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COMMENTS OF GOVERNMENTS ON THE REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Addendum

CONTENTS

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AUSTRIA

[Original: English]
[20 June 1994]

Draft article 2: Relationship of the Tribunal to the United Nations

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

Draft article 4: Status of the Tribunal

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

Draft article 5: Organs of the Tribunal

Austria believes that draft article 5 should not be understood as giving the Tribunal the right to give directions to the Procuracy.

Draft article 7: Election of judges

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

Draft articles 9 and 10: Independence of judges, election and functions of President and Vice-President

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

Draft article 11: Disqualification of judges

The wording of article 11, paragraph 1 "... in which they have previously been involved ..." seems too ambiguous, since it could be interpreted as

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

Draft article 13: Composition, functions and powers of the Procuracy

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

Draft article 15: Loss of office

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

Draft article 16: Privileges and immunities

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

Draft articles 19 and 20: Rules of the Tribunal, Internal rules of the Court

Austria shares the view that a distinction should be made between the Tribunal’s rules of procedure and the internal rules of the Court.

Draft article 21: Review of the Statute

Austria welcomes the provisions laid down in draft article 21, paragraph b which provide for a basis for incorporating new conventions into the scope of the Court’s jurisdiction.

Draft article 22: List of crimes defined by treaties

The list of crimes defined by treaties as enumerated in article 22 meets in general with the Austrian approval. Austria shares the view of members of the Working Group that the crime of torture as defined in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, should be included. Furthermore Austria believes that

article 22 should not be exhaustive and should envisage the possibility that new treaties define crimes falling under the competence of the Court.

Draft article 23: Acceptance by the States of jurisdiction over crimes listed in article 22

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

Draft article 24: Jurisdiction of the Court in relation to article 22

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

Draft article 25: Cases referred to the Court by the Security Council

In Austria's view the wording of draft article 25 leaves it open whether the Security Council may refer cases to the Court whose jurisdiction States have not accepted or whether this possibility is excluded.

Draft article 28: Applicable law

In the view of Austria, draft article 28, paragraph c should clarify which national law shall be the subsidiary source, e.g. national law, where the crime has been committed, the law of the State, of which the accused, respectively the victim, is a national.

Draft article 29: Complaint and commencement of prosecution

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

Draft article 30: Investigation and preparation of the indictment

In light of the Tribunal's objective to guarantee an independent and impartial jurisdiction, Austria expresses her reservations concerning the competence of the Bureau, consisting of the President and Vice-President of the Court, to review decisions of the Prosecutor. However, Austria shares the view that in cases of completely unreasoned complaints investigations should not be initiated.

Draft article 31: Commencement of prosecution

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

Draft article 32: The indictment

Austria believes that the examination of the indictment should not rest with the Bureau but with a separate "indictment chamber" (c.f. commentary on art. 29). Such a provision would also avoid the impression of bias concerning the President or Vice-President who are members of the Bureau, if they are involved in cases of appeal.

Draft article 33: Notification of the indictment

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

Draft article 37: Establishment of Chambers

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

Draft article 38: Disputes as to jurisdiction

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

Draft article 39: Duty of the Chamber

Austria believes that the prosecutor shall read the indictment at the commencement of the trial. Otherwise the impression of an identity of Court and Procuracy could arise.

Draft article 41: Principle of legality (nullum crimen sine lege)

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

Draft article 44: Rights of the accused

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

Draft article 45: Double jeopardy (non bis in idem)

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

Draft article 47: Powers of the Court

Austria shares the view of the Working Group laid down in the commentary on draft article 47 that a complete and accurate recording of the trial proceedings is of high importance for the accused or the prosecutor in cases of appeal or revision. Therefore Austria considers it necessary that the records are to be transmitted to these persons. It could also be considered whether a provision should be added which grants the mentioned persons a right to receive a copy of the records.

Draft article 48: Evidence

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

Draft article 51: Judgment

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

Draft article 52: Sentencing

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

Draft article 53: Applicable penalties

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

Draft article 55: Appeal against judgment or sentence

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

Draft article 56: Proceedings on appeal

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

Draft article 58: International cooperation and judicial assistance

Austria proposed that States should be required to state their reasons when requests for international judicial assistance are declined or delayed (see art. 4, para. 5 of the Model Treaty on Mutual Assistance and Criminal Matters adopted by General Assembly resolution 45/117).

Draft article 61: Communication and contents of documentation

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

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

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

Draft article 62: Provisional measures

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

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

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

Draft article 63: Surrender of an accused person to the Tribunal

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

Draft article 67: Pardon, parole and commutation of sentences:

According to Austria's view the system provided in paragraph 4 should be the normal so that the establishment of a Chamber solely for this purpose could be avoided.

HUNGARY

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[20 June 1994]

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

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

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

The decision of the Hungarian Constitutional Court, in our opinion, demonstrate the fact that Hungary is committed to the ideals of the International Criminal Tribunal and, as far as her own legal system is

concerned, she will do all in her power to take the needed legislative and practical steps to assist the work of the Tribunal following its establishment.

II. Detailed analysis of the Statute of the International Criminal Tribunal

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

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

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

Regarding the structure of the Tribunal, we are more or less in agreement with the units as listed in article 5. We consider a Court established in this manner to be viable. We would add, however, that the creation of a committee which would consist of the delegates of the signatory States would be worth considering. This committee could be responsible for those tasks which would depend on the decisions of the States parties anyway, namely the

selection of the judges, the selection of prosecutors, the determination of the budget and would serve, further, as a forum of communication between the Tribunal and the member States on matters of a political nature.

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

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

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

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

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

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

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

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

10. Article 21 contains the regulations referring to the re-evaluation of the Statute. It is our opinion that it is not absolutely necessary to maintain a five-year time limit regarding re-evaluation, especially if the re-evaluation would pertain to the crimes listed in article 22. At the same time, we would think it worth considering whether the member States can re-evaluate any question relating to the Statute at the request of one-third of all the member States.

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

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

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

(c) the struggle against these crimes must, at least, involve cooperation between nations and which would lead to the proceedings by the International Criminal Tribunal calling the perpetrators to task.

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

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

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

Here, we must make mention of the relationship to the Draft Code of Crimes Against Peace and the Security of Humanity. We greatly value the work which the International Law Commission has done to date in the preparation of the Code and it is our opinion that the present status of the work offers hope as to completion. It is our determined opinion that there is a need for the Code and its text should be adopted as soon as possible.

We do not, however, connect the establishment of the International Criminal Tribunal to the adoption of the Code. It is our opinion that the Statute and particularly the provisions of article 22 do sufficiently outline the sphere of crimes which would be adjudicated by the International Criminal Tribunal. We are aware that in and of itself, article 22 contains a much more

narrow sphere, but it is our opinion that it is sufficient for the Criminal Tribunal to begin its work with the crimes listed therein and to perhaps expand these within the bounds set forth in article 26.

12. Article 23 of the Statute settles the question of acceptance of jurisdiction by States. Alternative A seems to be logical in and of itself, but we still support Alternative B instead. In our opinion, despite the difficulties in the beginning, it is this Alternative which would guarantee the actual operations of the Tribunal and its broader legitimacy.

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

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

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

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

We have grave doubts as to the provisions of paragraph 2b of article 26. It is our opinion that, while dealing in narcotics is a serious crime, it cannot fall under the same category as the international crimes listed in article 22 of the Statute or as aggression.

