not include a provision making it a crime to give false testimony before the court. On balance the Commission thought that prosecutions for perjury should be brought before the appropriate national court, and paragraph 2 so provides.

(3) The prosecution or defence may be required to inform the court of the nature and purpose of evidence to be offered in the trial to enable it to rule on its relevance or admissibility (see para. 3, which is similar to art. 20 of the Nürnberg Charter).¹⁰² This should assist the court to ensure an expeditious trial limited in scope to a determination of the charges against the accused and issues properly related thereto. Some members also stressed the desirability of this provision to prevent the collection or production of evidence from being used as a delaying tactic during the trial, as well as the substantial costs which may be involved in translating inadmissible or immaterial evidence. Other members felt strongly that this provision should not be interpreted as allowing the court to exclude evidence *ex parte* or closed proceedings.

(4) Under paragraph 4, the court may take judicial notice of facts which are common knowledge rather than requiring proof of them (see art. 21 of the Nürnberg Charter).¹⁰³

(5) The court should exclude any evidence obtained by illegal means which constitute a serious breach of the statute or of international law (including, but not limited to, internationally protected human rights). One member suggested that only evidence obtained in violation of a peremptory norm of human rights law should be inadmissible. However, others felt that the court should exclude any evidence obtained in violation of international law, provided that the violation was serious, and paragraph 5 so provides.

Article 45. Quorum and judgement

1. At least four members of the Trial Chamber must be present at each stage of the trial.

2. The decisions of the Trial Chamber shall be taken by a majority of the judges. At least three judges must concur in a decision as to conviction or acquittal and as to the sentence to be imposed.

3. If after sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.

4. The deliberations of the Court shall be and remain secret.

5. The judgement shall be in writing and shall contain a full and reasoned statement of the findings and conclusions. It shall be the sole judgement issued, and shall be delivered in open court.

Commentary

(1) Article 45 lays down the general rules concerning the necessary quorum during the trial and the extent of agreement required for taking decisions.

(2) Paragraph 1 requires four judges to be present at all times. This would not include alternate judges under article 9, paragraph 6, who had not yet been called on to act. Decisions as to conviction or acquittal and as to the sentence to be imposed require three affirmative votes, although the chamber should make every effort to reach a unanimous decision.

(3) Provision is made in paragraph 3 for cases of failure to agree. The power of a trial chamber to order a retrial in such cases is strictly circumscribed. Such a power does not exist in some national systems; the trial court is required to reach a judgement, and if it cannot do so should acquit the accused. A retrial under the statute is only possible where the chamber has been reduced to four members only (for instance by death or disability of one member) and they are deadlocked. Every effort should be made (such as through the use of alternate judges under article 9, paragraph 6) to avoid this happening, and some members thought that in these cases the benefit of the doubt should always favour the accused.

(4) The deliberations of the court are to be held in private and must remain secret (see para. 4).

(5) The court is to publish a single judgement reflecting the opinion of the majority of judges, and with no dissenting or separate opinions (see para. 5). Different views were expressed on the desirability of allowing separate or dissenting opinions. Some felt that they could undermine the authority of the court and its judgements. Other members believed that judges should have the right to issue separate, and especially dissenting, opinions as a matter of conscience, if they chose to do so, pointing out that this was expressly allowed by article 23, paragraph 2, of the statute of the International Tribunal.¹⁰⁴ It was also suggested that these opinions would be important in the event of an appeal. On balance the Commission preferred the former view.

(6) As noted in the commentary to article 42, an acquittal on a charge under the statute does not preclude the possibility that the accused may be guilty of some crime under national law arising out of the same facts. It would no longer be justified to detain an accused after a final judgement of acquittal under the statute, but the court should, subject to the rule of specialty under article 55, be able to make arrangements for the transfer of a person to the relevant State in such circumstances.

¹⁰² See footnote 83 above.

¹⁰³ Ibid.

¹⁰⁴ See footnote 56 above.

Article 46. Sentencing

1. In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.

2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

Commentary

(1) Sentencing is generally considered to represent a separate process which is distinct from the trial. The purpose of the trial is to determine the truth of the charges against the accused; the purpose of the sentencing hearing is to determine an appropriate punishment in relation to the individual as well as the crime. Of course the fundamental procedural guarantees inherent in a fair trial, notably the right to counsel, also extend to the sentencing hearing. The Commission felt that these considerations merited a further and separate sentencing hearing: this is provided for in paragraph 1, although details of the procedure are left to the rules.

(2) At the conclusion of the sentencing hearing, the court is required to consider the matter in private, and to decide on an appropriate sentence, having regard to such factors as the degree of punishment commensurate with the crime in accordance with the general principle of proportionality.

Article 47. Applicable penalties

1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) A term of life imprisonment, or of imprisonment for a specified number of years;

(b) A fine.

2. In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of:

(a) The State of which the convicted person is a national;

(b) The State where the crime was committed;

(c) The State which had custody of and jurisdiction over the accused.

3. Fines paid may be transferred, by order of the Court, to one or more of the following:

(a) The Registrar, to defray the costs of the trial;

(b) A State of which the nationals were the victims of the crime;

(c) A trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.

Commentary

(1) Article 47 specifies the penalties available to the court in determining the appropriate punishment in a particular case. They are a term of imprisonment up to and including life imprisonment and a fine of a specified amount. The court is not authorized to impose the death penalty.

(2) In determining the term of imprisonment or the amount of fine to be imposed, the court may consider the relevant provisions of the national law of the States which have a particular connection to the person or the crime committed, namely the State of which the convicted person is a national, the State where the crime was committed and the State which had custody of and jurisdiction over the accused.

(3) The 1993 draft statute¹⁰⁵ provided for the court to order restitution or forfeiture of property used in conjunction with the crime. However, some members of the Commission questioned the ability of the court to determine the ownership of stolen property in the absence of a claim filed by the original owner, which might need to be considered in a separate proceeding. Others felt that it was not appropriate to authorize the court to order the return of stolen property, a remedy which they considered to be more appropriate in a civil rather than a criminal case. One member suggested that allowing the court to consider such matters would be inconsistent with its primary function, namely to prosecute and punish without delay perpetrators of the crimes referred to in the statute. On balance the Commission considered that these issues were best left to national jurisdictions and to international judicial cooperation agreements, of which there is a growing network. The relevant provisions have accordingly been deleted.

(4) Some other members of the Commission while regretting that decision, felt that as a consequence provisions such as those in article 47, paragraphs 3 (b) and 3 (c) should also be deleted, since these were in a sense aimed at reparation for victims. On the other hand, although a reflection of concern for victims of crimes, paragraphs 3 (b) and 3 (c) are not intended in any way to substitute for reparation or to prevent any action which victims may take to obtain reparation through other courts or on the international plane.

