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AD HOC COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
3-13 April 1995

COMMENTS RECEIVED PURSUANT TO PARAGRAPH 4 OF GENERAL ASSEMBLY RESOLUTION 49/53 ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

Report of the Secretary-General

Addendum

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CYPRUS

[Original: English]

[22 March 1995]

1. The Government of the Republic of Cyprus agrees with and supports the recommendation of the Commission to the General Assembly that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.

2. The topic of the draft Code of Crimes against the Peace and Security of Mankind is a topic of major significance which Cyprus strongly advocated and supported from the very beginning. We firmly remain of the view, and this conviction has been reinforced by recent and current developments in the world, that such a legal instrument deserves its rightful place in the present-day corpus of public international law. We believe that the acceptance of the Code, already adopted by the Commission on first reading in 1991, can and should serve the important purpose of punishment and deterrence of present and future violators of its provisions. In our view such a Code should be comprehensive but, at the same time, lean and defensible, encompassing well-understood and legally definable crimes, so as to ensure the widest possible acceptability and effectiveness.

3. In recent years it has become increasingly clear that, besides ad hoc tribunals set up for particular situations, as we have witnessed very recently, a permanent institution has its rightful place on the contemporary scene. There have been many calls towards this objective, including by heads of State and other statesmen, by leading newspapers, by outstanding experts in the field and at intergovernmental and non-governmental conferences. We cite in particular the call by the President of the Republic of Cyprus, Mr. Glafcos Clerides, who, during the Commonwealth Heads of Government Meeting held in Cyprus in October 1993, urged the establishment of such a court and received a positive response by the other participants, who as is stated in the communiqué, "recognized that the successful culmination of this initiative could provide the international community with an important instrument against international crime".

4. In addition to the other reasons for the creation of a permanent international court, several serious problems recently faced by the international community, including situations which received much publicity and gave rise to complaints of double standards, would have been obviated through the availability of, and resort to, such a court.

5. The Government of the Republic of Cyprus would like to reiterate and underline once again its utmost interest in the speedy establishment of the international criminal court and reserves its right to comment on the draft statute, in detail, during the forthcoming Conference.

FRANCE

[Original: French]

[31 March 1995]

1. In resolution 49/53 of 9 December 1994, the General Assembly invited States to submit to the Secretary-General written comments on the draft statute for an international criminal court, and requested the Secretary-General to invite such comments from relevant international organs. In his note LA/COD/7/2 of 23 December 1994, the Secretary-General informed the Permanent Representative of France to the United Nations that he would appreciate receiving any comments which the French Government might have on the draft statute, and that such comments would form part of the documentation of the Ad Hoc Committee provided for in paragraph 2 of the aforementioned resolution.

2. One purpose of these comments by the French Government is to restate its general position on the matter as set forth in the two most recent statements by its representatives in the Sixth Committee, on 26 October 1993, during the forty-eighth session, and on 27 October 1994, during the forty-ninth session. Another purpose is to draw attention to certain shortcomings in the draft articles prepared by the International Law Commission, and to suggest modifications aimed at making them acceptable to more States.

3. The French Government favours the establishment of an international criminal court with jurisdiction in respect of a number of crimes against international law which, according to the stock phrase, are an affront to the conscience of mankind. It might be a semi-permanent court with a light structure. The establishment of jurisdictions to prosecute crimes committed during certain conflicts (the former Yugoslavia and Rwanda) has demonstrated the usefulness of that type of machinery as one of the measures to promote peace-keeping and peacemaking. The experience now being gained should be used to improve the draft statute prepared by the Commission. If it proves impossible for the United Nations to establish successfully a permanent international criminal jurisdiction acceptable to a significant number of States, international opinion will undoubtedly turn towards the Security Council and invite it to establish, whenever the circumstances of a crisis so warrant, competent jurisdictions in respect of specific situations, on the basis of Chapter VII of the Charter of the United Nations.

4. First of all, the French Government would like to point out that the question of establishing an international criminal court should be kept separate from the question of the Code of Crimes against the Peace and Security of Mankind. While the International Law Commission’s work has led to very substantial progress on the first question, it is far from producing broadly acceptable solutions with regard to the second. Since experience has shown that an international criminal jurisdiction can fulfil its mandate in the absence of the Code of Crimes against the Peace and Security of Mankind, the French authorities take the view that the Ad Hoc Committee should concentrate on carrying out successfully, as soon as possible, the task entrusted to it by the General Assembly. It is up to the Commission to continue its work on the Code

of Crimes against the Peace and Security of Mankind on a new basis, with a view to formulating proposals likely to be taken into consideration one day.

5. As far as France is concerned, the permanent international criminal court would stand a good chance of coming into being if it is based on a treaty open to all States. That is the formula that seems likely to win the broadest approval.

6. It also seems desirable that, without being a United Nations organ, the international criminal court should have close links to the United Nations, links which might be governed by an agreement between the two institutions. The links between the United Nations and the international criminal court should be consistent with a complementarity of functions: the essential function of the court should be to hear cases involving extremely serious crimes - often committed in times of conflict, especially international conflict. It would therefore punish, primarily, breaches of the laws of warfare and humanitarian law. Its work, remaining distinct from that of the United Nations, would complement that of the General Assembly and the Security Council with respect to the observance of the Charter. France therefore favours the existence of close links to the United Nations organs so that each institution might fulfil its mission in perfect complementarity, with the aim of attaining the same goals: prevention of conflicts, respect for humanitarian law, and prosecution of the most serious crimes against humanity. The definition of the terms of such cooperation should be without prejudice to the Charter.

7. The French Government has no substantive objections to part 1 of the draft articles ("Establishment of the Court"), but reserves the right to request improvements on specific points and call for clarifications, within the framework of the Ad Hoc Committee. The French Government takes the view that article 6, paragraph 3, introduces an element of virtually unprecedented rigidity in the composition of a court whose functions would essentially be of a penal nature and which should, for that reason, have a majority of criminal law experts. The French Government strongly endorses the provision of article 19 that the initial rules of the court and amendments thereto should be subject to the approval of the States parties. The wording of the article might be made more precise.

8. Part 3 of the draft articles ("Jurisdiction of the Court") calls for substantive amendments as spelt out below.

9. The French Government considers that the jurisdiction of the court should focus on a hard core of especially serious crimes involving breaches of international conventions or of universally recognized rules of international law. Article 20 as it stands seems unsatisfactory, for the following reasons:

> The definition of the crimes is not as rigorous and precise as required by criminal law. In the opinion of the French Government, the crimes should be defined by reference to international conventions or should be specifically defined within the very body of the statute. If that approach is followed, the French Government would like the wording to be directly along the lines of the Statute of the International Tribunal for the former Yugoslavia;

The introduction of the concept of "crime of aggression" raises difficulties. Aggression is a particularly serious violation of public international law, a violation attributable to States, rather than an offence with which an individual may be charged;

With regard to the crimes referred to in paragraph (e) in conjunction with breaches of the treaties listed in the annex, the French Government is reluctant to extend, from the outset, the jurisdiction of the court to a category of acts which, though highly reprehensible, relate to issues different from those of the hard core within the jurisdiction of the court. The French Government would welcome an in-depth discussion of the question whether acts of terrorism and acts related to drug trafficking should be included in the list. At any rate, in its opinion, recognition of jurisdiction in that area must be optional and discretionary, without prejudice to the possibility of recognition of special jurisdiction of the court in specific instances.