The 1988 Vienna Convention on Narcotics sees the problem of pursuit of narcotics dealers to be one which can be solved on national level with international assistance. It is our opinion that this group of crimes cannot, in any event, be placed under article 22. It is even questionable whether the jurisdiction of the Tribunal should be extended, under present circumstances, to this group of crimes. We would add that the Vienna Convention on Narcotics does not sufficiently define these crimes.

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

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

17. The initiation of proceedings has been conferred by article 29 to the States party and to the Security Council. This, we feel, is in harmony with the spirit of the entire Statute, although we would add that we do not consider it undesirable to have proceedings initiated ex officio i.e. by the authority of the Tribunal, as well.

18. Article 30 deals with the initiation of the investigation and the preparation of the prosecution. Paragraph (1) would grant an important role in this activity to the Bureau, which would, in practice, see to the supervision of the legality of the investigation and the actions of the prosecution. As a matter of fact, the Bureau would practise the authority of a certain type of "Judge in charge of investigation". We find this to be a bit worrisome for our part, since the members of the Bureau are given a role in the Council of Appeals.

19. Article 31 refers to the act commencement of prosecution. We find important rules here regarding taking suspects into preventive detention. Paragraph 2 of article 31 states that the Tribunal may place the defendants into custody for a period of time of its own choosing.

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

20. Article 32 refers to the indictment. Paragraph (2) names the Bureau as the body which would act as an indictment chamber. According to our previously expressed opinion, the general competence of the members of the Bureau is incompatible with this assignment. The indictments should rather be handled by a separate council of prosecution organized within the Tribunal.

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

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

23. Article 37 regulates the composition of the Chambers. There is a unique rule of disqualification which would not allow a judge to participate who is a citizen of either the State submitting the complaint or that of which the accused is a national.

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

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

The Commentary states that in the absence of the Chambers, the Bureau must evaluate the defendant’s petition. We find this to be worrisome from a guarantee point of view. The Bureau cannot engage in such activity, in our opinion, as this would constitute conflict of interests. In our opinion, a prosecution Chambers must be created for the evaluation of such complaints and this type of decision would belong to its jurisdiction during the period prior to the trial proper.

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

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

Article 44 lists the individual rights of the accused. We find lacking the right to submit a general complaint, in which the defendant might challenge the procedural decisions taken during the course of the trial which he considers damaging to himself but which are not of a verdict nature.

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

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

26. Article 45 of the Statute states the prohibition against double jeopardy. We agree with this provision entirely, although we must say openly that in the event of international crimes, the jurisdiction of the international court takes precedence over the jurisdiction of the national court. It is as a result of this that paragraph 2b of article 45 was drafted. We consider it

proper, in the event of a second trial, to take into consideration the penalty which the person has actually already served. However, guidelines would be necessary as regards this provision.

27. Article 46 protects the rights of the accused, the victim and the witness. Only one objection can be raised to these and that is the principle of direct evidence. It is a limit to the accused rights if evidence such as electronically-recorded testimony is introduced, since it may deny his right to cross-examination or the opportunity to practise other rights of defence.

For this reason, it is our opinion that article 46 must be reworded in order to protect fully the rights of both the accused and the victim.

We agree entirely with the provisions contained in article 48, which deal with the evaluation of evidence. Hungarian Law also states that evidence gained by way of illegal means is not admissible to court. We consider it problematic, however, that we cannot find provisions in the Statute which would regulate who can and cannot be a witness and who can deny testimony. It is our opinion that in certain cases the witness can be rejected, for instance if he is to accuse himself or a member of his family with a crime. In such a case, testimony cannot be forced. A problem is also caused by the fact that the consequences of perjury are not laid out.

28. Article 53 of the Statute satisfies the principle of nulla poeana sine lege. The Statute allows to impose two penalties: imprisonment and monetary fine.

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

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

29. We think the possibility for appeal is vital as a guarantee. The provisions of article 55 satisfy our expectations only partially. As concerns the sphere of those who are given the right to appeal, it is our concerted opinion that the prosecutor and the defence attorney, in the interests of, but separate from, the convicted person, should be given the right to appeal. We also consider it necessary to regulate that if there is only an appeal by the

defence, the Tribunal of second resort should not be allowed to hand down a verdict any more serious than that which was handed down in the initial trial.

30. Part 6 of the Statute discusses a fundamental question from the point of view of the functioning of the Tribunal, i.e. the international cooperation and judicial assistance. We consider this to be a key question because practical work cannot even be considered without the proper cooperation of the States concerned. We agree with most of the provisions of Part 6 regarding judicial assistance and we consider these provisions realizable. We do, however, feel that those articles which refer to extradition and arrest for surrender are needed to be re-examined. It may not be undesirable to undertake an examination which would collect and reflect the positions of the States.

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

III. It goes without saying that this opinion could not deal with all the provisions of the Statute. It may also appear to some of the readers, that most of the remarks were of a critical nature. At the same time it should be emphasized that the draft Statute is an outstanding result of jurisprudence and constitutes a worthy foundation for the establishment of an International Criminal Tribunal in the future.

UNITED STATES

[Original: English]
[2 June 1994]

The United States of America is pleased to provide the following comments on the report of the Working Group of the International Law Commission (A/48/10) containing draft articles for an International Criminal Court ("ICC"), as requested by the Secretary-General in his communications of 4 October 1993 and 4 January 1994.

I. General comments

The United States wishes to express its appreciation to the Working Group of the International Law Commission ("ILC") for its impressive efforts. As a result, Governments have before them a document which provides a useful focal point for examining the complexities of this topic.

These comments are by necessity preliminary, and the United States Government may wish to provide further views in the future. Failure to comment on an aspect of the draft Statute, however, does not mean that the United States either supports or does not support the ILC's specific formulation.

Although the Working Group's report addresses many of the concerns shared by the United States and other nations regarding the establishment of an ICC, a number of significant problems remain. We believe that unless these problems are corrected, the ICC will not make the kind of contribution to world order the ILC envisions. It is therefore important that the ILC take into account the views of States as it continues its effort to create a Statute that builds upon, not displaces, effective national judicial and international processes.

As the ILC continues its deliberations, we urge the Commission to reflect on the following considerations:

- An international criminal court should be viewed as a supplementary facility - one that does not compete with existing functioning law enforcement relationships. In other words, it should exist expressly for those cases where interested States perceive a need for this type of forum, presumably because no other forum will serve.

- The Statute must reflect a consensus among States. If there is no such consensus, the treaty will fail to gain a meaningful acceptance among States, and this important effort will fail.

- In keeping with the need for consensus, it is necessary to avoid any linkage between the proposal to create an international criminal court and the development of the Draft Code of Crimes Against the Peace and Security of Mankind. The Code of Crimes is,

so far, a highly controversial and imperfect document. As long as it remains this way, it cannot form the basis for an international court's jurisdiction.

- The budgetary and administrative requirements of the Tribunal must be handled with great care. The Tribunal could be an extraordinarily expensive undertaking, especially if it is used at any one time for extensive investigations or more than a limited number of cases.

We believe that the rules of evidence and procedure of the Tribunal should be agreed to by States parties and formulated in conjunction with the Statute, and not left to the discretion of the Court. In many instances, the content of the rules can be as important as that of the Statute. One reason for this is because such rules have an important impact on the rights of defendants, and thus must be in keeping with relevant human rights and due process norms.