(5) Some members felt that sanctions other than detention should exceptionally be provided for. In particular, the court should, in their view, be empowered to order community service in aid of the victim or society at large. Other members stressed that, as the court would only deal with the most serious crimes, the idea of "community service" was entirely inappropriate.

¹⁰⁵ See footnote 48 above.

PART SIX

APPEAL AND REVIEW

Article 48. Appeal against judgement or sentence

1. The Prosecutor and the convicted person may, in accordance with the Rules, appeal against a decision under articles 45 or 47 on grounds of procedural error, error of fact or of law, or disproportion between the crime and the sentence.

2. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

Commentary

(1) Under article 14, paragraph 5, of the International Covenant on Civil and Political Rights, ‘‘Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law’’. This right is provided for in article 25 of the statute of the International Tribunal.¹⁰⁶ It is equally provided for in article 48 of the statute. The right to appeal may be regulated by the Rules, for example as to such matters as time-limits for an appeal.

(2) Appeals may be brought either against judgement or sentence. The Commission believes that the right to appeal should exist equally for the Prosecutor and the convicted person. The grounds for appeal may relate to one or more of the following: procedural error, errors of fact or law, or disproportion between the crime and the sentence. The standard to be applied by the appeals chamber, and its power to alter a decision or order a new trial, are dealt with in article 49.

Article 49. Proceedings on appeal

1. The Appeals Chamber has all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:

(a) If the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;

(b) If the appeal is brought by the Prosecutor against an acquittal, order a new trial.

3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.

4. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court. Six judges constitute a quorum.

5. Subject to article 50, the decision of the Chamber shall be final.

Commentary

(1) Proceedings on appeal are regulated by article 49. The appeal is heard by the appeals chamber (see art. 9, paras. 1-3), presided over by the President or (if the President is unavailable or disqualified) by a Vice-President. Although under article 48 the right of appeal exists for both Prosecutor and defence, and extends equally to errors of procedure, error of fact or law and disproportion between crime and sentence, there is an important difference between appeals by prosecution and defence: the only relief the court can grant in an appeal by the Prosecutor from an acquittal on a particular charge is an order for a retrial. It is not open to the appeals chamber to reverse or amend a decision of a trial chamber acquitting an accused on a given charge as distinct from annulling that decision as a prelude to a new trial. In other respects the appeals chamber has all the powers of a trial chamber.

(2) Thus the appeals chamber combines some of the functions of *appel* in civil law systems with some of the functions of *cassation*. This was thought to be desirable, having regard to the existence of only a single appeal from decisions at trial.

(3) Not every error at the trial need lead to reversal or annulment: the error had to be a significant element in the decision taken. This is expressed in paragraph 2 by the requirement that the proceedings must have been, overall, procedurally unfair or the decision must be vitiated by the error. As to sentencing, paragraph 3 requires that a sentence be manifestly disproportionate to the crime before the court should vary the sentence. The court will—like national appellate courts—necessarily have to exercise a certain discretion in these matters, with any doubt being resolved in favour of the convicted person.

(4) Decisions would be reached by majority (four judges) and should be published.

(5) Like article 45, article 49 does not allow for dissenting or separate opinions. While some members felt that such opinions should not be allowed for the reasons expressed in connection with article 45, paragraph 5, others considered such opinions essential with respect to appellate decisions which deal with important questions of substantive and procedural law. The Commission concluded, however, that no distinction should be made between the two situations, and that separate and dissenting opinions on appeal should be prohibited.

(6) It is not intended that the appeal should amount to a retrial. The court would have power if necessary to allow new evidence to be called, but it would normally rely on the transcript of the proceedings at the trial.

¹⁰⁶ See footnote 56 above.

Article 50. Revision

1. The convicted person or the Prosecutor may, in accordance with the Rules, apply to the Presidency for revision of a conviction on the ground that evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction.

2. The Presidency shall request the Prosecutor or the convicted person, as the case may be, to present written observations on whether the application should be accepted.

3. If the Presidency is of the view that the new evidence could lead to the revision of the conviction, it may:

- (a) Reconvene the Trial Chamber;
- (b) Constitute a new Trial Chamber; or
- (c) Refer the matter to the Appeals Chamber;

with a view to the Chamber determining, after hearing the parties, whether the new evidence should lead to a revision of the conviction.

Commentary

(1) A person convicted of a crime may, in accordance with the rules, apply for revision of a judgement on the ground that a new evidence has been discovered, which was not known to the accused at the time of the trial or appeal and which could have been a decisive factor in the conviction. This reflects the provisions of article 14, paragraph 6, of the International Covenant on Civil and Political Rights, as well as Article 61, paragraph 1, of the Statute of ICJ, and is a necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the court at the time of the initial trial or of any appeal. The Commission believes that it should be available only in the case of a conviction. There are safeguards in the statute against unfounded prosecution (see, for example, arts. 26, paras. 1 and 4, and 27, para. 2), but once a prosecution has been duly launched and conducted it would be a violation of the *non bis in idem* principle to allow revision of an acquittal on grounds of the discovery of new evidence (see art. 42, paras. 1 and 2). On the other hand the right to apply for revision of a conviction should extend to the Prosecutor as well as the convicted person, on the ground that the Prosecutor has an equal interest with the defence in securing a just and reliable outcome in proceedings brought under the statute.

(2) The right to apply for revision must be based on new evidence which could have been a decisive factor in the conviction. It does not extend, for example, to alleged errors in the assessment of facts presented at the trial or to errors of law or procedure, which are a matter for the appeals process. Having regard to these limitations and to the need to avoid frivolous applications, the Presidency has power to decide under paragraph 3 whether or not to accept an application for revision. If, after considering written submissions from the convicted

person and the Prosecutor, it decides to accept the application, it may reconvene the trial chamber, constitute a new chamber, or (for example, if the truth of the new fact relied on is not at issue) refer the matter to the appeals chamber. The procedure to be adopted for the hearing of an application for revision should be regulated by the rules.

PART SEVEN

INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 51. Cooperation and judicial assistance

1. States Parties shall cooperate with the Court in connection with criminal investigations and proceedings under this Statute.

2. The Registrar may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) Any other request which may facilitate the administration of justice, including provisional measures as required.

3. Upon receipt of a request under paragraph 2:

- (a) In a case covered by article 21, paragraph 1 (a), all States Parties;
- (b) In any other case, States Parties which have accepted the jurisdiction of the Court with respect to the crime in question;

shall respond without undue delay to the request.