10. In the opinion of the French Government, it must be made clear that the court will have jurisdiction over individuals. The concept of criminal responsibility of States is not generally accepted. Nor is there general agreement on the responsibility of legal persons, a question that poses specific problems.

11. The French Government considers that the jurisdiction of the international court in the eyes of States recognizing such jurisdiction would have to be concurrent with that of national courts. The latter have an inherent mission to prosecute crimes in respect of which the statute recognizes the international court's competence. The court should retain the option of exercising its priority role in such matters whenever it deems it necessary. It is in cases where a de jure or de facto situation involves a denial of justice that, in our opinion, the role of the international court should be to supersede national courts. Indeed, in such cases the legal rules governing jurisdiction would not be applicable, the criminal laws of the State that would normally have jurisdiction might be inadequate or there might be particular circumstances on the ground (disorganization of the judicial apparatus, partiality of the courts because of internal or external conflict, a deliberate refusal to prosecute or extradite) impeding the administration of justice. Conversely, whenever a State's courts are in a position to prosecute and punish, severely and fairly, perpetrators of the types of crimes referred to in article 20, the international court would not normally have occasion to take cognizance, unless it invokes its priority role to hear a case on account of special circumstances. The French Government is convinced that the institution of concurrent jurisdiction between the court and national judicial systems is a prerequisite for the broadest acceptance of the statute. For that reason, it suggests that the draft should be along the lines of articles 9 and 10 of the Statute of the International Tribunal for the former Yugoslavia.

12. Acceptance of the court's jurisdiction for the purpose of article 21 represents an essential element of the statute. The French Government would like a formula based on the following principles:

With regard to the hard core defined in article 20 (crimes against humanity, genocide, serious violations of the laws and customs of war), States parties to the statute would accept ipso facto the concurrent jurisdiction of the international court and national courts;

As to crimes defined or referred to in the treaties listed in the annex, each State party to the statute of the court would retain the option of accepting the jurisdiction of the court with regard to crimes covered by the respective treaties. It would do so under conditions specified by it in its declaration, without obligations other than those freely accepted by it;

All States, including those that are not parties to the statute of the court, should be given the option of making a declaration waiving jurisdiction in respect of a particular act or an act committed during a particular period, if that act is among the crimes or offences in connection with which States parties may recognize the court's jurisdiction.

13. As they now stand in the Commission's draft, the conditions for referring matters to the court could have the disadvantage of allowing charges to be brought by one State party against another without just cause, for purely political motives or solely for the sake of controversy. A formula must be devised to eliminate that risk without creating a problem of compatibility with the Charter and without impeding legitimate prosecution. The French Government suggests that the court may exercise its jurisdiction over an individual with respect to a crime under its jurisdiction:

If a Security Council resolution gives reason to believe that such a crime has been committed;

In the absence of a Security Council resolution, on the basis of a complaint filed by a group of States parties to the statute of the court (threshold to be determined).

14. The procedural difficulties derive essentially from certain differences between the penal laws and practices of different States. The French Government would like to make special mention of the following points.

15. As far as article 26 is concerned, it is hard to imagine how the Prosecutor would be completely free to conduct proceedings in the territory of a given State. Such an approach would create problems of compatibility with the constitutional principles of many States, and could interfere with the judicial guarantees that the accused must enjoy. Moreover, it hardly seems realistic for the cooperation of the State in whose territory the investigation is carried out is always necessary for the proper conduct of the proceedings.

16. Similar difficulties arise from the pre-trial detention procedures as set forth in draft article 29. As it is now worded, an individual in custody in the territory of a State party may apply for release only to the international court, which means that the courts of the State party would no longer have jurisdiction over persons in custody in its national territory. Such a clause

hardly seems compatible with the constitutional rules of many States or with the treaty obligations they might have under regional arrangements for the protection of human rights.

17. The conditions under which an order might be given for the trial to proceed in the absence of the accused when the latter is at the disposal of the court (art. 37, para. 2) are too imprecise and broad, even if the statute provides that in such cases the rights of the accused must be respected.

18. The determination of the applicable penalties, as provided for in article 47 of the draft statute, is based on rules that are too vague. The French Government considers that those rules should be clarified and made more precise.

UNITED STATES OF AMERICA

[Original: English]

[30 March 1995]

A. Introduction and summary comment

1. Since the adoption of the draft statute by the International Law Commission (ILC) last summer, the Government of the United States of America has undertaken an in-depth review of its terms. In the view of the United States, the draft statute is a substantial improvement over the initial draft statute prepared by the International Law Commission at its forty-fifth session in 1993. 1/ The United States Government is pleased that many of the comments which it submitted on 2 June 1994 2/ were addressed in whole or in part by the ILC in the draft statute. The draft statute holds the potential for progress among Governments and we look forward to exploring that potential at the Ad Hoc Committee meeting in April 1995 and thereafter.

2. The United States notes that whether the creation of an international criminal court will contribute to international law enforcement efforts depends on whether it is accepted and used by States. The commendable work of the experts of the ILC must be supplemented by adequate intergovernmental deliberations to ensure that the proposal is truly workable both in itself and also in relation to national legal systems, and that it will garner the necessary broad political support. Intergovernmental deliberations are also particularly important in so far as it is Governments which in fact possess critical relevant experience and expertise, for example with respect to the investigation and prosecution of criminal cases and the budgetary and administrative issues associated within international organizations. For its part, the United States is committed to a thorough, constructive and timely examination of these issues.

3. As will be explained in greater detail below, the United States Government urges Governments to consider nine major areas of concern that we believe must be addressed ultimately in revisions to the draft statute:

(1) Complementary jurisdiction of the international criminal court. The preamble to the draft statute emphasizes that the court is intended to be complementary to national criminal justice systems. Because national prosecutions generally will be preferable whenever possible, the principle of complementarity is an important one. This fundamental principle, however, is not always adequately reflected in the draft statute;

(2) Focus of the court on serious, well-established international crimes. The preamble further emphasizes that the "court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole". Again, however, it is important to consider and refine the draft statute in the light of that principle;

(3) Need to further consider the investigative phase. The Prosecutor is not performing a function comparable in range or resources to national investigations, but rather a more limited function which, apart from the recently established International Tribunals for the former Yugoslavia and for Rwanda, is essentially unprecedented. The current draft statute does not reflect a fully clear or realistic understanding of this function, either by itself or in relation to national jurisdiction;

(4) Inclusion of narcotics crimes within the court's investigative and prosecutorial jurisdiction. All of the above considerations weigh most strongly against the inclusion of narcotics crimes in the jurisdiction of the court;

(5) Inclusion of terrorism treaty crimes. The United States continues to reserve its position on the inclusion of terrorism crimes in the jurisdiction of the court. We are deeply concerned about the possibility that the court might actually undermine the investigation, protection against or prosecution of crimes of international terrorism. These considerations raise serious questions about the feasibility of the court's jurisdiction in this area;

(6) Mechanisms for initiating jurisdiction. The mechanism for State consent set forth in article 21, upon reflection, requires considerably more thought and refinement, both as to who are interested States in relation to different types of crimes and as to the role of the Security Council. The conditions and threshold for initiating investigations also must be carefully considered, especially in the light of the considerations noted in point (3) above;

(7) Crimes against humanity and international humanitarian law. The United States remains committed to the effective prosecution of these crimes, both at the national and the international levels. The current draft, however, presents considerable difficulties in relation to national jurisdiction, the initiation of jurisdiction, the workability of the consent regime and other principles noted above. The United States also remains concerned about the need for further definition of these crimes;

(8) Rules of evidence and procedure. The United States is firmly of the view that the rules of evidence and procedure must be drafted and agreed to simultaneously with the statute. Such rules lie at the very core of criminal procedure and thus are essential to defining a fair, effective court;

(9) Budget and administration. The current draft contains no provisions regarding the budget and administration of the court. In order to provide for effective functioning and adequate oversight, a number of such matters must be addressed as part of the statute of the court.