II. Comments on specific articles

Part 1: Establishment of the Tribunal

Article 1 - Establishment of the Tribunal

The United States supports the approach taken by the ILC Working Group in establishing the proposed Tribunal through a multilateral treaty, binding those States which choose to become parties to the instrument.

Article 2 - Relationship of the Tribunal to the United Nations

The United States believes that the proposed Tribunal should not be established as an organ of the United Nations, which would involve the complicated task of amending the United Nations Charter, but the Tribunal should none the less have a clear relationship to the United Nations. An agreement between the United Nations and the Tribunal is desirable because it would facilitate cooperation. This is especially important given, as noted by the commentary, that a part of the Tribunal's jurisdiction might depend upon decisions by the Security Council. One appropriate way of establishing such a relationship would be for the United Nations and the proposed court to enter into an agreement along the lines of agreements between the United Nations and specialized agencies, pursuant to Articles 57 and 63 of the United Nations Charter.

We believe that the Statute should include an appropriate mechanism for "ratification" by States parties of major decisions by the Tribunal that may have financial or operational repercussions. This might be accomplished by including an article in the Statute providing for specified matters to be put before States parties.

Article 3 - Seat of the Tribunal

This issue could be resolved in the convention establishing the proposed court. Alternatively, the resolution of the issue should be subject to approval of the majority of States parties.

Article 4 - Status of the Tribunal

We agree that, for budgetary reasons, the Tribunal should sit only when it needs to conduct business. We do not believe that this result means that the Tribunal will lack the requisite degree of permanence or authority for it to accomplish its mission. At this point, States are not in a position to predict how active the Tribunal might be. Requiring that the proposed court be in permanent session would deprive the institution of necessary flexibility, and subject States parties to unnecessary costs.

Article 6 - Qualification of judges

We believe that the Statute should make a distinction between the qualifications for trial and appellate judges. Trial judges should be required to have experience in trying criminal cases. While it would be desirable for appellate judges to have a background in hearing appeals of criminal cases, given the international law character of this Tribunal, it may not be necessary to require such experience in cases where an individual has had other relevant experience.

Article 7 - Election of judges

The United States believes strongly that the appellate function should be independent from the trial function in order to ensure full and fair appellate review. Consequently, we propose that judges be elected separately for these two functions. Candidates for judicial positions will likely have more experience in one or the other capacity, and thus separate voting will assure States parties that relative expertise will be channelled appropriately.

We reserve judgment as to whether 18 judges is the proper number. Much depends on how many cases States parties predict the Tribunal will have, and the overall budgetary requirements of the Tribunal.

The judges should be elected by States parties.

Article 9 - Independence of Judges

The rules of the Tribunal will need to include specific guidelines for judicial service, and will need to strike a proper balance between allowing part-time judges to earn a living and the necessity of ensuring that the integrity of the judges and the Tribunal in appearance and fact is protected. For example, judges should be permitted to teach or practise law (although they may not take cases that relate to matters before the Tribunal or that otherwise are inconsistent with the Tribunal's conflict of interest standard). They should not participate as members of executive or legislative branches of Governments. Whether they could act as judges in domestic courts is an issue which should be explored.

One important reason to have the rules of service specified in advance is that candidates for judgeships may not put themselves forward if they cannot predict how their outside activities and incomes will be affected.

Article 10 - Election and functions of president and vice-presidents

We believe it would be appropriate for States parties to elect the president and vice-presidents, rather than leave the matter to the judges.

Article 11 - Disqualification of judges

We do not believe that there is any reason to limit the number of judges whose disqualification an accused can request. There should be no difficulty in handling such challenges in the ordinary course. The Prosecutor should also have the right to request the disqualification of a judge. Other judges, too, should have this right. Rather than have the Chamber, or the Chamber supplemented by the Bureau, render a decision on this question, it would be preferable for the Court as a whole to do so. The final decision should be reached on the basis of a majority vote, with a majority consisting of more than half the eligible judges present and voting.

In certain circumstances, States parties may have information bearing upon whether a judge should be disqualified. In such circumstances, there should be a procedure to permit such States parties to file a motion with the Court requesting a review by the Chamber concerned.

Article 12 - Election and functions of registrar

The Statute should provide that the registrar can be removed for cause by a vote of a majority of the Court. A seven-year term appears somewhat long for this type of office, and we suggest that five years may be a more appropriate period particularly in view of the permissibility of re-election.

The Tribunal, as a supplementary facility, should have a small professional staff, which States parties could agree to expand as needed. This basic principle should apply to both the Registry and the Procuracy.

The number of employees of the Registry and its budget should be subject to approval by States parties. As drafted, the Bureau could authorize unlimited numbers of additional staff, presumably to be paid for by assessments from States parties. Instead, on a yearly or shorter basis, the Registry should submit to the President of the Court a detailed accounting of its activities, along with a proposal for changes in expenditures for the next period. The President would submit a proposal to States parties, based on the Registrar’s proposal.

Article 13 - Composition, functions and powers of the procuracy

The United States Government agrees with the Working Group’s proposal that the Prosecutor and Deputy Prosecutor be elected by States parties. That election should require a super majority vote, for example an affirmative vote of two thirds of the States parties.

Without affecting its basic independence, States parties must none the less have oversight with respect to the budget of the Procuracy. Thus, as with the Registry, the Procuracy should draw up periodic budgetary proposals for approval by States parties.

Article 15 - Loss of office

The Statute should provide, here or elsewhere, that judges, the Prosecutor or Deputy Prosecutor, and the Registrar may be removed from office, or suspended, by reason of inability to perform their functions because of long-term illness or disability.

Given the importance placed in the independent status of the Prosecutor, we question whether the Court should have the authority to remove the Prosecutor or Deputy Prosecutor from office. Thus, we suggest that the Statute limit the authority of the Court to barring participation of any prosecutor for cause, but leave removal from office of the Prosecutor or the Deputy Prosecutor to a super majority decision of States parties. The ILC will need to develop mechanisms for expeditious consideration of issues by States parties and voting procedures.

Article 16 - Privileges and immunities

This provision should be revised so that it states clearly, and without reference to the standards used by other institutions, the privileges and immunities of specific persons or categories of persons. Thus, we suggest that the judges and the Prosecutor (and perhaps the Deputy Prosecutor) should enjoy full diplomatic immunity while present in the territory of any State party where they are performing official functions related to the work of the Tribunal. We would provide full privileges and immunities to the Prosecutor because he or she will likely make the kind of controversial decisions that would require such protections. All other categories or persons listed should enjoy the privileges and immunities provided to administrative and technical staff under the Vienna Convention on Diplomatic Relations while present in the territory of any State party where they are performing official functions related to the work of the Tribunal.

Further consideration should be given to who should be able to waive immunities (we prefer the term "waive" to "revoke"). The person with authority to waive immunity should normally be someone with direct authority over the person whose immunity is affected. Thus, it would be appropriate for the Prosecutor to be able to waive the immunity of other prosecutors or members of the Procuracy, the President (perhaps in consultation with the rest of the Court) for the staff of the Court, the Registrar and his staff, and counsel, experts and witnesses.

Article 17 - Allowances and expenses

If judges reach the point where they are working full time, there should be a transition mechanism, so that per diem payments do not exceed what would normally be paid as a full-time salary for the same period.