Commentary

(1) The effective functioning of the court will depend upon the international cooperation and judicial assistance of States. Thus States parties to the statute should cooperate with criminal investigations conducted by the Prosecutor and respond without undue delay to any request from the court regarding, for example, the location of persons, the taking of testimony, the production of evidence, the service of documents, and so forth. Article 51 states this general obligation in terms adapted from article 29 of the statute of the International Tribunal,¹⁰⁷ it being understood that issues of implementation will be worked out between the court and the requested State. Article 51 is without prejudice to the more precise and graduated obligations imposed, for example, by article 53 in relation to the transfer of accused persons.

¹⁰⁷ Ibid.

(2) One important difference as compared with the International Tribunal is that the present court has jurisdiction over a wider range of matters and that its jurisdiction is not limited in time and place. Moreover, some States parties to the statute may not be parties to one or more of the treaties in the annex, or may not have accepted the court's jurisdiction over crimes defined by those treaties. These factors would have to be taken into account in giving effect to the general obligation of cooperation under paragraph 1.

(3) Some members of the Commission thought that article 51 went too far in imposing a general obligation of cooperation on States parties to the statute, independently of whether they are parties to relevant treaties or have accepted the court's jurisdiction with respect to the crime in question. They would therefore prefer article 51 to say no more than that parties would use their "best efforts" to cooperate, thus incorporating a greater element of flexibility and discretion.

(4) Paragraph 2 is an empowering provision, providing for the Registrar to make requests to States for cooperation. Paragraph 3 requires a prompt response to such requests from the States specified in that paragraph. It does not, in terms, require States to comply with such requests, since whether they will be able to do so will depend on the circumstances: a State cannot, for example, arrest a person who has fled its territory. The substantive obligation of States parties in relation to requests made under paragraph 2 is contained in paragraph 1.

Article 52. Provisional measures

1. In case of need, the Court may request a State to take necessary provisional measures, including the following:

- (a) To provisionally arrest a suspect;
- (b) To seize documents or other evidence; or
- (c) To prevent injury to or the intimidation of a witness or the destruction of evidence.

2. The Court shall follow up a request under paragraph 1 by providing, as soon as possible and in any case within 28 days, a formal request for assistance complying with article 57.

Commentary

(1) When circumstances so require, the court may request a State or States to take provisional measures, including measures to prevent an accused from leaving its territory or the destruction of evidence located there. Such a request may include provisional arrest of a suspect pursuant to a warrant issued under article 28, paragraph 1. See also article 9 of the Model Treaty on Extradition.¹⁰⁸

¹⁰⁸ See footnote 96 above.

(2) A request for provisional measures may have to be made very quickly and in circumstances where a fully documented request would take too long to prepare. Paragraph 2 provides that a formal request for assistance under part seven should be made within 28 days of such a provisional request.

(3) Article 52 is essentially an empowering provision so far as the court is concerned. Obligations of cooperation on the part of States parties are dealt with in article 51, paragraph 1.

Article 53. Transfer of an accused to the Court

1. The Registrar shall transmit to any State on the territory of which the accused may be found a warrant for the arrest and transfer of an accused issued under article 28, and shall request the cooperation of that State in the arrest and transfer of the accused.

2. Upon receipt of a request under paragraph 1:

(a) All States Parties:

- (i) In a case covered by article 21, paragraph 1 (a); or
- (ii) Which have accepted the jurisdiction of the Court with respect to the crime in question;

shall, subject to paragraphs 5 and 6, take immediate steps to arrest and transfer the accused to the Court;

(b) In the case of a crime to which article 20, subparagraph (e), applies, a State Party which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to that crime shall, if it decides not to transfer the accused to the Court, forthwith take all necessary steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution;

(c) In any other case, a State Party shall consider whether it can, in accordance with its legal procedures, take steps to arrest and transfer the accused to the Court, or whether it should take steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution.

3. The transfer of an accused to the Court constitutes, as between States Parties which accept the jurisdiction of the Court with respect to the crime, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case referred to the competent authorities of the requested State for the purpose of prosecution.

4. A State Party which accepts the jurisdiction of the Court with respect to the crime shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States.

5. A State Party may delay complying with paragraph 2 if the accused is in its custody or control and is being proceeded against for a serious crime, or serving a sentence imposed by a court for a crime.

It shall within 45 days of receiving the request inform the Registrar of the reasons for the delay. In such cases, the requested State:

(a) May agree to the temporary transfer of the accused for the purpose of standing trial under this Statute; or

(b) Shall comply with paragraph 2 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be.

6. A State Party may, within 45 days of receiving a request under paragraph 1, file a written application with the Registrar requesting the Court to set aside the request on specified grounds. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 2 but shall take any provisional measures necessary to ensure that the accused remains in its custody or control.

Commentary

(1) Having regard to article 37 of the statute and to the need to establish a clear relationship between existing obligations to try or extradite and the statute, article 53 is a crucial provision. For the reasons explained in the commentary to article 51, it is necessary to distinguish between the various levels of obligation States parties to the statute may have accepted, which can range from not being a party to a relevant treaty defining a crime, on the one hand, to having accepted the jurisdiction of the court over such crimes in all cases, on the other hand. Article 53 is drafted accordingly. Moreover, the statute differs from the statute of the International Tribunal, article 9, paragraph 2, of which proclaims the International Tribunal's "primacy over national courts".¹⁰⁹ By contrast the statute operates in principle on the basis of concurrent jurisdiction.

(2) In the first place, the Registrar may request any State to cooperate in the arrest and transfer of an accused pursuant to a warrant issued under article 28. As to States not parties to the statute, no obligation of transfer can be imposed, but cooperation can be sought in accordance with article 56. The term "transfer" has been used to cover any case in which an accused is made available to the court for the purpose of trial, in order to avoid any confusion with the notion of extradition or other forms of surrender of persons (such as under status of forces agreements) between two States.

(3) Paragraph 2 spells out the extent of the obligation of a State party to respond to a transfer request. Four different situations have to be considered, as follows:

(a) All States parties to the statute will have accepted the court's "inherent" jurisdiction over genocide under articles 20, subparagraph (a) and 21, paragraph 1 (a). In that case, subject to the other safeguards and guarantees in the statute, the transfer obligation in article 53, paragraph 2 (a), will apply.

(b) The same obligation should apply to States parties which have accepted the jurisdiction of the court with respect to the crime in question; they must take immediate steps to arrest and surrender the accused person to the court under paragraph 2 (a).

(c) In the case of crimes defined by the treaties listed in the annex, a State party which is also a party to the relevant treaty defining the crime in question but which has not accepted the court's jurisdiction must arrest and either transfer, extradite or prosecute the accused.

(d) In any other case, a State party must consider whether its own law permits the arrest and transfer of the accused. As to other crimes under general international law, some States may not have some of these crimes (such as aggression) as part of their own criminal code; it was thought that the only obligation that could be imposed in such cases, if a State does not accept the jurisdiction of the court in relation to the crimes, was that spelt out in paragraph 2 (c).

