UNITED NATIONS

A

General Assembly

Distr.
limited

A/CN.4/L.491/Rev.2/Add.3
18 July 1994

ENGLISH
Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-Sixth session
2 May-22 July 1994

WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Report of the Working Group

CONTENTS

Draft Commentary to Parts 6 to 8 (articles 48 to 60) and to Annex

Appendix I: Relevent treaty provisions mentioned in the Annex

Appendix II: Outline of possible ways whereby a permanent international criminal court may enter into relationship with the United Nations

Note on possible clauses of a treaty to accompany the draft statute

GE.94-63209 (E)

PART 6. APPEAL AND REVIEW

Article 48: Appeal against judgment or sentence

Commentary

(1) Under article 14 (5) of the ICCPR, "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher court according to law." This right is provided for in article 25 of the Statute of the International Tribunal for the Former Yugoslavia. It is equally provided for in article 48 of the present Statute. The right to appeal may be regulated by the Rules, for example as to such matters as time-limits for an appeal.

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

Article 49: Proceedings on appeal

Commentary

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

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

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

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

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

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

Article 50: Revision

Commentary

(1) A person convicted of a crime may, in accordance with the Rules, apply for revision of a judgment on the ground that a new evidence has been discovered, which was not known to the accused at the time of the trial or appeal and which could have been a decisive factor in the conviction. This reflects the provisions of article 14 (6) of the ICCPR, as well as article 61 (1) of the Statute of the International Court of Justice, and is a necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal. The Working Group believes that it should be available only in the case of a conviction. There are safeguards in the Statute against unfounded prosecution (see e.g. articles 26 (1) and (4) and 27 (2)), but once a prosecution has been

duly launched and conducted it would be a violation of the non bis in idem principle to allow revision of an acquittal on grounds of the discovery of new evidence (cf. articles 42 (1) and (2)). On the other hand the right to apply for revision of a conviction should extend to the Prosecutor as well as the convicted person, on the ground that the Prosecutor has an equal interest with the defence in securing a just and reliable outcome in proceedings brought under the Statute.

(2) The right to apply for revision must be based on new evidence which could have been a decisive factor in the conviction. It does not extend, for example, to alleged errors in the assessment of facts presented at the trial or to errors of law or procedure, which are a matter for the appeal process. Having regard to these limitations and to the need to avoid frivolous applications, the Presidency has power to decide under paragraph 3 whether or not to accept an application for revision. If, after considering written submissions from the convicted person and the Prosecutor, it decides to accept the application, it may reconvene the Trial Chamber, constitute a new Chamber, or (for example, if the truth of the new fact relied on is not in issue) refer the matter to the Appeals Chamber. The procedure to be adopted for the hearing of an application for revision should be regulated by the Rules.

PART 7. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 51: Cooperation and judicial assistance

Commentary

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

(2) One important difference as compared with the Yugoslav Tribunal is that the present Court has jurisdiction over a wider range of matters and that its

jurisdiction is not limited in time and place. Moreover, some States parties to the Statute may not be parties to one or more of the treaties in the Annex, or may not have accepted the Court's jurisdiction over crimes defined by those treaties. These factors would have to be taken into account in giving effect to the general obligation of cooperation under paragraph 1.

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

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

Article 52: Provisional measures

Commentary

(1) When circumstances so require, the Court may request a State or States to take provisional measures, including measures to prevent an accused from leaving its territory or the destruction of evidence located there. Such a request may include provisional arrest of a suspect pursuant to a warrant issued under article 28 (1). See also article 9 of the Model Treaty on Extradition adopted by the General Assembly in resolution 45/116 on 14 December 1990.

(2) A request for provisional measures may have to be made very quickly and in circumstances where a fully documented request would take too long to prepare. Paragraph 2 provides that a formal request for assistance under Part 7 should be made within 28 days of such a provisional request.

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

Article 53: Transfer of an accused to the Court

Commentary

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

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

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

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

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

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

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

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

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

(10) Taking these various provisions together, it is the view of the Working Group that these provisions provide adequate guarantees that the Statute will not undermine existing and functional extradition arrangements. Some members, however, felt that paragraph 4 went too far in the direction of giving priority to the Court's jurisdiction as compared with that of a State requesting extradition: they stressed that the Court should in no case interfere with existing and functioning extradition agreements.

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

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

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

Article 54: Obligation to prosecute or extradite

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

(2) Thus, a State party whose acceptance of the Court's jurisdiction is necessary, but which does not accept the jurisdiction, is under an aut dedere aut judicare obligation, equivalent to the obligation included in most of the treaties listed in the Annex. As between parties to the Statute this in effect integrates the International Criminal Court into the existing system of international criminal jurisdiction and cooperation in respect of treaty crimes. It should avoid the situation of a State party in effect giving asylum to an accused person in relation to prima facie justified

charges of crimes which have been accepted as such by that State. On the other hand it gives States parties the same range of options when confronted with a request for transfer of an accused that they have now under the listed treaties, unless the State in question has expressly accepted the jurisdiction of the Court in relation to the crime: see article 53 (2) (a).

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

Article 55: Rule of speciality

Commentary

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

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

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

Article 56: Cooperation with States not parties to the Statute

Commentary

Article 56 recognizes that all States as members of the international community have an interest in the prosecution, punishment and deterrence of the crimes covered by the Statute. Thus, even those States which are not

parties to the Statute are encouraged to cooperate with and to provide assistance to the Court on the basis of a unilateral declaration, which may be general or specific in character, an ad hoc arrangement for a particular case, or some other type of agreement between the State and the Court.