Article 19 - Rules of the Tribunal

As noted above, the United States believes that the Tribunal's rules should be formulated in conjunction with the Statute and agreed to by States parties prior to establishment of the ICC. The conduct of pre-trial investigations, rules of procedure and evidence and other matters "necessary" to the implementation of the Statute can have a fundamental impact on the ability of the Tribunal to have fair and acceptable proceedings. Rules that affect the operation of the Tribunal to this degree will require painstaking effort to draft; States parties should not be asked to give their approval to the ICC unless that effort has been made and the results have met with general approval.

Article 20 - Internal rules of the Court

As a general proposition, we agree that the Court should have leeway in determining its own internal rules. Nevertheless, care needs to be taken to ensure that these rules do not adversely affect the rights of the accused. If the Court's internal rules are not subject to prior approval of States parties, then the Statute should provide that the rules of procedure and evidence (which would be subject to such approval) take precedence over the rules of the Court in case of conflict.

Article 21 - Review of the Statute

While we agree that providing for a review conference is desirable, this article should not refer to the Code of Crimes. As noted above, the Code is a controversial document which at this time cannot form the basis for the jurisdiction of an international criminal court. We are not optimistic that it will be able to form such a basis in the near future.

Part 2: Jurisdiction and applicable law

Article 22 - List of crimes defined by treaties

The United States Government has reviewed the draft articles on jurisdiction with great attention. This is undeniably the heart of the ICC proposal, and must be crafted with great care. In making a number of recommendations on structuring the jurisdiction of an ICC, we have borne in mind the need to attain a very wide degree of support for an ambitious project of this nature.

(a) War crimes, crimes against humanity, genocide

Recent events have shown that there is an important need to ensure that war crimes, crimes against humanity and genocide do not go unpunished. While international prosecution is not an effective substitute for systems of military justice and discipline in most cases, there are circumstances in which domestic efforts will not suffice. For that reason, we believe that such crimes are appropriate subjects for the jurisdiction of an international criminal court. These crimes are of fundamental concern to all States. Beyond the fact that such crimes may be so serious that they shock the conscience of the civilized world, in large measure the significance of such

cases to all States derives from the fact that the commission of such crimes may create instabilities which threaten international peace and security, or because such crimes are committed in connection with international conflicts. Because of this connection to issues of peace and security, the United States concludes that such crimes should be subject to the Tribunal's jurisdiction only where such cases are referred to the Tribunal by the United Nations Security Council.

At the same time, we believe that these types of cases should not be initiated in the Tribunal by individual States. The Council is well-placed to make judgments about when particular situations are of so great a concern to the international community that an international (rather than a national) prosecution is required. In addition, we are concerned that there would be a temptation for States to invoke the jurisdiction of the Tribunal for political purposes.

We believe that it is appropriate for the ICC to have jurisdiction over offences under the laws of war that are well-established. Because aspects of Protocol I additional to the Geneva Conventions of 1949 have yet to attain a sufficient level of recognition and acceptance, we conclude that Protocol I should not form part of the Tribunal's jurisdiction. Furthermore, in armed conflicts, applicable laws of war derive from the treaties to which all belligerents are parties. The ILC draft would allow one of the belligerents to a future conflict to initiate ICC prosecution of members of another belligerent's armed forces for violations of laws of war under an instrument to which the latter is not a party, and for crimes which have not been sufficiently well accepted as crimes. Such a result should be avoided. (In addition, as discussed below, we believe that the Tribunal should not have jurisdiction over cases otherwise subject to an existing status of forces agreement.)

In these circumstances, the United States Government supports establishment of an ICC which permits referral of cases for investigation and prosecution only by the Security Council for crimes set forth in the instruments listed in sections 22 (a) and (b)(i)-(iv) of the draft. In addition to grave breaches under the Geneva Conventions, we would also include violations of equivalent gravity of the 1907 Hague Conventions. With respect to crimes against humanity, in the absence of an appropriate instrument defining the crime, we suggest that the ILC consider developing a definition for inclusion in the Statute, perhaps modelled along the lines of article 5 of the Statute of the Yugoslavia Tribunal. In the context of an ICC, we would suggest that the ILC make clear that there is no requirement that crimes against humanity be limited to those cases arising out of or even during an armed conflict.

(b) Crimes under the "terrorism" Conventions

The United States Government also recognizes that it might, in principle, be desirable in some cases to have a forum available for prosecution of persons committing crimes defined in the conventions listed in sections 22 (c), (d), (f), (g) and (h) of the draft Statute where national forums are unavailable or will not suffice. At the same time, however, the

possibility of ICC jurisdiction should under no circumstances impede or undermine the effective prosecution of terrorists in domestic courts. Unfortunately, under the present proposal this latter risk is presented.

Many difficulties may arise in bringing such cases to an ICC. Such difficulties include whether a Tribunal of this nature would be able to conduct investigations of complex terrorist cases as competently as national Governments. Such investigations often take many years and considerable resources, resources which the ICC Prosecutor may not possess. In addition, an ICC might end up competing with or pre-empting legitimate national investigations, or causing national authorities to leave to the Tribunal elements of investigations which in fact could be more efficiently performed by those authorities.

In addition, we continue to have a number of reservations about creating jurisdiction on the basis of treaties which in many respects do not provide precise definitions of crimes, but instead impose obligations in aid of the exercise of national jurisdiction. As a general rule, important elements of crimes and defences are left to national jurisdictions. The Statute, and the rules of evidence and procedure, will need to provide an adequate guide to the Court on the question of elements of crimes and defences if the ICC is to meet the requirements of nullem crimen sine lege.

The ILC and Member States will need to give careful consideration to whether these difficulties can be overcome so as to justify inclusion of terrorism within the ambit of the ICC. The United States Government reserves judgment on whether this is possible, but hopes that the ILC will be able to make progress in presenting an analysis of issues which can assist in further discussions among United Nations Member States.

(c) Protection of peacekeepers

We note with satisfaction that progress is being made at the United Nations in elaborating a convention concerning responsibility for attacks on United Nations peacekeepers and associated personnel. Should such a convention come into force, consideration should be given to including crimes under that convention within the jurisdiction of the ICC. The ILC should consider now mechanisms for bringing these crimes within the jurisdiction of the ICC expeditiously once the treaty comes into force and States parties determine that they wish to add it to the Statute.

(d) The Apartheid Convention

We believe that article 22 should not include the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973. This convention was addressed primarily to a particular situation, that of the system of apartheid in South Africa, that has now been dismantled. This convention was controversial at its adoption and has not gained wide support in part because it is not sufficiently precise in defining the crimes which are its subject.

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

With respect to the options provided in the draft Statute, we prefer Option A because it best reflects, as pointed out in the commentary, the consensual basis of the Tribunal's jurisdiction.

Article 24 - Jurisdiction of the Court in relation to article 22

It is essential that the Tribunal not substitute for or undermine existing and functioning law enforcement relationships. Thus, States should not be permitted to avoid their obligations under existing extradition treaties by referring a case to the ICC. Moreover, military personnel who would otherwise be subject to the jurisdiction of their national courts by reason of a status of forces or similar agreement should not be tried by the Tribunal. The most compelling reason for establishing an ICC is that persons who commit the most serious crimes will otherwise go unpunished; where persons would be tried and punished in a national forum but for the intervention of the ICC, the ICC becomes a competing rather than a supplementary mechanism.

National prosecutions are usually preferable for criminal prosecutions. There are many reasons for this: the applicable law in a national prosecution will usually be clear; the prosecution will be less complicated, based on familiar precedents and rules; the prosecution and defence is likely to be less expensive; evidence and witnesses will normally be more readily available; language problems are minimized; the local courts will apply established means for compelling production of evidence and testimony, including application of rules related to perjury. International criminal proceedings will almost always be more complicated and expensive than national proceedings, and will not necessarily produce a more just result.