4. This listing of major concerns is intended as an overview and guide, with the particular object of facilitating the discussions in the Ad Hoc Committee. Accordingly, it is not an exhaustive itemization of questions and issues. In particular we would note that there are a number of more discrete concerns and issues under the headings of due process, applicable law and measures of cooperation between national jurisdictions and the court, many of which others have noted, which merit further discussion.

5. We do not focus here on issues which seem more of a technical or drafting character, although these can be significant as well. Failure to comment on any aspect of the draft statute does not mean that the United States Government either supports or does not support the formulation found therein. A number of such technical comments, however, are included in section C below; they reflect comments which we also made to ILC in June 1994. 3/

B. Major concerns

1. Complementary nature of the jurisdiction of the Court

6. The third preambular paragraph of the draft statute reiterates the guiding principle that the international criminal court "is intended to be complementary to national criminal justice systems in cases where such trial procedures many not be available or may be ineffective". The ILC commentary to this preambular paragraph states that the international criminal court "is intended to operate in cases where there is no prospect of those persons being duly tried in national courts". The commentary continues that the international criminal court "is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements". The United States Government strongly supports this fundamental approach.

7. This guiding principle is critical for a number of reasons, not least of which is that national prosecutions will usually be preferable in criminal matters. All parties involved will be working within the context of established legal and cultural systems, including existing bilateral and multilateral arrangements; the applicable law will be more developed and 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; and the system of punishments will be clearly defined and readily available. In general, moreover, it is important to the vital interests of the State, including its legitimacy and authority, that it remain responsible and accountable for prosecuting violations of its law.

8. Thus, national jurisdiction should be respected where it is effective, willing and available. While the draft statute remains in some respects faithful to this principle, it frequently fails to uphold it. In some respects this is linked to the need for a deeper consideration of the investigative process. In other respects it may be related to difficulties with the consent regime. The State with the primary investigative and prosecutorial responsibility or interest, for example is often not the State with transitory custody or even territorial jurisdiction. Under status-of-force agreements, for example, the sending State has exclusive or concurrent jurisdiction, effective exercise of this jurisdiction can be essential to maintaining military discipline and control.

9. Draft article 26 (1) of the draft statute requires the Prosecutor to initiate an investigation upon the mere receipt of a complaint from an eligible State party under draft article 25, even if one or more States are investigating the same or related crime and even if the Prosecutor's investigation might place at risk such national investigation(s).

10. Draft article 27 (1) empowers the Prosector to file an indictment if upon investigation he/she concludes that there is a prima facie case, even though such a filing might disrupt a legitimate national investigation or prosecution.

11. The United States believes that draft article 35, although an effort in the right direction, is inadequate in its treatment of this problem. In general, provisions which are intended to accommodate national jurisdiction should take such jurisdiction into account throughout the course of proceedings. An ongoing investigation, which might lead to a prosecution or extradition request, should not be ignored. Moreover, a bona fide national determination not to prosecute, after full and adequate investigation of the facts and consideration of the law, should be recognized as an effective exercise of national jurisdiction.

12. The draft statute, however, does not appear to take those principles into account until the very late stage of presentation to the court for prosecution. These are issues that should be considered before the Prosecutor initiates an investigation. They also are issues which should be mandatory preconditions for the exercise of jurisdiction, not secondary considerations which the court (or Prosecutor) has sole discretion to decide. The "interested States" which may raise such a concern may also be too narrowly defined.

13. Draft article 53 (4) grants primacy to the international criminal court over requests for extradition from States, including those acting under extradition treaties. How this squares with draft article 21 (2), which requires the consent of the requesting State under an extradition treaty before the court can assume jurisdiction, is uncertain. Both articles also undermine the principle of complementarity by clearly favouring prosecution by the court over the system of national prosecution and international extradition that has provided effective law enforcement in most cases.

14. Draft article 21 (2) gives rise to further concern because it negates a central pillar of extradition practice: the obligation either to extradite or to submit the case to prosecuting authorities. Under the draft statute, the custodial State merely has to deny a request for extradition from another State

(bound to it by international agreement) and be relieved of all responsibility to prosecute by delivering the suspect to the court for prosecution or exercising its right under draft article 21 (1) (b) (i) to deny the court any jurisdiction. This denigration of the requesting State's pre-existing treaty rights, which is further aggravated by the draft statute's requirement that surrender requests of the court be given precedence over national extradition requests, is very much at odds with the principle of complementarity.

2. Focus of the court on the more serious, well-established international crimes

15. The second preambular paragraph of the draft statute emphasizes that the international criminal court "is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole". Given the multitude and frequency of violations of international humanitarian law and of the multilateral conventions on terrorism and narcotics covered by draft article 20 (e), the question of what constitutes "the most serious crimes of concern to the international community as a whole" is central to determining which crimes in fact fall within the ambit of the court's jurisdiction.

16. As most lucidly explained by the Government of Japan, 4/ moreover, the court's jurisdiction should be limited to clear, well-defined and well-established crimes. Not only is this essential to comport with the fundamental principle of nullum crimen sine lege, it is also critical for overall respect for the law. The force of international, legal prohibitions depends on having a clear international consensus and understanding. The imposition of new and novel norms and applications,which do not have general acceptance is not only unacceptable in a criminal context, it also would undermine the entire structure and authority of international criminal law.

17. Accordingly it is necessary further to define the crimes which are included within the court's jurisdiction. In some respects - as, for example, with crimes against humanity - this can be done in the first instance within the statute itself. In other areas, such as international humanitarian law, which are too extensive to be defined within the statute, another way must be found to ensure that prosecutions stay within the realm of clear, established law.

18. Aggression. In our June 1994 comments, we stated that aggression is not yet sufficiently well defined as a matter of international criminal law to form the basis of the court's jurisdiction. The United States fully recognizes the historical significance of the Nürnberg trials and how aggression as a crime was prosecuted in those trials. We also regard the General Assembly's declaration on the subject in 1974 (resolution 3314 (XXIX)) to be a significant step in the development of applicable standards for review of acts of aggression. There is no question that States bear a heavy responsibility under the Charter of the United Nations, treaty law and customary law to avoid acts of aggression, as that term is understood, for State behaviour.

19. The condition for Security Council action set forth in draft article 23 (2) of the draft statute is an essential step in the right direction, and one which

the United States welcomes. However, we continue to be deeply concerned that individuals will be prosecuted for actions that are essentially the responsibility of States and about which international law has not adequately defined the elements of offensive conduct. Even with an initial Security Council determination as contemplated by draft article 23 (2), the risks of politicized complaints remain high, particularly if complaints on numerous individuals can be filed after the Security Council has made a single determination that the target State has committed aggression.

20. The United States thus believes that with respect to individual culpability the crime of aggression should be excluded from the draft statute. The support of many Governments to include this crime in the jurisdiction of the court, however, compels us to propose that, at a minimum, the elements of the crime of aggression must be drafted and reviewed before Governments make an informed judgement on supporting its inclusion in the jurisdiction of the court.