(4) As to the relationship between extradition and transfer, several provisions of article 53 are relevant. Under paragraph 2 (b), a State which is a party to the relevant treaty defining the crime but which has not accepted the jurisdiction of the court with respect to a crime is under an *aut dedere aut judicare* obligation, and thus has the option of extraditing the accused to a requesting State. (If an extradition request has been granted or is pending and is subsequently granted, the requesting State must, anyway, have accepted the jurisdiction of the court before it can proceed with the case (see art. 21, para. 2).) Under paragraph 4, a State party which accepts the court's jurisdiction over the crime must, as far as possible, give priority to a transfer request from the court, bearing in mind that such a request will not have been made before the confirmation of the indictment and an opportunity on the part of the interested States to challenge the court's jurisdiction or the admissibility of the particular case, which is provided for under articles 34 or 35. The words "as far as possible" inserted in paragraph 4 reflect, on the one hand, the inability of the statute to affect the legal position of non-parties, and, on the other hand, the difficulties of imposing a completely homogeneous obligation on States parties to the statute given the wide range of situations covered.

(5) Transfer to the court is to be taken, as between parties to the statute which accept the jurisdiction of the court with respect to the crime, to constitute compliance with *aut dedere aut judicare* provisions in extradition treaties (see para. 3). In other cases it is recognized that the decision as between transfer or extradition must rest with the requested State, in particular so far as requests from non-parties to the statute are concerned, and this being so there is no reason to disadvantage requesting States that have become parties to the statute but have not accepted the court's jurisdiction in a given case.

(6) Taking these various provisions together, it is the view of the Commission that these provisions provide adequate guarantees that the statute will not undermine existing and functional extradition arrangements. Some members, however, felt that paragraph 4 went too far in the direction of giving priority to the court's jurisdiction

¹⁰⁹ See footnote 56 above.

as compared with that of a State requesting extradition. They stressed that the court should in no case interfere with existing and functioning extradition agreements.

(7) A State party which receives a transfer request may take action under paragraphs 5 or 6. Paragraph 5 allows a requested State to delay complying while the accused is tried before its own courts for a serious crime, or completes a sentence imposed for a crime. This is without prejudice to the possibility of temporary transfer of a prisoner for the purpose of standing trial under the statute for some other crime within the jurisdiction of the court; in such cases arrangements could be made for any sentence imposed under the statute to be served concurrently or consecutively in the State concerned.

(8) Alternatively, a requested State may apply under paragraph 6 to have the request set aside for sufficient reason. The court in dealing with such an application would have regard to article 35 and to the preamble.

(9) In case of delay under paragraph 5, the court must be informed of the reasons for the delay; in case of an application under paragraph 6, necessary provisional measures must be taken. The Registrar might also arrange with a State which has in its custody a person arrested under the statute for the person to continue to be held in that State pending trial.

Article 54. Obligation to extradite or prosecute

In a case of a crime referred to in article 20, subparagraph (e), a custodial State Party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21, paragraph 1 (b) (i), shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose.

Commentary

(1) The role of article 54 in the scheme of the statute has been referred to already (see commentary to article 21). Article 54 is, in effect, a corollary for States parties to the statute of unwillingness to accept the court's jurisdiction in respect of apparently well-founded charges of treaty crimes.

(2) Thus, a State party whose acceptance of the court's jurisdiction is necessary, but which does not accept the jurisdiction, is under an *aut dedere aut judicare* obligation, equivalent to the obligation included in most of the treaties listed in the annex. As between parties to the statute this in effect integrates the international criminal court into the existing system of international criminal jurisdiction and cooperation in respect of treaty crimes. It should avoid the situation of a State party in effect giving asylum to an accused person in relation to *prima facie* justified charges of crimes which have been accepted as such by that State. On the other hand it gives States parties the same range of options when confronted with a request for transfer of an accused that they have now under the listed treaties, unless the State in question

has expressly accepted the jurisdiction of the court in relation to the crime (see article 53, para. 2 (a)).

(3) The Commission gave careful consideration to the question whether an equivalent obligation should be imposed on States parties generally with respect to the crimes under international law referred to in article 20, subparagraphs (b) to (d). On balance it decided that this was difficult to achieve with respect to such crimes in the absence of a secure jurisdictional basis or a widely accepted extradition regime. The problem is most acute with respect to article 20, subparagraph (d) (crimes against humanity), but many States do not have as part of their criminal law a provision specifically dealing with such crimes.

Article 55. Rule of speciality

1. A person transferred to the Court under article 53 shall not be subject to prosecution or punishment for any crime other than that for which the person was transferred.

2. Evidence provided under this Part shall not, if the State when providing it so requests, be used as evidence for any purpose other than that for which it was provided, unless this is necessary to preserve the right of an accused under article 41, paragraph 2.

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes specified in the request.

Commentary

(1) Article 55 states a rule of speciality (sometimes referred to as the rule of identity of transfer and trial). It is intended to ensure that a person delivered to the court can only be prosecuted or punished for the crime indicated in the initial request (see para. 1). Similarly, evidence tendered to the court can only be used as evidence for the purpose stated in the original request if the State when providing the information so requests (see para. 2). This is subject, however, to the rights of an accused to disclosure of exculpatory evidence under article 41, paragraph 2.

(2) A distinction must be drawn between the tender of evidence as such and the use of information as a basis for the investigation of the same person for other crimes or for the investigation of other persons who may have been involved in related criminal activity. The limitation in paragraph 2 only applies to the former situation.

(3) The court may request the State concerned to waive the limitation under article 55 (see para. 3). It will be a matter for the requested State to decide whether to do so.

Article 56. Cooperation with States not parties to this Statute

States not parties to this Statute may assist in relation to the matters referred to in this Part on the

basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.

Commentary

Article 56 recognizes that all States as members of the international community have an interest in the prosecution, punishment and deterrence of the crimes covered by the statute. Thus, even those States which are not parties to the statute are encouraged to cooperate with and to provide assistance to the court on the basis of a unilateral declaration, which may be general or specific in character, an ad hoc arrangement for a particular case, or some other type of agreement between the State and the court.

Article 57. Communications and documentation

1. Requests under this Part shall be in writing, or be forthwith reduced to writing, and shall be between the competent national authority and the Registrar. States Parties shall inform the Registrar of the name and address of their national authority for this purpose.

2. When appropriate, communications may also be made through the International Criminal Police Organization.

3. A request under this Part shall include the following, as applicable:

(a) A brief statement of the purpose of the request and of the assistance sought, including the legal basis and grounds for the request;

(b) Information concerning the person who is the subject of the request on the evidence sought, in sufficient detail to enable identification;

(c) A brief description of the essential facts underlying the request; and

(d) Information concerning the complaint or charge to which the request relates and of the basis for the Court's jurisdiction.