In these circumstances, it is necessary to provide appropriate mechanisms to ensure that, with respect to State-initiated cases, where States are willing and able to bring national proceedings, those proceedings will be preferred over ICC ones. This preference was recognized in the ILC's draft paper in 1992, A/CN.4/430/Add.1, which provided for broader consent requirements than does the Working Group's draft.

We propose that article 26 be revised so that the very limited consent regime currently reflected in the Statute is expanded to include States with a critical interest in the prosecution. Specifically, for each case under sections 22 (c), (d), (f), (g) and (h) we believe the Statute should require the consent of the State where the crime occurred or the State of nationality of the victim (or in cases where there are victims of many nationalities, the State or States with the most significant interest). The State where the crime occurred will in almost all cases have jurisdiction over the crime, and a very strong interest in the prosecution of any person who committed it. The State of nationality of the victim will often be, in terrorist cases, the State against which the attack was directed; as a result, that State has a particular interest in trying persons accused of the crime.

We are not opposed to including a requirement that the State with custody have a right of prior consent. We note, however, that among States with an "interest" in a prosecution, the State with custody does not necessarily have the strongest interest. Indeed, the presence of the fugitive in that State may be no more than fortuitous. Traditional extradition practice has given particular weight to the role of the State with custody, but that emphasis may not be appropriate where the objective is to identify those States which have such a strong reason to prosecute themselves that their preferences should prevent an ICC prosecution.

If a State with custody under any circumstances exercises a right either to refuse to surrender the accused to the ICC, or a right to withhold consent for an ICC prosecution, that State (if it has jurisdiction over the crime) must be required to submit the case to its appropriate authorities for prosecution or surrender to another State that is ready to prosecute.

In addition, any State which has an applicable extradition agreement with the State with custody, or any State which could make a request for extradition under the provisions of the latter State's domestic extradition law, should be given the opportunity to seek extradition prior to the ICC taking a case. If the State with custody is not obliged and does not intend to extradite to the requesting State (or is not obliged to prosecute under the terms of an extradition treaty), or the State having received the fugitive via extradition for any reason does not proceed with the prosecution within a reasonable period of time, the ICC could take jurisdiction over the case.

Article 25 - Cases referred by the Security Council

As noted above, the United States believes that only the Security Council should have authority to refer war crimes, crimes against humanity and genocide cases to the Tribunal. See our comments above with respect to article 22. In addition, articles 29 and 30 should be revised to make clear that no investigation may commence nor complaint be filed with respect to those types of cases prior to such Security Council action.

We noted with interest the view contained in the commentary that the Security Council would not normally be expected to refer a "case" in the sense of a complaint against individuals, but would more usually refer to the Tribunal's situation. We agree that the Council would normally refer situations, which would then be the subject of investigation by the Procuracy. However, we see no reason that the Council, in appropriate circumstances, should be prevented from referring specific cases for the consideration of the ICC. In such instances, the Council would not require that a prosecution be brought, but would refer a case that would then be taken up by the Prosecutor. If the Prosecutor did not find that the case involved criminal conduct, he or she would under no obligation to seek an indictment.

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

We do not support inclusion within the jurisdiction of the ICC of crimes under general international law or crimes under national law which give effect to provisions of a multilateral treaty. The concept of "crimes under general

international law" is not sufficiently defined and inviting States to initiate prosecutions on such a basis would be potentially counterproductive and ill-advised. As discussed above with respect to article 22, we are prepared to include within the Tribunal's jurisdiction crimes against humanity - a category of crimes which is sufficiently well-defined under customary international law. We would also be willing to consider proposals for the inclusion of other particularly well-defined categories of crimes, if any, under customary international law when referred by the Security Council.

The United States Government does not support including drug-related crimes which give effect to the provisions of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. We share the concerns expressed by many States in the Sixth Committee debate that this Convention does not provide the level of specificity needed to form the basis of criminal charges in an ICC. Moreover, even if this defect could be rectified, we are not convinced that a way could be found to ensure among other things that the Tribunal would hear only the most significant drug cases; instead, the court would likely be overwhelmed with cases, with all the resource implications this implies. The Tribunal could become a drug court with little time for other cases of critical importance to the world community.

Article 27 - Charges of aggression

We would not support prosecutions on charges of aggression, even if the Security Council has first determined that the State concerned has committed the act of aggression which is the subject of the charge. Although the Council is the international political body charged with determining the difference between unlawful aggression and lawful self-defence, we believe that the offence of aggression is not yet sufficiently well-defined as a matter of international criminal law to form the basis of ICC jurisdiction. In addition, charges of aggression are essentially charges of State and not individual responsibility. Recent difficulties in determining whether particular armed conflicts are international armed conflicts are examples of definitional problems also encountered in defining aggression.

Article 28 - Applicable law

We are concerned about the reference to "the rules and principles of general international law" as well as references to "applicable national law". Neither the Statute nor the commentary make clear the purposes for which the Court may have reference to these sources of law. We recognize that application of some elements of national law to fill out the elements of crimes specified in the treaties (or the rules of procedure and evidence) is inevitable unless there is a more developed international law to which the Court can refer. The crimes in the listed treaties, for example, would normally be interpreted by national courts in conjunction with domestic legal principles, often pursuant to domestic legislation defining elements of the crimes, related defences, and other matters. This lack of more detailed international law, however, poses serious questions and concerns. Our preference is to develop supplementary legal principles for the Court in conjunction with the Statute.

If reliance on national laws is necessary, which law is to be applied, the law of the State where the crime was committed, that of the State of nationality of the defendant, or of where the defendant is located? Is the Court to survey the laws of all States on the matter and come up with general principles as recognized under article 38 (c) of the Statute of the ICJ? These are matters that need to be further analysed by the ILC.

Finally, we note that unless addressed in the Statute, an overlap will exist between the International Court of Justice and the ICC regarding jurisdiction to determine questions relating to the interpretation and application of the provisions as many of the treaties that would be covered by the Statute. Consequently, it is possible that the two courts will opine on the same or similar issues. Of course, the parties to the Statute can agree among themselves to bring such questions only to the ICC, but this would not preclude other States from bringing the same or similar questions to the ICJ.

Part 3: Investigation and commencement of prosecution

Article 29 - Complaints

States should not be allowed to pick and choose when they will subject themselves to the general obligations of the Statute. It would be particularly inappropriate if a non-party could bring a case to the ICC, but that State would be under no treaty obligation to cooperate with the Tribunal in legal assistance matters. Moreover, we oppose giving a right to non-States parties to bring cases before the Tribunal. Only States paying for the ICC's operations should be able to act as a complainant.

As noted above, the United States Government concludes that only the Security Council should be permitted to refer cases involving war crimes, crimes against humanity and genocide to the ICC. Thus, no complaint regarding crimes under instruments listed in sections 22 (a) and (b)(i)-(iv) should be accepted by the ICC unless referred by the Security Council.

We believe that the Statute should provide that there be some threshold showing, if not determination, of jurisdiction before the investigation begins - rather than wait for the issue to be raised on the eve of trial under article 38. At a minimum, the complaining State should be required to make a showing on the issue of jurisdiction and the Prosecutor or Tribunal would be able to decline or defer the case if there appears to be a serious jurisdictional defect. In order to avoid a waste of investigatory resources, all interested States which have a right under the Statute to withhold consent (and thereby curtail a prosecution) should be required to make an election at a specified early point, either an irrevocable election or a provisional one, without prejudice to the right of the defendant to challenge the jurisdiction of the Tribunal. In addition, States must be given a reasonable amount of time in which to make a decision concerning consent.