21. Genocide. The United States supports the inclusion of the crime of genocide in the jurisdiction of the court. The bald reference to the "crime of genocide" in draft article 20, however, is inadequate and potentially misleading. We believe that the definition of the crime of genocide found in the Genocide Convention should be incorporated in the text of draft article 20 (a). Such an incorporation would be consistent with the ILC commentary. 5/

22. Crimes against humanity. The United States also supports the inclusion of crimes against humanity in the jurisdiction of the court. But these types of crime need to be carefully defined. The ILC commentary concedes that "there are unresolved issues about the definition of the crime". 6/ We propose that "crimes against humanity" be carefully defined in the statute of the court taking into account the following factors:

- The crime should include types of atrocities which may not otherwise be covered by genocide or war crimes;

- Some threshold should be set so that a single alleged or isolated instance is not sufficient to require investigation or prosecution unless it affects a significant number of people. The ILC commentary recognizes this requirement when it states: "It is the understanding of the Commission that the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or part. The hallmarks of such crimes lie in their large-scale and systematic nature." 7/ We would regard a standard of "serious violations of human rights" to be inadequate for purposes of the jurisdiction of the court.

23. The United States emphasizes that States have a continuing responsibility to prosecute crimes against humanity in the first instance, and that the establishment of an international criminal court should not detract from that responsibility.

24. A general criterion: seriousness of the crime. The United States also remains concerned that the draft statute lacks the specificity or emphasis required to avoid burdening the international criminal court with individual crimes that do not satisfy the requirement for seriousness or concern to the international community as a whole expressed in the preamble. We welcome the recognition of this concern in draft article 35 (c), but recommend that the principle embodied therein be more firmly established elsewhere in the draft statute.

25. For example, draft article 20 should include explicit language restricting any complaint filed under subparagraph (b), (c), (d) or (e) to criminal conduct that is both "serious" in terms of its magnitude and significant enough to concern the international community as a whole. Perhaps "manifest and significant violations" would be the appropriate standard. States parties lodging complaints under article 25 should be held to the identical standard. Without this condition, individual crimes under any one of the multilateral conventions listed in the annex (even "grave breaches" under the Geneva Conventions) could (and often would) be of a character that might merit national prosecution but not necessarily the attention of the court.

26. The Prosecutor under article 26 should be held to a high standard of review of the complaint, including whether the complaint meets the above-described conditions. The right of an interested State to apply for a decision of the court in this regard under draft article 35 (c) should be reinforced with greater clarify (particularly the right to prevent the initiation of investigation by the Prosecutor of crimes that are of insufficient gravity).

3. Need to further consider issues in connection with the investigative phase

27. The United States Government is deeply concerned that the draft statute could undermine the extensive investigative work undertaken in national prosecutions of international terrorists and narcotics traffickers, and of war criminals. As a country that is a frequent target for international terrorists and narcotics traffickers, the United States is properly concerned that the work of an international criminal court not compromise important, complex and costly investigations carried out by its criminal, justice or military authorities.

28. For the most part, neither drug crimes nor crimes of terrorism occur as isolated criminal acts. Rather, they are the acts of criminal organizations as part of ongoing patterns of criminal activity. The United States commits hundreds of millions of dollars each year to the investigation of crimes of international character and develops highly sophisticated and wide-ranging inquiries into groups of individuals who participate in criminal conspiracies and cartels. The object is not only to prosecute crimes but also to prevent them. Investigations often cover patterns of activity over long periods of time, including a whole series of committed and anticipated crimes by numerous suspects. A great deal of sensitive and confidential information is gathered and used in a variety of ways to track criminal activity and target suspects for apprehension and prosecution. Investigations often take years to unfold at considerable cost involving large numbers of law-enforcement personnel across

the globe. Effective investigation and prosecution at the national level and close bilateral and multilateral cooperation by countries around the world is essential to addressing the grave problems caused by ongoing criminal enterprises.

29. Particularly where serious crimes of international importance in the areas of terrorism and narcotics are concerned, the strategy developed by cooperating Governments to penetrate criminal organizations and conspiracies frequently involves careful, multi-tiered decisions as to when and where (and on occasion, whether) certain individuals are apprehended. The apprehension of lower-level personnel, perhaps for lesser crimes, leads step by step to the development of cases against central figures. Any interference by the Prosecutor of the international criminal court in this national and bilateral investigative work could jeopardize bringing criminals to justice and have the unfortunate result of the Prosecutor acting as a shield to effective law enforcement.

30. We question whether the Prosecutor should initiate and control such investigations in the manner set forth in the draft statute. As noted above, the Prosecutor is not designed to perform ongoing, full-scale investigations comparable to those at the national level, but rather performs a more limited investigative function for purposes of development of a particular case in response to a particular complaint. The immediate and broad sweep of authority to investigate granted to the Prosecutor under draft article 26, in which he is required to charge into investigations upon the mere filing of a complaint, is thus incompatible with his true role and, in so far as it could undermine ongoing national investigations, unacceptable.

31. The Prosecutor should not duplicate national investigative work. Nor should the Prosecutor supersede or supplement national investigations if in the result it might jeopardize the integrity of important investigative work by national law-enforcement agencies. The low threshold for investigative work set up by draft article 26 means that the court could be politically manipulated by States parties that see in such a convenient mechanism either a means to thwart more effective national investigations or avoid their own law-enforcement responsibilities, or both. The lack of clear mechanisms for appropriate respect for national investigations compounds the problem. The United States believes that the precise role of the Prosecutor in different types of cases, and particularly at the investigative stage, should be further considered.

4. Inclusion of narcotics crimes within the court's investigative and prosecutorial jurisdiction

32. The above considerations weigh most strongly against the inclusion of narcotics crimes in the jurisdiction of the court. There is no question that international narcotics crimes constitute a problem of astonishing dimension. Our experience within the United States and with enforcement efforts globally speaks for itself. The effort to create an international criminal court to address this epidemic is a natural reaction. It is, however, also unrealistic and potentially destructive to established law-enforcement efforts. Moreover, including narcotics crimes in the jurisdiction of the court dramatically increases the costs and burdens of the court.

33. As stated in our comments submitted to the United Nations last year, the United States does not support including within the jurisdiction of an international criminal court 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 with many States their concern that that Convention does not provide the level of specificity needed to form the basis of criminal charges. But even if this defect could be rectified, we are not convinced that a way could be found to ensure, among other things, that the court would hear only the most significant drug cases and not be overwhelmed with cases, with all the resource implications this implies. Some States might view the court as a means by which to shift the responsibility of narcotics investigations and prosecutions, as well as the imprisonment of convicted narcotics traffickers. This would be in direct contradiction of the system of national responsibility the United States and other States worked hard to obtain in the Vienna Convention. In short, the court would afford certain States, if they so chose, a way to avoid their international obligations.

34. We have discussed above the critical importance the United States attaches to maintaining the integrity of the investigative process, in which we invest significant money and human resources. The most significant drug cases - those that would qualify for consideration by the court - typically involve drug cartels engaged in complex transactions and activities involving casts of characters who may take years to investigate. The nature of any such investigation involves highly confidential information and strategies that require sophisticated cooperative efforts among the law-enforcement agencies of Governments. A major prosecution results after years of lesser efforts. The prosecution of minor cases is an essential step on the way to prosecution of more significant ones; one cannot simply "start at the top" with major crimes.