4. A requested State which considers the information provided insufficient to enable the request to be complied with may seek further particulars.

Commentary

(1) Under article 57, communications should normally be between the Registrar and the competent national authorities of the State concerned and should be in writing. There is also the possibility of communications with or through the International Criminal Police Organization (INTERPOL).

(2) Any request made to a State under part seven must be accompanied by a sufficient explanation of its purpose and legal basis as well as appropriate documentation, in accordance with paragraph 3. The State may ask the court to provide additional information if necessary. This article is based on a similar provision contained in

article 5 of the Model Treaty on Mutual Assistance in Criminal Matters.¹¹⁰

PART EIGHT

ENFORCEMENT

Article 58. Recognition of judgements

States Parties undertake to recognize the judgements of the Court.

Commentary

(1) States parties to the statute must recognize the judgements of the court, in the sense of treating those judgements, unless set aside under part six, as authoritative for the purposes of the statute (see art. 42). Thus a judgement of the court should be capable of founding a plea of *res judicata* or issue estoppel or their equivalents under legal systems which recognize those pleas. On the other hand more affirmative obligations of enforcement are imposed not by article 58 but by article 59 and by part seven of the statute.

(2) Depending on their constitutional systems, it may be necessary for States parties to enact legislation or to introduce administrative measures to give effect to this and other obligations under part eight. The content of such legislation will depend on the national system concerned, and cannot be prescribed in advance.

(3) Some members doubted whether a mere obligation to recognize a judgement of the court had any particular meaning. In their view, the obligation, to be meaningful, should extend to recognizing the appropriate legal consequences of a judgement. The judgement itself would be enforced under the statute and did not as such require recognition by States. Others favoured the deletion of the article.

Article 59. Enforcement of sentences

1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State.

3. A sentence of imprisonment shall be subject to the supervision of the Court in accordance with the Rules.

Commentary

(1) Prison sentences imposed by the court are to be served in the prison facilities of a State designated by the

¹¹⁰ General Assembly resolution 45/117, annex.

court or, in the absence of such a designation, in the State where the court has its seat. Since the limited institutional structure of the court, in its initial stages at least, would not include a prison facility, States parties would be requested to offer the use of such facilities to the court.

(2) While the prison facilities would continue to be administered by the relevant national authority, the terms and conditions of imprisonment should be in accordance with international standards, notably the Standard Minimum Rules for the Treatment of Prisoners.¹¹¹ The imprisonment would also be subject to the supervision of the court, the details of which would be elaborated in the rules. For example, the rules could establish procedures under which a convicted person could seek redress for maltreatment and provide for periodic reports by the national authorities, taking into consideration on the one hand the limited institutional structure of the court and the difficulties of administering different standards within a single prison facility, and on the other hand the necessary guarantees of international minimum standards. For the most part the Commission believes that arrangements can be made through a combination of delegation of custodial and administrative authority to the State concerned combined with periodic reporting, and provision for review of complaints.

(3) In recognition of the substantial costs involved in the incarceration of convicted persons for prolonged periods of time, it is desirable that States parties share the burden of such costs as expenses of the court. This will need to be worked out as part of the financial structure of the statute, as to which, see paragraph (5) of the commentary to article 2.

Article 60. Pardon, parole and commutation of sentences

1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Court.

2. If a notification has been given under paragraph 1, the prisoner may apply to the Court in accordance with the Rules, seeking an order for pardon, parole or commutation of the sentence.

3. If the Presidency decides that an application under paragraph 2 is apparently well-founded, it shall convene a Chamber of five judges to consider and decide whether in the interests of justice the person convicted should be pardoned or paroled or the sentence commuted, and on what basis.

4. When imposing a sentence of imprisonment, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to par-

don, parole or commutation of sentence of the State of imprisonment. The consent of the Court is not required to subsequent action by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment.

5. Except as provided in paragraphs 3 and 4, a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

Commentary

(1) The Commission felt that the statute should provide for the possibility of pardon, parole and commutation of sentence. Some members felt that such questions should be decided on the basis of a uniform standard, while others stressed the consideration of efficient administration of justice by the relevant national authorities. Article 60 seeks to balance these considerations by providing for a regime of pardon, parole and commutation of sentence that gives the court control over the release of the accused but allows for relatively uniform administration at the national level.

(2) In particular, article 60 provides that the State where the person is imprisoned must notify the court if the person would be eligible for pardon, parole or commutation of sentence under the law of that State (see para. 1). This would enable the prisoner to apply to the court, in accordance with the rules, for an order granting pardon, parole or commutation of the sentence. The Presidency would convene a chamber to consider the matter if the application appeared to be well-founded.

(3) In imposing sentence, the court might instead specify that the sentence should be governed by the applicable national law on these matters, in effect delegating the issue to the custodial State. In such cases, the court must be notified prior to any decision that would materially affect the terms or extent of imprisonment, but its consent would not be required.

(4) Except as provided in article 60, a prisoner must not be released before the sentence imposed by the court has been served.

ANNEX

Crimes pursuant to treaties (see art. 20, subpara. (e))

1. Grave breaches of:

(a) The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by article 50 of that Convention;

(b) The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by article 51 of that Convention;

¹¹¹ *First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August-3 September 1955* (United Nations publication, Sales No. 1956.IV.4), annex I, pp. 67-73.

(c) The Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by article 130 of that Convention;

(d) The Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by article 147 of that Convention;

(e) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 8 June 1977, as defined by article 85 of that Protocol.

2. The unlawful seizure of aircraft as defined by article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970.

3. The crimes defined by article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971.

4. Apartheid and related crimes as defined by article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973.

5. The crimes defined by article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973.

6. Hostage-taking and related crimes as defined by article 1 of the International Convention against the Taking of Hostages of 17 December 1979.

7. The crime of torture made punishable pursuant to article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

8. The crimes defined by article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and by article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, both of 10 March 1988.

9. Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by article 3, paragraph 1, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to article 2 of the Convention, are crimes with an international dimension.

Commentary

(1) The basis for the list of crimes in the annex has been explained in the commentary to article 20, subparagraph (e). Only treaties in force of universal (as distinct from regional) scope are included. Treaties which merely regulate conduct, or which prohibit conduct but only on an inter-State basis, are not included. On this basis, the following treaties (listed in chronological order) are not included in the annex:

(a) Regulations respecting the laws and customs of war on land: annexed to the Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land

Reason: The Hague Regulations contain no provisions dealing with individual criminal responsibility. Most (though not all) of the violations of the laws and customs of war specified in the Charter of the Nürnberg

Tribunal¹¹² are covered by the Geneva Conventions of 1949 and Additional Protocol I, which also provide for prosecution in the case of grave breaches. In addition, aspects of the Regulations fall within the notion of serious violations of the laws and customs applicable in armed conflict and are thus covered by article 20, subparagraph (c) of the statute.