Further consideration needs to be given to the role and function of the Bureau, especially to the extent it will perform judicial functions that would otherwise be referred to a Chamber of the Court. One member of the Working Group suggested the possibility of establishing an "Indictment Chamber." (See art. 36, comment 6.) See e.g., articles 30 (1) (Bureau can direct the

Prosecutor to commence a prosecution which he or she has declined), and 32 (Bureau determines sufficiency of indictment). Giving authority to the Court under article 30 (1) to direct that a prosecution be brought might constitute an infringement on the independence of the Prosecutor and thus we would prefer to limit the authority of the Court in this respect to requiring reconsideration of the matter.

Article 30 - Investigation and preparation of the indictment

To avoid potential abuse of the Tribunal's investigative powers and waste of financial and personnel resources, the standard for declining an investigation (currently "unless the Prosecutor determines that no possible basis exists for action by the Court") should be made less demanding. In addition, provision should be made for retention of information or evidence, for possible future use, in the event the Prosecutor declines prosecution.

Although this may be presumed in paragraph 4, it would be preferable for the right of a person to be informed, at the time of the questioning, that he or she is a suspect be included explicitly in the list of the suspect's rights.

Paragraph 2 provides that the Prosecutor shall have the power to request the presence of certain persons and production of information. The obligations of States to cooperate with the Tribunal, e.g., with respect to subpoenas seeking disclosure and production of documentation or exhibits should be spelled out more clearly with respect to both this article and article 58.

Because war crimes, crimes against humanity and genocide cases should be referred only by the Security Council (see discussion above with respect to art. 22), this article should be redrafted to take the distinction between State-initiated and Security Council referred cases into account.

Article 31 - Commencement of a prosecution

We propose that the Prosecutor be authorized to proceed with preparation of an indictment if he determines there is a prima facie case, not, as provided in the Statute, if he determines "there is a sufficient basis to proceed." This is in line with article 32 which requires there to be a prima facie case for affirmance of the indictment. The Prosecutor should proceed to indictment only if he or she has a good faith belief that the indictment will be upheld by the Court.

In addition to information specified in paragraph 1, the indictment should specify the alleged facts establishing the elements of the offence. It could also include a statement of the basis of jurisdiction. The standard for pre-indictment arrest ("sufficient grounds to believe") should be clarified. This sounds like the equivalent of probable cause (the standard used in the United States), but it is hard to determine whether this is the case.

The Statute leaves the period of pre-indictment detention to the discretion of the Court. Many judicial systems, provisional arrest articles in extradition treaties, and international human rights standards (for

example, art. 9 (3) of the International Covenant on Civil and Political Rights) allow detention for a stated period of time, or for a "reasonable" period. If the Prosecutor cannot seek a timely indictment, e.g. cannot establish a prima facie case, the appropriateness of a lengthy detention is open to question. Thus, article 31 might be revised to permit pre-indictment detention for a "reasonable" period.

Article 32 - The indictment

We question whether the judges who affirm an indictment should hear the resulting case or appeal. The Statute or rules should provide for the amendment of an indictment after it has been affirmed and for the sealing of indictments. Presumably determination of whether there is a prima facie case would be based on a review of the evidence submitted as part of the "supporting documentation". It is unclear from the language of the Statute what facts must be established preliminarily, and how "prima facie" would be defined.

So that the Court will have control over the Tribunal's docket, we believe that the Court should have discretion to decline to hear State-initiated cases which otherwise meet the requirements of the Statute, based on appropriate criteria to be developed by the ILC. Such criteria might include the fact that a case would be better handled at the national level, or is not of sufficient gravity to warrant the attention of the ICC.

Article 33 - Notification of the indictment

This article should be read together with article 58 (international cooperation and judicial assistance) and article 63 (surrender of an accused person). The Statute made a distinction between States parties which have accepted jurisdiction of the Tribunal with respect to the crime(s) in question, which are ordered to make the necessary notification and/or arrest, and those which have not accepted jurisdiction of the Tribunal for those crimes, which are merely "requested" to cooperate in this regard. We agree that, with respect to a State which does not accept the jurisdiction of the Tribunal for the crime in question, the Tribunal should be able to do no more than make a request for cooperation with respect to service of the indictment and detaining the accused. Similar limitations on States' obligations should be reflected in article 58.

Article 34 - Designation of persons to assist in prosecution

In particular because the Tribunal will function on an ad hoc basis, the Prosecutor will have limited staff, and thus will need the ability to designate persons to assist in prosecutions. This is also desirable because the Prosecutor will likely need assistance with issues related to local law. It is not clear from the text whether this article applies to pre-indictment investigations (which it should).

Article 35 - Pre-trial detention or release on bail

The Statute or rules needs to address issues related to the standards for determinations of whether a person should be detained or released on bail prior to trial, duration of detention and right to review. Given the nature of the offences the Court may hear, consideration of both the risk of flight and danger would seem appropriate and would frequently result in a decision not to grant release. The Statute or rules should also specify that these provisions will apply to pre-indictment proceedings. It is not clear that the place of detention should be limited to the host State; if the Tribunal were to handle many cases at the same time, this limitation could create difficulties.

Part 4: The trial

Article 37 - Establishment of Chambers

As noted with respect to article 7, the Statute should be revised so that there is a clear distinction between trial and appellate judges. As for the question of composition of the Chambers, we prefer the option of rotation on an annual or other periodic basis among the specially-selected trial judges (consistent with the need to preserve the composition of the panel of judges hearing a particular case). There should be no rotation between the trial and appellate benches.

Regarding subparagraph 4, we recognize that disqualification of judges who are nationals of the complainant State or who are from a State of which an accused is a national is a difficult question. Although the removal of any taint of partiality is a valid objective, this prohibition can remove from the proceedings an expert on what is potentially relevant local law. Thus, we would delete subparagraph 4.

Article 38 - Disputes as to jurisdiction

An allegation of jurisdiction and the basis therefore should be included in the indictment. Pre-trial challenges to jurisdiction upon arrest or indictment should also be authorized.

We agree that allowing any State party to challenge jurisdiction is not necessary and would only complicate the proceedings. However, we believe that any interested State should be able to make such a challenge at the beginning of the proceedings. Such States could be any State that asserts a right to consent under the Statute, the State of nationality of the accused, the State of nationality of the victims, the State (or States) where the crime occurred and the State where the accused is present.

Article 39 - Duty of the Chamber

The Statute appropriately authorizes disclosure of evidence to the accused and exchange of information between the defence and prosecution before trial. This fosters a more efficient trial and improves the accused's ability to prepare a defence. However, the Court also should be given the authority to issue protective orders and take other measures to address legitimate

concerns that may arise about the scope or nature of discovery. In addition, there will need to be procedures to protect disclosure of sensitive information provided by governments (see comments with respect to arts. 47 and 48).

The details concerning handling of exculpatory evidence, prior convictions, witness lists, defences, and related matters should be provided for in the rules of procedure and evidence.

Paragraph 2 should be read in conjunction with article 44 on the rights of the accused. Paragraph 2 states that the Chamber "may" order disclosure of evidence to the defence "having regard" to article 44. This presumably means the Court will in fact (i.e. is authorized to) ensure that exculpatory information is disclosed, not that it might do so.