35. It follows that effective national investigation and prosecution is a sine qua non to addressing the extensive, ongoing criminal activity which constitutes the drug trade. Establishment of an international criminal court cannot effectively address this problem. To the contrary, by distracting from vital national efforts the court could even aggravate the problem.

36. We have worked hard in cooperation with other Governments to build cooperative relations and overall multilateral capacity to combat international narcotics trafficking. Techniques for responding to drug cartels focus not just on apprehension at the scene of the crime, but using undercover agents and sophisticated methods, and where appropriate mitigating punishment of cooperating defendants and providing long-term protection to them and other witnesses testifying against ruthless criminal organizations. These efforts will be undermined if the court deals with these same organizations in an uncoordinated, case-specific manner, depending on the vagaries of who files what complaint. National law-enforcement agencies would often lose the opportunity to learn whether the individual subject to the jurisdiction of the court knows of additional conspirators.

5. Inclusion of terrorism treaty crimes

37. The United States continues to reserve its position on whether the treaty crimes of international terrorism listed in the annex to the draft statute 8/ are appropriate for the jurisdiction of the court. The United States is deeply concerned about the possibility that the court might actually undermine the investigation, protection against or prosecution of crimes of international terrorism. These considerations raise serious questions about the feasibility of the court's jurisdiction in this area.

38. It is worth recalling that the conventions themselves aim at the development of strong national investigative capabilities within effective law-enforcement agencies working in an increasingly cooperative manner with their counterparts in other countries. They also rely upon the responsibility of States to honour their obligations under extradition treaties.

39. In our comments last year, we set forth fundamental concerns about including crimes under the "terrorism" conventions. 9/ Those earlier comments remain applicable to the draft statute. We find the ILC commentary 10/ to be unsatisfactory in addressing these concerns. They bear repetition here.

40. Jurisdiction of the international criminal court should under no circumstances impede or undermine the effective prosecution of terrorists in domestic courts. Unfortunately, this risk is not removed by the draft statute.

41. Many difficulties may arise in bringing such cases to an international criminal court. As discussed at length above, the Prosecutor is not in a position to conduct investigations of complex terrorist cases as competently as national Governments. Such investigations often take many years and considerable resources, which the Prosecutor of the court will not possess. Governments typically make considerable ongoing permanent efforts to detect and prevent terrorist activity, utilizing diplomatic, intelligence and law-enforcement resources. Progress results from a considerable body of information and expertise which can be brought to bear on any given incident.

42. Even with respect to a given incident, the efforts may be of a considerable scale. For example, it took a massive, highly expert forensic effort of well over a year, and at times employing more than 1,000 persons, to collect and examine all the debris from the mid-air bombing of Pan Am 103 - an effort that ultimately proved critical in solving the case.

43. The Prosecutor, on the other hand, is supposed to determine whether there is or is not a case and against whom, and to do so on the simple filing of a complaint within a reasonable period of time and with limited resources. Is the Prosecutor supposed to continue to devote the necessary amount of time and resources, until the crime is solved? If the Prosecutor fails to make a full examination, should he/she leave the guilty unaccused?

44. It seems inevitable, moreover, that under the current scheme of the draft statute, which gives primacy to the international investigation over national efforts, the Prosecutor would end up in some sense competing with or pre-empting legitimate national investigations, or causing national authorities to leave to

the court elements of investigations which in fact could be more efficiently performed by those authorities.

45. In addition, the United States continues to have a number of reservations about creating jurisdiction on the basis of treaties which in many respects do not provide precise definitions of crimes, but instead impose obligations in aid of the exercise of national jurisdiction. As a general rule, important elements of crimes and defences are left to national jurisdictions. The draft statute, and the rules of evidence and procedure, will need to provide an adequate guide to the court on the questions of elements of crimes and defences if the international criminal court is to meet the requirements of nullum crimen sine lege.

46. Governments will need to explore how the integrity of national investigations into crimes of international terrorism can be fully preserved and indeed enhanced by the establishment of an international criminal court with jurisdiction of such crimes. We are concerned about having the Prosecutor involved during the investigative stage and invite discussion about how the Prosecutor can best assist States engaged in investigating such crimes. Our concern includes the need to avoid redundant investigative work by the Prosecutor and how he/she can facilitate coordination among the national law-enforcement agencies of interested Governments. Would it, for example, be more practical and effective for the Prosecutor to serve initially as a facilitator of coordinated national investigative work in particular cases upon the filing perhaps of a "motion to investigate" rather than a complaint?

47. With respect to the prosecution of crimes of international terrorism, we also remain concerned about the consent mechanism embodied in the draft statute (see sect. B.6 below) and the need to refine that mechanism to include such interested States as the State(s) of nationality of the victim(s) and the target State of the crime. States may also wish to explore the merit of permitting an interested State's prosecutor - particularly if that State has been deeply engaged in the investigation of the crime(s) - to participate in the prosecution of the case before the international criminal court with the consent of the court's Prosecutor and judges. Under this "transfer" mechanism, the transferring State would prepare the case for argument before the court and then send its representatives to try the case as authorized prosecutors under the overall responsibility of the court's Prosecutor.

48. In addition, particularly in relation to terrorism but also in other cases, more precise mechanisms should be developed with respect to highly sensitive national security information. Draft article 38 (which provides that the Trial Chamber may protect confidential information) does not appear to go far enough to meet the legitimate concerns of States cooperating with the court. In particular, it will be necessary in appropriate circumstances to permit a State to decline in its discretion to produce information related to its security despite a request from the court. Further, procedures should be developed (along the lines of those being worked out with the International Tribunals for the former Yugoslavia and for Rwanda) 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 absent the State's consent. If such rules are sound, it will greatly assist in widening the scope for

cooperation between States parties and the court. 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 court. In addition, in order to safeguard both the rights of the defendant and the need to protect highly sensitive information, special procedures should exist for the use of necessary information derived from confidential sources at trial.

49. We would point to rules 66 and 70 of the International Tribunal for the former Yugoslavia as constructive starting-points for examining this issue.

6. Mechanisms for initiating jurisdiction

50. The mechanism for State consent set forth in draft article 21, upon reflection, requires considerably more thought and refinement, both as to who are interested States in relation to different types of crimes and as to the role of the Security Council. The conditions and threshold for initiating investigations also must be carefully considered, especially in the light of the considerations noted above.

51. Draft article 21 establishes a broad power by the court to exercise its jurisdiction. For any crime other than genocide, the court has jurisdiction if the State with custody of the suspect and the State on the territory of which the crime occurred have accepted the jurisdiction of the court with respect to the crime in question. We read this to mean if those States have accepted the jurisdiction of the court pursuant to their respective declarations lodged with the Registrar, then thereafter a specific crime falling within such jurisdiction would be admissible before the court. The commentary makes it clear, however, that States may give such consent on a case-by-case basis if they so choose, which is a critical feature in ensuring the complementarity of the court. The entire issue of consent, however, is to be considered only at the stage where the case has advanced to the point of the court asserting personal jurisdiction over the accused.

52. We see at least two profound difficulties with this approach. First, as discussed in other sections, it is essential to take account of the views of interested States at the very earliest stage of investigation, and not wait until there is a prosecution before the court. In addition to the importance of respecting the ongoing bona fide activities of national jurisdictions, it is also senseless to proceed with a long and costly investigation if there ultimately will be no jurisdiction over the case.