(b) Convention on the Prevention and Punishment of the Crime of Genocide

Reason: Genocide within the meaning of the Convention is covered as a crime under general international law, and is the only crime within the inherent jurisdiction of the court (see art. 20, subpara. (a)). Its inclusion in the annex is thus unnecessary.

(c) Convention for the Protection of Cultural Property in the Event of Armed Conflict

Reason: The Convention includes an undertaking by States parties to respect cultural property in time of armed conflict, unless military necessity imperatively demands otherwise (art. 4, paras. 1 and 2), and to prohibit theft, pillage, misappropriation and vandalism of such property, and makes related provisions for its protection, including a system of special protection of particularly valuable items. It does not create crimes as such (see art. 8), it does not extend State jurisdiction over acts contrary to the Convention, and contains no provisions for extradition, nor does the Protocol for the Protection of Cultural Property in the Event of Armed Conflict, which deals with export of cultural property from occupied territory.

(d) Piracy, as defined by article 15 of the Convention on the High Seas and article 101 of the United Nations Convention on the Law of the Sea

Reason: Article 14 of the Convention on the High Seas requires cooperation "to the fullest possible extent in the repression of piracy", defined in article 15 as consisting of certain "acts". Article 19 gives jurisdiction over piracy to any State which seizes a pirate vessel on the high seas or outside the jurisdiction of any State. Articles 100, 101, 105 of the United Nations Convention on the Law of the Sea are identical in substance. These provisions confer jurisdiction only on the seizing State, and they cover a very wide range of acts. On balance the Commission decided not to include piracy as a crime under general international law in article 20.

(e) Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961

Reason: The Convention and Protocol regulate production and traffic in drugs. Article 36 requires each State party to make certain conduct unlawful under its national law, subject, *inter alia*, to "constitutional limitations" and to "domestic law". There are special provisions for extradition and an *aut dedere aut judicare* provision (art. 36, para. 2 (a) (iv)). There is a case for inclusion in the annex, but on balance the ground is covered by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which is included in the annex.

(f) Convention on Offences and Certain Other Acts Committed on Board Aircraft

Reason: The Convention applies to offences against national penal law (including minor offences) as well

¹¹² See footnote 83 above.

as to conduct which may interfere with air safety whether or not it involves an offence. Its principal purpose is to establish flag State jurisdiction over crimes, etc. on board aircraft. The major terrorist offences against the safety of international civil aviation are covered by the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which are included in the annex.

(g) Convention on Psychotropic Substances

Reason: The Convention is merely regulatory, and does not treat use or traffic in psychotropic drugs as a crime of an international character.

(h) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction

Reason: Article 4 provides for prohibition of development, etc. of such weapons within the jurisdiction of each State party, but the Convention does not create criminal offences or extend the jurisdiction of any State, and contains no provisions relating to extradition.

(i) Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques

Reason: The Convention merely prohibits the use of environmental modification techniques in certain circumstances (art. 4). It does not create crimes as such, does not extend State jurisdiction over acts contrary to the Convention, and contains no provisions for extradition.

(j) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II)

Reason: Protocol II prohibits certain conduct but contains no clause dealing with grave breaches, nor any equivalent enforcement provision.

(k) Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects

Reason: The Convention prohibits certain conduct but does not treat that conduct as criminal or require it to be suppressed by criminal sanctions.

(l) International Convention against the Recruitment, Use, Financing and Training of Mercenaries

Reason: Articles 2 to 4 create offences "for the purposes of the Convention". Articles 9, paragraph 2, and 12 in combination impose an *aut dedere aut judicare* obligation on all States parties. The Convention is excluded from the annex because it is not yet in force. If it were to come into force before the statute is adopted, consideration could be given to adding the Convention to the list. In that case the following additional paragraph would be appropriate:

"10. Crimes related to mercenaries as defined by articles 2, 3 and 4 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989."

(2) In the case of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the problems of limiting that Convention to individual crimes of substantial international concern is discussed in the commentary to part three. The Commission takes the view that only the offences referred to in article 3, paragraph 1, of the Convention should be included, and then only subject to the

further qualification set out in the annex, referring to the purpose of the Convention as stated in article 2. Without such a limitation, article 3, paragraph 1, would cover too wide a range of cases to justify its inclusion.

APPENDIX I

POSSIBLE CLAUSES OF A TREATY TO ACCOMPANY THE DRAFT STATUTE

1. The Commission envisages that the statute will be attached to a treaty between States parties. That treaty would provide for the establishment of the court, and for the supervision of its administration by the States parties. It would also deal with such matters as financing, entry into force, etc., as is required for any new instrument creating an entity such as the court.

2. The standard practice of the Commission is not to draft final clauses for its draft articles, and for that reason it has not sought to draft a set of clauses for a covering treaty which would contain clauses of that kind. However, in discussions in the Sixth Committee of the General Assembly, a number of the matters which it will be necessary to resolve in concluding such a treaty were discussed, and the Commission felt that it may be useful to outline some possible options for dealing with them.

3. Issues that will need to be dealt with include the following:

(a) *Entry into force:* The statute of the court is intended to reflect and represent the interests of the international community as a whole in relation to the prosecution of certain most serious crimes of international concern. In consequence, the statute and its covering treaty should require a substantial number of States parties before it enters into force.

(b) *Administration:* The administration of the court as an entity is entrusted to the Presidency (see art. 8). However States parties will need to meet from time to time to deal with such matters as the finances and administration of the court, and to consider periodic reports from the court, etc. The means by which States parties will act together will need to be established.

(c) *Financing:* Detailed consideration must be given to financial issues at an early stage of any discussion of the proposed court. There are essentially two possibilities: direct financing by the States parties or total or partial financing by the United Nations. United Nations financing is not necessarily excluded in the case of a separate entity in relationship with the United Nations (such as the Human Rights Committee). The statute is drafted in such a way as to minimize the costs of establishment of the court itself. On the other hand, a number of members stressed that investigations and prosecutions under the statute could be expensive. Arrangements will also have to be made to cover the costs of imprisonment of persons convicted under the statute.

(d) *Amendment and review of the statute:* The covering treaty must of course provide for amendment of the statute. It should, in the Commission's view, provide for a review of the statute, at the request of a specified number of States parties after, say, five years. One issue that will arise in considering amendment or review will be the question whether the list of crimes contained in the annex should be revised so as to incorporate new conventions establishing crimes. This may include such instruments in the course of preparation as the draft Code of Crimes against the Peace and Security of Mankind, and the proposed convention on the protection of United Nations peacekeepers.