Article 40 - Fair trial

The reference to an "expeditious" trial is an important one, and might be emphasized in the Statute or rules by including not only an explicit "speedy trial" requirement (which we find in art. 44's provision for trial "without undue delay", based on art. 14 (3) (C) of the International Covenant on Civil and Political Rights), but standards for the amount of time in which a trial should normally take place after the accused has been placed in custody.

This article permits closed sessions only in order to protect a witness, but broader issues are involved, such as the need to protect sensitive information provided by governments. (See discussion below with respect to arts. 47 and 48.)

Article 41 - Principle of legality

The principle of nullem crimen sine lege is a critical one. The problem posed is in the difficulty of its application. Meeting this standard produces particular problems for crimes under "general international law" which in many cases will lack precise definitions, and will thus pose a risk to fair and effective prosecutions. We would not want the Tribunal to make ad hoc determinations of criminality based on controversial notions of what constitutes general or customary international law.

Article 43 - Presumption of innocence

The Statute fails to establish a standard of proof for a finding of guilt. The commentary suggests that beyond a reasonable doubt will not necessarily be the standard. Rather than leave the matter uncertain, the Statute should provide a standard. We suggest that that standard be a stringent one such as "beyond a reasonable doubt" (however expressed).

Article 44 - Rights of the accused

The United States delegation listened with interest to the debate within the Sixth Committee on the question of whether in absentia trials should be permitted under the Statute. By "in absentia," we mean that the accused never appears before the Court. Although such in absentia trials are not permitted

under the United States system, trials are permitted in some circumstances where the defendant appears initially but later absents himself voluntarily.

We appreciate that a number of legal systems permit in absentia trials of some sort, and that such trials may serve in some circumstances to vindicate the rights of victims. Nevertheless, on balance we conclude that in absentia trials are too controversial and should not be part of the proceedings. The most effective and fair prosecutions will usually be those where an effective defence is presented, and this will not normally be the case in an in absentia trial. It is important that the ICC not be tempted to seek the easier route of hearing cases in absentia when the custody of accused persons becomes difficult to obtain. Rather, every effort should be made to ensure that States comply with obligations to surrender fugitives.

Paragraph 1 (h) is problematic given that the absence of the accused will often be wilful, and thus deliberate. Thus, trials in absentia would be permitted in any case where the accused does not voluntarily offer himself to the Tribunal. Given our reasons for opposing in absentia trials, we cannot support this provision.

We note that the Statute of the Yugoslavia War Crimes Tribunal incorporates the right of the accused to be tried in his or her presence, based on article 14 (3) (d) of the International Covenant on Civil and Political Rights. The Statute or the rules of procedure should cover post-indictment "voluntary" absence, and waiver of the defendant’s right to be present after a warning by the Court that his or her disruptive behaviour justifies exclusion from the proceedings.

Other than the question of in absentia trials, we support this article, which reflects the International Covenant on Civil and Political Rights. Article 44 (g) requires that an accused should not be compelled to testify or to confess guilt. Consideration should be given also to ensuring that the defendant’s silence cannot be considered evidence of guilt.

We noted that the commentary to article 39 speaks of a "right" to simultaneous interpretation. While simultaneous interpretation is always preferable, this should not be viewed as a right of absolute dimension, as there may be times when this is not possible.

Article 45 - Double jeopardy

A number of questions need to be addressed with respect to this article, including whether lesser/greater offences implicate double jeopardy. What if the conduct in question has subjected the person to prior prosecution, but not for particular crimes that are now charged? Should there be a requirement that the prior trial has resulted in a determination on the merits?

The United States Government agrees that a "sham" prior prosecution should not deprive the Tribunal of jurisdiction. We note that the ILC Working Group employed in this context the formulation used in the Yugoslavia Tribunal Statute. The experience of the Yugoslavia Tribunal will be relevant to determining whether this formulation is a good one in practice.

Article 46 - Protection of the accused, victims and witnesses

We believe that the rules will need to provide details of the "measures" that might be taken by the Court. In particular, while it is important to protect victims, a countervailing consideration is that the accused must have a meaningful opportunity to have examined witnesses against him.

Articles 47 and 48 - Powers of the Court and evidence

The relationship of these articles to article 58 (international cooperation and judicial assistance) needs to be clarified. While States parties will be obligated to cooperate in carrying out the Court's orders to provide witnesses and evidence, it is not clear to what degree national legal systems will be able to comply. A series of questions concerning the relationship of the ICC to States parties and their domestic courts will often arise because the Tribunal, lacking personal jurisdiction of persons having requisite evidence, must rely on States parties to enforce the Tribunal's orders. The Tribunal in every case will be operating in the realm of international judicial assistance. Its Statute and rules must reflect the flexibility essential for effective prosecutions in this area.

Article 48 (5) establishes a rather low threshold for exclusion of evidence ("obtained directly or indirectly by illegal means which constitute a serious violation of human rights"). The commentary suggests adding serious violations of international law as well. We believe that the focus must be on whether the evidence to be placed before the Court is reliable. Persons may differ on what constitutes serious violations of human rights or international law; we believe the ILC should indicate in detail what situations will likely result in exclusion of evidence under these standards. Using that information, States will be able to determine whether they can support either reference.

In order to make the oath requirement (art. 48, para. 2) meaningful, the Tribunal must have the authority to prosecute witnesses for perjury. Asking States to punish persons who commit perjury before the ICC appears to us likely to be an impractical solution.

The reference to "complete record of the trial" (art. 47. para. 2) should be construed to mean either a verbatim transcript or a video/audiotape record, together with copies of documents, and not merely the judge or clerk's notes of the proceedings.

The ILC should give further consideration to the question of how national security information will be handled or disclosed. In particular, it will be necessary to permit a State to decline in its discretion to produce information related to its security despite a request from the Tribunal. Furthermore, procedures should be developed to ensure that a State may disclose sensitive information to the Prosecutor without fear that such information will be disclosed to defendants and defence counsel without that State's consent. If such rules are sound, it will greatly assist in widening the scope for cooperation between States parties and the Tribunal. If there

is uncertainty about how sensitive information may be used or disclosed, governments may be reluctant to provide certain types of valuable information to the Tribunal.

The ILC will no doubt wish to consider national security implications as they affect not only this article, but a number of others related to rights of and measures to protect the accused (e.g. arts. 44 and 46), court orders on disclosure of evidence (art. 39), and the requirement of a fair trial (art. 40).

Article 49 - Hearings

A host of issues, such as an opportunity for the Court to rule on the sufficiency of the evidence presented by the prosecution at the close of its case, and handling of cross-examination and re-direct, are not dealt with here. The commentary states that the rules will contain additional procedures. Consideration will need to be given by the ILC as to whether some of these issues should be reflected in the Statute; if not they would unquestionably have to be reflected in the rules.

Article 50 - Quorum and majority for decisions

Although making decisions by majority vote is sensible, in principle we would want the full bench of five judges to be present during the entire trial, particularly considering that the judges are finders of fact as well as law. We propose that this provision be revised accordingly.

Article 51 - Judgment

The Statute should permit the judges of the Court (both the trial and appellate benches) to issue dissenting and concurring opinions. The ability of the dissenters to challenge the majority's reasoning will help ensure that majority decisions are well grounded and publicly justified.