53. As noted elsewhere, even if there were an adequate consent regime applicable at the initial stage of commencing an investigation, the current threshold for invoking the court’s machinery is impossibly low. A State has merely to file a complaint, which does not even entail any cost or commitment, and walk away. The Prosecutor then is obliged to commence an investigation unless he concludes that "there is no possible basis for a prosecution under this Statute." Such investigation, with all the expense and commitment of limited resources which it entails, must then be continued until the Prosecutor can determine that there is in fact no sufficient basis for a prosecution. As noted above, this is surely a double-edged sword. Supposing that a complaint is

filed concerning a large-scale, ongoing situation of hostilities, how far is the Prosecutor supposed to go in its investigation? The above-mentioned International Tribunals are spending tens of millions of dollars a year in massive investigations. Is this supposed to be the response to every complaint? On the other hand, if the Prosecutor closes an investigation prematurely, what are the implications and results?

54. A second source of difficulty is that the current scheme does not adequately deal with the question of which States are truly interested ones. At the initial stages, the State with custody, if the suspect's presence is only transitory, may have only a coincidental interest. 11/ Where the suspect happens to be at the time an investigation is commenced may be irrelevant; more significant is where the suspect is at the time his custody is required.

55. On the other hand, the consent of the State on the territory of which the crime occurred is neither necessary nor sufficient, depending on the crime in question. In the case of a terrorist act, the State with an even greater interest in our view, may be the State against which the terrorist act is directed. If the diplomats of country X are killed by a car bomb in country Y, surely country X has a considerable interest in whether and where there is a prosecution. If an aeroplane registered to country A, containing largely country A citizens, has a bomb planted aboard in country B by a terrorist group retaliating against country A, and blows up over country C, countries B and C have a territorial connection but country A clearly has a compelling (if not the most compelling) interest.

56. In the case of a war crime, on the other hand, the territory on which the crime occurred may be the country of the victim or the country of the perpetrator. In either case, it is only one party to the conflict, which may well involve war crimes on either side. There does not seem to be any rational principle which would assign control over such cases solely to the State which happens to be the territory. In the case of a border war, for example, the possibilities for the prosecution of war crimes would vary, depending on which side of the border at the moment the fighting happened to be taking place. As discussed more fully below, however, the State with the greatest interest in the prosecution of a war crime, in the first instance, is the State whose national has committed it.

57. Draft article 21 thus fails adequately to identify and address the concerns of the "interested State" in any particular case. Nor does draft article 34 afford adequate additional protections, in that it simply permits a challenge (which the court has the discretion to deny) to the court's jurisdiction prior to or at the commencement of the hearing "in accordance with the Rules", which have not been drafted. However, it is encouraging that the ILC recognized in draft article 34 that an interested State has a stake in the court's jurisdiction in any particular case.

58. The United States appreciates the requirement in draft article 21 (2) that any requesting State under an international agreement (such as an extradition treaty or status-of-forces agreement) would have to accept the court's jurisdiction. This important requirement is wholly undercut, however, where the custodial State has rejected such request. As discussed above, we find this

limitation on the court's jurisdiction weakens the national jurisdiction of the requesting State under extradition treaties and of the sending State under status-of-forces agreements.

59. The United States Government believes that: (a) the draft statute should require explicit consent in every case brought before the court, at the time of commencement of investigations; (b) there are additional categories of States which should be required to accept the court's jurisdiction in any particular case; and (c) the requesting or sending State under extradition treaties and status-of-forces agreements should retain the power to deny the court jurisdiction even if the custodial State denies a request to surrender a suspect for purposes of prosecution. Consideration should be given to including as an "interested State" - whose consent is required before the court could exercise jurisdiction in any particular case - the State of nationality of the victim, the State which may be the target of the crime and in some cases the State of the nationality of the suspect.

60. As noted in our earlier comments, the role of the Security Council is also of critical significance. As recent experience has shown, those situations which present the most compelling case for international prosecution are almost inevitably ones with which the Security Council is concerned (because they affect international peace and security). In this regard, the recognition of the Security Council's role in referring matters under Chapter VII of the Charter of the United Nations and in relation to acts of aggression is very important. Beyond this, however, the Security Council also has an interest, in fulfilment of its mandate to preserve and restore international peace and security, in situations of which it is or has been seized. We believe that the logic of the Charter of the United Nations and of draft article 23 should require the Council's approval with respect to any case arising out of a situation of which the Security Council is or has been seized.

7. Crimes against humanity and international humanitarian law

61. The United States Government strongly supports the prosecution of war crimes and other violations of international humanitarian law. With the world's largest military organization deployed globally, the United States takes seriously its obligations to comply with and enforce international humanitarian law. Our support for the establishment and operation of the International Tribunals for the former Yugoslavia and for Rwanda also reflects this commitment.

(a) Role of the Security Council

62. The United States still believes that the appropriate way to initiate such cases before the international court is through referral of situations by the Security Council. While we are not closed to consideration of other methods, Security Council referral resolves many difficult problems and the current scheme is clearly deficient in this regard.

63. As discussed in the ILC commentary, the Security Council would refer situations or "matters". Experience shows that in such situations the serious

crimes typically are not limited to one category or even one side. It would be for the Prosecutor and the court to determine the question of individual culpability, with full integrity and independence.

64. As noted above, these are the types of situations in which international prosecution is most clearly warranted: the crimes are grave, the international community has a deep interest in seeing them prosecuted and national mechanisms have generally failed.

65. The individual complaint mechanism, on the other hand, seems aimed at cases of a very different character, discrete cases, which can be isolated from overall situations. It is with respect to such cases that the difficulties noted above are at their height: the ease of setting investigations in motion, the limited nature of the investigative function, the lack of prosecutorial discretion, the lack of consistent adherence to the principle of complementarity and the limited focus of the consent mechanism on territorial and custodial States. The individual complaint mechanism, in the context of situations which typically generate war crimes and crimes against humanity, seems an ill-designed tool. One is left with either a very partial approach to a vast and complex situation, or the prospect of one or a very few States setting up a massive investigation or prosecution of the situation as a whole. In this context, the potential for political and other abuse is also at its height.

(b) National jurisdiction

66. Moreover, in any event there should be greater weight given to national prosecution. The United States strongly believes in national prosecution wherever this is adequate and available. Not only are national prosecutions preferable in general, for reasons described above, they are also particularly important to maintain the authority of the military commander and to reflect the commitment to the rule of law within the national system.

67. Disciplined armed forces are a cornerstone of international humanitarian law. Commanders have the right and duty to discipline their personnel, and normally should have the first opportunity to do so in national courts. The Geneva Conventions of 1949 and the laws and customs applicable to armed conflict are intended to be enforced rigorously, in the first instance, by national Governments and military commands.

68. As discussed above with respect to cases involving the military, the international criminal court should complement but not replace or undermine the national military command responsibility to discipline personnel, including for commission of serious war crimes. The State of nationality (or any other State which is actively exercising jurisdiction) should therefore have pre-emptive rights of jurisdiction with respect to war crimes. To that end the Prosecutor should be required to decline a war crimes case that is being adequately investigated by another country, or where that country has given bona fide consideration to prosecution. Where the State declines to prosecute on an insufficient legal or factual basis for prosecution, this should be bona fide unless there is an affirmative showing of bad faith or the legal or factual judgement is manifestly unreasonable. Provided the court so determined at an appropriate stage that such bad faith or manifestly unreasonable judgement had

occurred, the Prosecutor could accept such a case and proceed with prosecution before the court. This proposal builds upon the current non bis in idem provisions of article 42 and on the discretion of the court under article 35 to deny a case that is being fully investigated.