(e) *Reservations:* Whether or not the statute would be considered to be "a constituent instrument of an international organization" within the meaning of article 20, paragraph 3, of the Vienna Convention of the Law of Treaties, it is certainly closely analogous to a constituent instrument, and the considerations which led the drafters to require the consent of the "competent organ of that organization" under article 20, paragraph 3, apply in rather similar fashion to it. The draft statute has been constructed as an overall scheme, incorporating important balances and qualifications in relation to the working of the court: it is intended to operate as a whole. These considerations tend to support the view that reservations to the statute and its accompanying treaty should either not be permitted, or should be limited in scope. This is of course a matter for States parties to consider in the context of negotiations for the conclusion of the statute and its accompanying treaty.

(f) *Settlement of disputes*: The court will of course have to determine its own jurisdiction (see arts. 24 and 34), and will accordingly have to deal with any issues of interpretation and application of the statute which arise in the exercise of that jurisdiction. Consideration will need to be given to ways in which other disputes, with regard to the interpretation and implementation of the treaty embodying the statute, arising between States parties, should be resolved.

APPENDIX II

RELEVANT TREATY PROVISIONS MENTIONED IN THE ANNEX (see art. 20, subpara. (e))

1. GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD OF 12 AUGUST 1949

Article 50

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

2. GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITIONS OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA OF 12 AUGUST 1949

Article 51

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

3. GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF 12 AUGUST 1949

Article 130

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

4. GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 12 AUGUST 1949

Article 147

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular

trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

5. PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I)

Article 85. *Repression of breaches of this Protocol*

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse party protected by articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) Making the civilian population or individual civilians the object of attack;

(b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii);

(c) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii);

(d) Making non-defended localities and demilitarized zones the object of attack;

(e) Making a person the object of attack in the knowledge that he is *hors de combat*;

(f) The perfidious use, in violation of article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(a) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

(b) Unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) Making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result, extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) Depriving a person protected by the Conventions or referred to in paragraph 2 of this article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

6. CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT

Article 1

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or

(b) is an accomplice of a person who performs or attempts to perform any such act; or commits an offence (hereinafter referred to as "the offence").

7. CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION

Article 1

1. Any person commits an offence if he unlawfully and intentionally:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:

(a) attempts to commit any of the offences mentioned in paragraph 1 of this article; or

(b) is an accomplice of a person who commits or attempts to commit any such offence.

8. INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

Article II

For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups,

in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

9. CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS, INCLUDING DIPLOMATIC AGENTS

Article 2

1. The intentional commission of:

(a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

(b) A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty; and

(c) A threat to commit any such attack;

(d) An attempt to commit any such attack;

(e) An act constituting participation as an accomplice in any such attack;

shall be made by each State Party a crime under its internal law.

2. Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.

3. Paragraphs 1 and 2 of this article in no way derogate from the obligations of States Parties under international law to take all appropriate measures to prevent other attacks on the person, freedom or dignity of an internationally protected person.

10. INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES

Article 1

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

2. Any person who:

(a) Attempts to commit an act of hostage-taking; or

(b) Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking;

likewise commits an offence for the purposes of this Convention.

11. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having

committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

...

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

12. CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION

Article 3

1. Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2. Any person also commits an offence if that person:

(a) attempts to commit any of the offences set forth in paragraph 1; or

(b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) threatens with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

13. PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF

Article 2

1. Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or

(c) destroys a fixed platform or causes damage to it which is likely to endanger its safety; or

(d) places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or

(e) injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (d).

2. Any person also commits an offence if that person:

(a) attempts to commit any of the offences set forth in paragraph 1; or

(b) abets the commission of any such offences perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform.

14. UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

Article 2. Scope of the Convention

1. The purpose of this Convention is to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

2. The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.

Article 3. Offences and sanctions

1. Each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

(a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

(ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

(iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;

(iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(v) The organization, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;

(b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or

offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions:

- (ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;
- (c) Subject to its constitutional principles and the basic concepts of its legal system:
 - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;
 - (ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
 - (iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;
 - (iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

...

APPENDIX III

OUTLINE OF POSSIBLE WAYS WHEREBY A PERMANENT INTERNATIONAL CRIMINAL COURT MAY ENTER INTO RELATIONSHIP WITH THE UNITED NATIONS

1. The way in which a permanent international criminal court may enter into relationship with the United Nations must necessarily be considered in connection with the method adopted for its creation.

2. In this respect, two hypotheses may be envisaged: (a) the court becomes part of the organic structure of the United Nations; (b) the court does not become part of the organic structure of the United Nations.

A. The court becomes part of the organic structure of the United Nations

3. Under this hypothesis the court, as a result of the very act of its creation, is already in relationship with the United Nations. This may be achieved in two ways.

I. THE COURT AS A PRINCIPAL ORGAN OF THE UNITED NATIONS

4. This solution would attach the maximum weight to the creation of the court by placing it on the same level with the other principal organs of the United Nations and, in particular, ICJ. It would also facilitate the *ipso jure* jurisdiction of the court over certain international crimes. Under this solution, the financing of the court would be provided for under the regular budget of the Organization.

5. On the other hand, this solution could give rise to potential obstacles in that it would require an amendment to the Charter of the United Nations under Chapter XVIII (Arts. 108-109). It should be noted, in this connection, that there is no precedent for the creation of any additional principal organ in the history of the Organization.

2. THE COURT AS A SUBSIDIARY ORGAN OF THE UNITED NATIONS

6. By contrast, there is a well-developed practice whereby United Nations principal organs create subsidiary organs under the relevant provisions of the Charter of the United Nations (in particular, Arts. 22 and 29), for the performance of functions conferred upon them or upon the Organization as a whole by the Charter. There is practice along these lines even in the jurisdictional field. An early example is the establishment of the Administrative Tribunal of the United Nations.¹¹³ A more recent example is the creation of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as the "International Tribunal").¹¹⁴

7. Normally and as concerns most fields of competence, the establishment of a subsidiary organ is essentially auxiliary in nature. The subsidiary organ's decisions will usually be in the nature of recommendations which the relevant principal organ is free to accept or reject.

8. In the judicial field, however, the subsidiary nature of an organ reflects itself mainly in the fact that its very existence, as well as the cessation of its functions, depends upon the relevant principal organ of the Organization. As regards the exercise of its functions, however, the very nature of the latter (judicial) makes them incompatible with the existence of hierarchical powers on the part of the principal organ which established the court or tribunal. Therefore, the principal organ has no power to reject or amend the decisions of the tribunal or court established. This was clearly ruled by ICJ as regards the Administrative Tribunal of the United Nations¹¹⁵ and also arises from certain articles of the statute of the International Tribunal (arts. 13, 15, 25, 26, etc.).¹¹⁶

9. As regards financing, the activities of a subsidiary organ of the Organization are financed from United Nations sources, whether budgetary allocations, assessed contributions or voluntary contributions.¹¹⁷

10. It should also be noted that, occasionally, the General Assembly has set up tribunals as subsidiary organs, on the basis of provisions contained in treaties concluded outside the United Nations. This was the case of the United Nations Tribunal for Libya and the United Nations Tribunal for Eritrea.¹¹⁸ Although the matters dealt with by these tribunals were, broadly speaking, part of the generic competence of the General Assembly under Article 10 of the Charter of the United Nations, the provision which led to their creation was contained in annex XI, paragraph 3, of the Treaty of Peace with Italy.