Articles 52 and 53 - Sentencing and penalties

We believe that the rules of procedure will need to provide further details on issues related to sentencing. We also urge consideration of adopting uniform penalty provisions, so that the Court will not need to search for and justify references to national law. Such provisions will assist the Court in ensuring that persons committing similar crimes receive similar sentences.

Article 53, as drafted, appears to permit the Tribunal to exercise jurisdiction over and attach individual and even government property located within States. This is likely to require subsequent enforcement actions in national courts. Such litigation can be complex. While we strongly support remedies of forfeiture and restoration of property to victims, this has proved one of the more difficult areas in international assistance. Thus, the Statute may need to be revised to reflect the fact that Court orders involving execution in States with respect to property may be subject to review by national courts under national law.

Part 5: Appeal and review

Article 55 - Appeal against judgment or sentence

While the possibility for a prosecutor appealing an acquittal is limited under United States law, we recognize that it is permitted in other countries. At the very least, we do not believe it is appropriate for the prosecution to be able to seek a reversal based solely on new evidence at the appellate stage.

Article 56 - Proceedings on appeal

As noted above, we propose that the Court include separate trial and appellate chambers. See also comments above on dissenting and concurring opinions with respect to article 51.

There needs to be more specificity concerning the appeal process: can the Court hear newly discovered evidence? Will the appeal be done primarily on the briefing or will there be oral argument? Can the Court solicit views of States parties? Under what circumstances might the appellate chamber remand the case for further proceedings?

Article 57 - Revision

The Statute leaves open whether the Prosecutor can seek revision. We have serious reservations about allowing the Prosecutor open-ended authority to seek reversal of an acquittal particularly when the appellate phase has concluded. The ILC should clarify under what circumstances it would be appropriate for the Prosecutor to seek revision.

We assume that the reference to "judgment of the Court" pertains to the finding of guilt or innocence. It would be generally inappropriate to utilize this remedy to seek additional review of a sentence. It is unclear whether discovery of a new fact clearly indicating the Court lacked jurisdiction would be encompassed in this provision - we think it should be.

Part 6: International cooperation and judicial assistance

Article 58 - International cooperation and judicial assistance

Paragraph 2 requires States parties which have accepted the jurisdiction of the Court with respect to a particular crime to respond to ICC "orders" or "requests" for assistance. This obligation to cooperate extends to producing evidence and to arrest, detention and surrender of accused persons. However, there is no limitation on that obligation reflecting issues such as ongoing criminal proceedings, domestic constitutional requirements, jeopardy to the safety of victims or witnesses, and adequate articulation of the need for evidence. As a practical as well as a legal matter, it is not possible for States to cooperate with the Tribunal smoothly (and in some respects at all) unless these types of matters are clarified. If they are not, States will take it upon themselves to determine the extent of their obligation to cooperate, leading to what will likely be inconsistent results.

As a general matter, we believe that States must not be required to cooperate in legal assistance matters if they do not accept the ICC's jurisdiction over the offence giving rise to the need for cooperation. Although States parties would expect to cooperate in most cases, establishing a legal obligation is inconsistent with the consensual nature of the ICC proposal.

Article 60 - Consultation

The obligation to consult under this article is ambiguous. It is not clear who is to consult and for what purposes. It is not clear to us why formal consultations generally among States parties would be necessary or useful prior to the review conference.

Article 61 - Communications and contents of documentation

This article should provide that States parties will determine whom the competent national authority would be for purposes of communications, and would notify the Registry.

Article 62 - Provisional measures

Given the considerable legal complications of arresting individuals and seizing property, this provision must be expanded to cover at the very least issues addressed in standard extradition treaties. For example, the provision needs to spell out the form and content of requests. It should provide that the provisional arrest is for the purpose of awaiting the submission to the State with custody of a complete request for surrender (with accompanying documentation), and that if such complete request is not received in either a set period of time or a "reasonable" time, the individual will be released.

One difficulty we find with the Statute is that the various articles dealing with arrest do not clearly interrelate. Article 31 provides for "pre-indictment" arrest, although this provision discusses the arrest as part of the procedural requirements necessary for commencing a case, rather than as stand-alone element of an "extradition" process; article 62 is ambiguous in its relation to article 31 and requires further detail (as noted immediately above), and article 63 concerns the obligation to surrender rather than the functional steps needed to bring this about.

Article 63 - Surrender of an accused person to the Tribunal

The precise interplay between article 63 and article 33 on notification of the indictment needs to be clarified. Moreover, this article should specify the documents that would be provided with the request for surrender. The lack of a provision for transmission of evidence or a summary statement of the evidence, combined with the need for the custodial State to take "immediate steps" suggests that the Working Group did not contemplate the need for judicial proceedings in the requested State. The United States, and we suspect other countries as well, cannot surrender persons to another government or entity without judicial proceedings. Such proceedings have a constitutional dimension under United States law, and thus we could only participate in a criminal court structure that takes this need into account.

As noted above with respect to article 22, we believe that deference should be given to national prosecutions, including adherence to existing extradition obligations in aid of national prosecutions. Thus, the obligation to surrender as set forth in this article should be revised to reflect that basic approach.

Although the Statute permits delayed surrender while an accused is being prosecuted or serving a sentence, it might also include a clause permitting temporary surrender. It is sometimes useful, because of availability and freshness of evidence and recollections of witnesses, and where the accused is serving a long sentence, to surrender the accused temporarily to the Tribunal for trial. The United States often includes such a clause in its bilateral extradition treaties.

Overall, the Statute's approach to surrender obligations and their interplay with existing extradition treaties require further review and analysis.

Article 64 - Rule of speciality

Paragraph 2 provides that evidence tendered shall not be used as evidence for any purpose other than that for which it was tendered. Rather than make this an absolute requirement, with the burden on the Court to request a waiver from the affected State, it is preferable for the State providing the information to request this treatment with respect to evidence it believes warrants special procedures.

Also, this paragraph could be interpreted to mean that the Prosecutor could not reveal even exculpatory evidence relevant to the defence in one case, if the relevant information had been received in connection with another case. Such a limitation on use of evidence could seriously affect the rights of an accused.

Article 65 - Recognition of judgments

We assume that the purpose of this provision is primarily to provide for giving effect to judgments imposing fines or ordering return or forfeiture of property. Given the jurisdictional scheme envisioned for the Court, we believe that obligatory recognition of ICC judgments should be limited to States which accept jurisdiction over the offence in question. This is because it would not be appropriate for a State to be forced to execute under its domestic law an order based on an offence which is not recognized by that State.

Article 66 - Enforcement of sentences

The rules should set guidelines for the "supervision" envisioned under paragraph 4. As a general matter, once the Court is satisfied that a particular State's correctional system is satisfactory, the details of the incarceration should normally be left to that State. The Court would be expected to monitor whether basic norms for incarceration under relevant standards of international law are met.

Article 67 - Pardon, parole and commutation of sentences

There appears to be some confusion in this article as to whether the Court should rely on national law to decide issues related to pardon, parole and commutation. There is a potential inequity in allowing the national law of the State of incarceration to be decisive on these questions, as persons having committed the same grave crime may be subject to very different terms of actual imprisonment regardless of the fact that each received the same sentence. At the same time, we recognize the convenience of using national law of the State of imprisonment as a guide.

We propose that the rules of procedure provide basic guidelines on these issues, and that such rules along with the law of the State of imprisonment would be considered by the Court. We would delete paragraph 4, which allows too much discretion to the State of imprisonment.

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