69. The importance of military prosecution in the first instance is also reflected in bilateral status-of-forces and status-of-mission agreements. These agreements need to be honoured so that the system of discipline can work. The United States is party to status-of-forces agreements with Governments around the world. Other Governments with global military responsibilities also have entered into status-of-forces agreements with receiving States. The requirements of United Nations peace-keeping have generated status-of-mission agreements to govern the treatment of United Nations peace-keeping forces in host countries.

70. The draft statute exhibits a disturbing potential for inserting the international criminal court between the States parties to a status-of-forces agreement and disrupting not only the agreed allocation of jurisdiction, but the national commander's responsibility to discipline his forces under an enforceable code of military justice. Article 21 (2) would undermine status-of-forces agreements in that a rejection of a request for surrender would deny the sending State under a status-of-forces agreement the right to prevent the court's prosecution of the suspect. Thus the central pillar of status-of-forces agreements, namely, the authority of the sending State to prosecute its nationals, would be shattered.

71. The ILC commentary acknowledges the existence of status-of-forces agreements and explains that if the crime is committed on the territory of the receiving, or host, State, then the host State would have to consent to the court's jurisdiction in addition to the sending State. We welcome this explanation, but the draft statute itself has two shortcomings. First, it fails to provide for sending State consent in situations where its military member is in receiving State custody. Second, it makes no reference to status-of-forces agreements; both draft article 21 (2) and draft article 53 (4) of the draft statute embody principles in direct conflict with the operation of status-of-forces agreements. The latter provision in the draft statute would require a State party to a status-of-forces agreement which has accepted the jurisdiction of the court with respect to a crime to give priority to an arrest warrant issued by the court over requests for extradition from other States, including the sending State under such status-of-forces agreement. Such conduct would contravene the most basic obligation under a status-of-forces agreement. The statute of the court should explicitly recognize and preserve the rights of States parties to status-of-forces agreements and status-of-mission agreements. (The same concerns, of course, apply with respect to the disruption of existing extradition treaty regimes.)

8. Rules of evidence and procedure

72. The International Law Commission improved the provision on rules of the court (article 19) from the 1993 draft. The United States strongly believes, however, that the court's rules must be formulated in conjunction with the

statute of the court and agreed to by States parties prior to the establishment of the court. The conduct of pre-trial investigations, the handling of sensitive information that bears upon national security interests, 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 court to have fair, effective and acceptable proceedings. For criminal procedures, it is critical that the rules be known and approved contemporaneously with the draft statute. This is needed to protect the due process and human rights of the defendant, and is closely related to the nullum crimen sine lege standard. The ILC commentary appears to acknowledge the importance of the rules in this regard by noting that the rules extend to "matters concerning the respect of the rights of the accused, procedure, evidence, etc.". 12/

73. Rules that affect the operation of the court to this degree will require careful effort to draft, for they must be acceptable and workable in the light of the widely varying national legal systems involved. States parties should not be asked to give their approval to the court unless that effort has been made and the results have met with general approval. None the less, in the light of the experience gained from the preparation of the rules of evidence and procedure for the International Tribunal for the former Yugoslavia, and, shortly, the rules for the International Tribunal for Rwanda, and in the light of the work being done on model rules for international criminal tribunals by non-governmental organizations, we firmly believe that model rules can be prepared and approved without undue delay.

9. Budget and administration

74. Although the draft statute does not include any provisions on financial and oversight matters, the ILC commentary recognizes that such issues require detailed consideration. 13/ The United States Government considers these issues to be of the highest priority in the consideration of the draft statute and the ability of the international community to support the international criminal court. We believe that the court should not be an organic part of the United Nations, but rather should be a treaty-based institution. United Nations procedures and controls would not automatically apply. Financing and oversight issues therefore must be addressed in the statute.

(a) Issues presented

75. The draft statute does not set any fixed limits, for example on the size of the staff or the money which might be spent on investigations. It makes sense not to have rigid provisions on this, since the case-load could vary from nothing at all to a massive demand such as is currently faced by the ad hoc tribunals for Yugoslavia and Rwanda.

76. The costs involved in criminal investigations and prosecutions are potentially very large. It does not seem wise to leave budgetary decisions, such as the number of staff and the levels of salaries and benefits, wholly to the discretion and desires of prosecutors, registrars and judges. Such costs can be considerable. United States investigations of complicated cases often cost over US$ 1 million, and trial costs alone often are just as much. The

International Tribunal for the former Yugoslavia will have a budget over two years of $39 million, plus over $10 million in voluntary contributions. These may be only the initial costs if large numbers of cases end up being prosecuted.

77. Moreover, we believe it is necessary for States parties to have appropriate oversight in the administrative area. The independence and integrity of the court must of course be respected. A measure of ultimate accountability to the States parties, however, can help to foster the integrity of the court.

(b) Funding for the court

78. Potential sources of funds would include: (a) in general, the States parties to the statute of the court; (b) in particular cases, States which have initiated or are otherwise particularly interested in a case; and (c) in particular cases or matters referred by the Security Council, the United Nations.

79. In general, one would expect a basic budget to be borne by the States which are parties to the statute. Some formula would be necessary for the apportionment of such costs. We believe an appropriate formula would be that used by the Universal Postal Union, which is also used by the Permanent Court of Arbitration and the Hague Conference on Private International Law.

80. In the specific case of the Security Council referring a situation to the court, we believe that it would be appropriate for the United Nations to pay for the cost of investigation and prosecution. As noted above, the investigation and prosecution of a large-scale situation potentially involving many different crimes can be very costly. Such a major case-load would presumably not fit within the ordinary budget of the court.

81. It also seems appropriate that those States which initiate a complaint or are otherwise particularly interested should, in general, make some contribution to the costs. The initiation of a case triggers a potentially very costly and complex investigative process, and often relieves a country of burdens of investigating or prosecuting itself. The kinds of cases contemplated for the court often will involve large-scale situations, which the Prosecutor would presumably then be obligated to investigate and try. In such case, action of one or a few States could have very significant financial consequences for all. Even a single case, if particularly complex, could be very costly.

82. Requiring a degree, perhaps a substantial degree, of financial or in-kind contribution from the States involved would be fair in so far as the court is relieving those States of the burden of investigation and prosecution. It would also help to discourage cases which are not reasonably well grounded or are brought on political or other inappropriate grounds. Some formula could be found which is fair to States without adequate financial means.

83. The court should also be empowered to receive voluntary contributions of goods, personnel and services as well as funds.

(c) Approval of the budget

84. The court should establish an annual budget which would incorporate the respective budgets of the Prosecutor and the court. Because it will be difficult for the States parties as a whole to engage in detailed consideration and discussion of the budget together with each other and with the relevant officials of the Office of the Prosecutor and of the court, it would be prudent to establish a smaller body which can engage in analysis of the budget. This analysis, together with a recommendation for approval or redraft of the budget, would then be forwarded to the States parties for approval.

85. The advisory body could be seized as well with investigating and making recommendations to States parties on other matters which States parties must decide, such as the selection or removal of the Prosecutor and the Registrar.

(d) Provisions for necessary flexibility

86. The States parties should also have a residual power, in exceptional circumstances, to make or overturn management decisions. While it is not desirable for States to interfere in the operations of the court or its independence as a judicial body, in case of serious need there should be some mechanism other than amendment of the statute for States parties to take necessary measures as may be required.