11. The cases referred to in the preceding paragraph should be distinguished from those referred to in paragraphs 15 to 17 below in which the General Assembly undertakes certain functions with respect to organs established by the parties to a multilateral treaty.

B. The court does not become part of the organic structure of the United Nations and is set up by a treaty

12. Under this hypothesis the court would be created by a treaty binding on States parties thereto. There are two possible ways whereby such a court could be brought into relationship with the United Nations: by means of an agreement between the court and the United Nations; or by means of a resolution of a United Nations organ (such as the General Assembly).

¹¹³ General Assembly resolution 351 A (IV).

¹¹⁴ See footnote 55 above.

¹¹⁵ *Effect of awards* . . . (see footnote 58 above), p. 62.

¹¹⁶ See footnote 56 above.

¹¹⁷ See, for example, General Assembly resolution 48/251.

¹¹⁸ Set up, respectively, by General Assembly resolutions 388 A (V) and 530 (VI).

1. THE COURT COMES INTO RELATIONSHIP WITH THE UNITED NATIONS BY MEANS OF AN AGREEMENT BETWEEN THE COURT AND THE UNITED NATIONS

13. Cooperation agreements are the typical way whereby specialized agencies and analogous bodies enter into relationship with the United Nations under Articles 57 and 63 of the Charter of the United Nations. Agreements are concluded between the specialized agency concerned and the Economic and Social Council and are subject to the approval of the General Assembly. The agreements regulate, *inter alia*, matters of cooperation with the United Nations in the respective fields of action of each specialized agency and questions related to a common system as regards personnel policies. Each specialized agency constitutes an autonomous international organization with its own budget and financial resources.

14. A case in point is article XVI of the statute of IAEA,¹¹⁹ dealing with "Relationship with other organizations", which provides that the Board of Governors, with the approval of the General Conference, is authorized to enter into an agreement or agreements establishing an appropriate relationship between IAEA and the United Nations and any other organizations the work of which is related to that of IAEA. The Agreement governing the relationship between the United Nations and IAEA was approved by the General Assembly.¹²⁰ The Agreement, *inter alia*, regulates the submission of reports by IAEA to the United Nations, the exchange of information and documents, matters of reciprocal representation, consideration of items in the respective agendas, cooperation with the Security Council and ICJ, coordination and cooperation matters, budgetary and financial arrangements and personnel arrangements.

15. The conclusion of an international agreement with the United Nations is also the way being envisaged by the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea to bring the projected tribunal into relationship with the United Nations. The final draft of that agreement¹²¹ contemplates, *inter alia*, matters of legal relationship and mutual recognition, cooperation and coordination, relations with ICJ, relations with the Security Council, reciprocal representation, exchange of information and documents, reports to the United Nations, administrative cooperation and personnel arrangements. The draft agreement would also recognize "the desirability of establishing close budgetary and financial relationships with the United Nations in order that the administrative operations of the United Nations and the International Tribunal shall be carried out in the most efficient and economical manner possible, and that the maximum measure of coordination and uniformity with respect to these operations shall be secured".

2. THE COURT COMES INTO RELATIONSHIP WITH THE UNITED NATIONS BY MEANS OF A RESOLUTION OF A UNITED NATIONS ORGAN

16. Finally, a court created by a multilateral treaty could also be brought into relationship with the United Nations by means of a resolution of a United Nations organ. In the case of a permanent international criminal court such a resolution could be adopted by the General Assembly, perhaps with the concurrent involvement of the Security Council.

17. It is in the field of the protection of human rights that international practice offers the most relevant examples of treaty organs coming into relationship with the United Nations by means of a General Assembly resolution. Typically, the treaty creating the organ already contains some provisions resorting to the United Nations for the performance of certain functions under the treaty, for example, the role of the Secretary-General in circulating invitations to States parties for the election of the treaty organ, requests to the Secretary-General to provide the necessary staff and facilities for the effective performance of the functions of the treaty organ, and so forth. The United Nations, in its turn, takes such functions upon itself, by a resolution of the General Assembly which "adopts and opens for signature and ratification" the multilateral convention in question. Such a procedure has been followed, for instance, in the case of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the Interna-

tional Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

18. The adoption of such resolutions will usually have financial implications for the United Nations, making necessary the intervention of the Fifth Committee in the decision-making process. For instance, in the case of the Human Rights Committee, article 36 of the International Covenant on Civil and Political Rights provides that

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant,

and also article 35 provides that

The Members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

19. The International Convention on the Elimination of All Forms of Racial Discrimination establishing the Committee on the Elimination of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishing the Committee against Torture both provide that the secretariat of the Committees (staff and facilities) shall be provided by the Secretary-General of the United Nations (see art. 10, paras. 3-4 and art. 18, para. 3, respectively), even though the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 18, paragraph 5, that

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations. . . .

Unlike the International Covenant on Civil and Political Rights, however, these two conventions place upon the States parties and not upon the United Nations the expenses of the members of the committee while they are in the performance of their duties (see art. 8, para. 6 and art. 17, para. 7, respectively).

20. In practice the General Assembly may accept, with regard to such committees created by treaty, additional obligations to those already contained in the treaties concerned. Thus, by resolution 47/111, the General Assembly

9. *Endorses* the amendments to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and requests the Secretary-General:

(a) To take the appropriate measures to provide for the financing of the committees established under the conventions from the regular budget of the United Nations, beginning with the budget for the biennium 1994-1995;

...

2. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

92. At the present session, the Commission had before it the twelfth report of the Special Rapporteur on the topic (A/CN.4/460). It also had before it the comments and observations received from Governments on the draft Code of Crimes against the Peace and Security of Mankind,¹²² adopted on first reading by the International Law Commission at its forty-third session,¹²³ in response to the request made by the Commission at its forty-third session.¹²⁴

¹¹⁹ See footnote 68 above.

¹²⁰ See footnote 67 above.

¹²¹ See document LOS/PCN/SCN.4/WP.16/Add.4.

¹²² See footnote 42 above.

¹²³ See footnote 7 above.

¹²⁴ *Yearbook* . . . 1991, vol. II (Part Two), para. 174.