87. Further, the statute should expressly empower the court to enter into necessary agreements with the United Nations, States or private parties for administrative matters and other subjects necessary for implementation. An agreement on privileges and immunities will be desirable with the host country, for example. It might also be cost-effective for the court to enter into joint arrangements with other bodies for space or other administrative support.

C. Further concerns

88. While by no means an exhaustive treatment of the draft statute, our comments above are intended to highlight our major conceptual concerns and in the process point to some specific provisions of the document. We also want to point to some further concerns without foregoing the opportunity to bring additional points to the attention of Governments as our collective review continues.

1. Due process concerns

89. The draft statute requires more detailed and comprehensive treatment of pre-indictment detention, a mandatory requirement to file indictments, strict separation of appellate chambers from trial judges and from the Presidency, the appeal process, the need for perjury prosecution, exclusion of improperly obtained evidence, and the conduct of hearings.

2. Applicable law

90. The provisions on applicable law still require further consideration. It is not clear for what purposes the court is to have recourse to the various different sources of law; it would be better to develop supplementary legal principles for the court to use. If national law is to be used, choice of law rules must be clarified. One must also consider whether the court would ever apply general principles rather than a given national law, and under what circumstances.

91. The commentary states that the nullum crimen sine lege standard "requires" the court to be able to apply national law to the extent consistent with the statute. No doubt the ILC is responding to the fact that there is insufficient international law in the criminal law field, and a solution must be found. We believe the answer will be to develop the rules so that any law or rules of substantial importance are defined in advance.

92. We noted in our June 1994 comments that, unless addressed in the statute, an overlap will exist between the International Court of Justice (ICJ) and the international criminal court 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 might be interpreted by the ICJ. Thus, 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 international criminal court, but this would not preclude other States from bringing the same or similar questions to the ICJ.

93. It also will be important to provide clear guidance in the statute on how States parties' respective laws on parole and punishment are harmonized for execution of sentences of the international criminal court.

3. Measures of cooperation between national jurisdictions and the court

94. The draft statute is now clearer on who is to cooperate when, but still contains many open issues. States are under a general duty to cooperate, whether or not they accept the jurisdiction of the court with respect to the crime in question, and whether or not they are parties to a relevant treaty. Does this obligation to "cooperate" mean that the cooperation must be provided regardless of the provisions of domestic law? Is any obligation established to provide sensitive or national-security information when requested by the court?

95. Paragraph 2 of article 51 requires States parties which have accepted the jurisdiction of the court with respect to a particular crime to respond to orders or requests for assistance. This obligation to cooperate extends 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 court 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 obligations to cooperate, leading to what will likely be inconsistent results.

96. As a general matter, we believe that States must not be required to cooperate in legal assistance matters if they do not accept the jurisdiction of the court over the offence giving rise to the need for cooperation. 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. United States courts, for example, may need to respond to requests by accused persons (or other interested parties) concerning privilege, scope of requests/discovery, refusal to travel abroad to testify, constitutional rights and other matters. It is unlikely that a United States court could force a witness located in the United States to go to the place of the trial against his/her will. These types of questions, concerning the relationship of the international criminal court to States parties and their domestic courts will often arise because the court, lacking personal jurisdiction over persons having requisite evidence, must rely on States to enforce the court's orders. (Note that some of these issues have been or will be handled as between the United States Government and the International Tribunals for the former Yugoslavia and for Rwanda through "surrender agreements". Similar measures may be in order for the international criminal court, as noted in the ILC commentary.)

97. We also note that article 51 talks of "requests" by the court, but it was not entirely clear whether States parties are obligated to comply with such requests. The commentary says that States in some circumstances need not comply, but the example given (that a State cannot comply with a request to surrender a person who is not within that State's control) is not helpful; the real question is whether the State has a legal obligation to comply if it can.

98. Provisional measures. Although these provisions have been streamlined to some extent, it is not clear how these provisional measures are meant to work with closely related provisions, such as draft article 28 on pre-indictment/ provisional arrest.

99. 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 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.

100. Transfer of the accused. Draft article 53 and 54 have been revised with curious results. The draft now appears to recognize that there may be legal problems under domestic law with rendering a person to the court but none the less appears to impose a duty to surrender persons to the court.

101. The commentary makes clear that the ILC understood that it was in fact giving priority to the court over existing extradition agreements. In particular, States are required to give priority to requests of the court, despite having received extradition requests from States. As discussed above, this is a fundamental problem. The article establishes a procedure for asking the court to set aside its request on specified grounds. But again, as with article 35, the matter is decided by the judges of the court, not by interested States.

102. We note that certain of our comments are still valid: (a) this article should specify the documents that would be provided with the request for transfer, as they may be necessary for States to comply with the request via judicial proceedings (see draft article 57); (b) deference should be given to national prosecutions (this is done where the requested State itself has custody and seeks to prosecute, but not in the case of extradition requests).

103. The commentary notes that the draft statute employs the word "transfer" in order to "avoid any confusion with the notion of extradition or other forms of surrender of persons (e.g., under status-of-forces agreements) between two States." The problem of nomenclature needs to be addressed head-on at the Ad Hoc Committee. Most States will no doubt wish to apply existing extradition-law principles in complying with requests from the international criminal court. Calling the process a transfer does not mean that the ILC has effectively carved out a new area of law unencumbered by some of the difficulties associated with existing extradition law (including treaty practice) such as non-extradition of nationals and discretionary refusal of extradition (for reasons permitted under a treaty, or otherwise). The issue of extradition of nationals also merits further discussion. Would States which have constitutional bars to extraditing their nationals hold that these bars would apply to transfers to the international criminal court? Are there any circumstances where a State with a legal bar to extradition of its nationals could be required to surrender the person to the court?

4. Other jurisdictional concerns

104. The United States Government reiterates its objection to the inclusion of the Apartheid Convention as well as the Vienna Narcotics Convention (see discussion above) in the jurisdiction of the court under draft article 21 (e). We support the inclusion of the Torture Convention and would add the Convention on the Safety of United Nations and Associated Personnel.

105. The United States also continues to oppose the inclusion of Protocol I additional to the Geneva Conventions of 1949 to the jurisdiction of the court. Our concern is grounded in the core belief that Protocol I has not yet attained a sufficient level of recognition and acceptance to merit reliance upon it by an international criminal court to prosecute individuals under such treaty provisions.

106. We reaffirm the view expressed in our June 1994 comments, namely, that "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 prosecution [by the court] 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." 14/

Notes

1/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/49/10), annex, sect. B.

2/ See A/CN.4/458/Add.7.

3/ Ibid.

4/ See A/C.6/49/3, annex.

5/ Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10), para. 91., commentary to draft article 20, para. (5).

6/ Ibid., para. (11).

7/ Ibid., para. (14).

8/ Ibid., annex.

9/ See A/CN.4/458/Add.7, pp. 26-27.

10/ Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10), para. 91, commentary to draft article 20, paras. (21)-(22).

11/ In this context, we note that the reference to "custody" seems intended to imply that the defendant is actually in physical custody, and that this is intended as some sort of safeguard against abuse of the court. If this is the objective, however, it is quite unclear how this objective is supposed to be implemented or achieved. With regard to custody, it should further be noted that the United States, and presumably many other countries, would require some form of domestic court proceeding in order to turn over a defendant as a matter of fundamental due process, but the present draft does not appear to accommodate such a requirement.

12/ Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10), para. 91, commentary to draft article 19, para. (1).

13/ Ibid., appendix I, para. 3 (b) and (c).

14/ See A/CN.4/458/Add.7, p. 26.