Article 57: Communications and documentation

Commentary

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

(2) Any request made to a State under Part 7 must be accompanied by a sufficient explanation of its purpose and legal basis as well as appropriate documentation, in accordance with paragraph 3. The State may ask the Court to provide additional information if necessary. This article is based on a similar provision contained in article 5 of the Model Treaty on Mutual Assistance in Criminal Matters (adopted by General Assembly resolution 45/117, 14 December 1990).

PART 8. ENFORCEMENT

Article 58: Recognition of judgments

Commentary

(1) States parties to the Statute must recognize the judgments of the Court, in the sense of treating those judgments, unless set aside under Part 6, as authoritative for the purposes of the Statute: cf. article 42. Thus a judgment of the Court should be capable of founding a plea of res judicata or issue estoppel or their equivalents under legal systems which recognize those pleas. On the other hand more affirmative obligations of enforcement are imposed not by article 58 but by article 59 and by Part 7 of the Statute.

(2) Depending on their constitutional systems, it may be necessary for States parties to enact legislation or to introduce administrative measures to give effect to this and other obligations under Part 8. The content of such legislation will depend on the national system concerned, and cannot be prescribed in advance.

Article 59: Enforcement of sentences

Commentary

(1) Prison sentences imposed by the Court are to be served in the prison facilities of a State designated by the Court or, in the absence of such a designation, in the State where the Court has its seat. Since the limited

institutional structure of the Court, in its initial stages at least, would not include a prison facility, States parties would be requested to offer the use of such facilities to the Court.

(2) While the prison facilities would continue to be administered by the relevant national authority, the terms and conditions of imprisonment should be in accordance with international standards, notably the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crimes and the Treatment of Offenders, Geneva, 1955, and approved by Economic and Social Council resolutions 663-C (XXIV), 31 July 1957, and 2076 (LXII), 13 May 1977. The imprisonment would also be subject to the supervision of the Court, the details of which would be elaborated in the Rules. For example, the Rules could establish procedures under which a convicted person could seek redress for maltreatment and provide for periodic reports by the national authorities, taking into consideration on the one hand the limited institutional structure of the Court and the difficulties of administering different standards within a single prison facility, and on the other hand the necessary guarantees of international minimum standards. For the most part the Working Group believes that arrangements can be made through a combination of delegation of custodial and administrative authority to the State concerned combined with periodic reporting, and provision for review of complaints.

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

Article 60: Pardon, parole and commutation of sentences

Commentary

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

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

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

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

Annex

Crimes pursuant to Treaties (see article 20 (e))

Commentary

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

- Regulations concerning the Laws and Customs of War on Land. Annexed to the Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land

  Reason: The Hague Regulations contain no provisions dealing with individual criminal responsibility. Most (though not all) of the violations of the laws and customs of war specified in the London Charter of 1945 are covered by the Geneva Conventions of 1949 and Additional Protocol I, which also provide for prosecution in the case of grave breaches. In addition, aspects of the Regulations fall within the notion of serious violations of the laws and customs applicable in armed conflict and are thus covered by article 20 (c) of the Statute.

- Convention on the Prevention and Punishment of the Crime of Genocide. New York, 9 December 1948

  Reason: Genocide within the meaning of the 1948 Convention is covered as a crime under general international law, and is the only crime within the inherent jurisdiction of the Court: see article 20 (a). Its inclusion in the Annex is thus unnecessary.

- Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954

  Reason: The Convention includes an undertaking by States parties to respect cultural property in time of armed conflict, unless military necessity imperatively demands otherwise (articles 4 (1) and (2)), and to prohibit theft, pillage, misappropriation and vandalism of such property, and makes related provisions for its protection, including a system of special protection of particularly valuable items. It does not create crimes as such (cf. article 28), does not extend State jurisdiction over acts contrary to the Convention, and contains no provisions for extradition. Nor does the Protocol of 14 May 1954, which deals with export of cultural property from occupied territory.

- Piracy, as defined by article 15 of the Convention on the High Seas, Geneva, 29 April 1958 and article 101 of the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982

  Reason: Article 14 (1958) requires cooperation "to the fullest possible extent in the repression of piracy", defined in article 15 as consisting of certain "acts". Article 19 gives jurisdiction over piracy to any State which seizes a pirate vessel on the high seas or outside the jurisdiction of any State. Articles 100, 101, 105 (1982) are identical in substance. These provisions confer jurisdiction only on the seizing State, and they cover a very wide range of acts. On balance the Working Group decided not to include piracy as a crime under general international law in article 20.

- Single Convention on Narcotic Drugs. New York, 30 March 1961 (as amended by Protocol. Geneva, 25 March 1972)

  Reason: The Single Convention and Protocol regulate production and traffic in drugs. Article 36 requires each State party to make

certain conduct unlawful under its national law, subject inter alia to "constitutional limitations" and to "domestic law". There are special provisions for extradition and an aut dedere aut judicare provision (article 36 (a) (iv)). There is a case for inclusion in the Annex, but on balance the ground is covered by the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which is included in the Annex.

- Convention on Offences and Certain Other Acts committed on board Aircraft. Tokyo, 14 September 1963

  Reason: The Convention applies to offences against national penal law (including minor offences) as well as to conduct which may interfere with air safety whether or not it involves an offence. Its principal purpose is to establish flag State jurisdiction over crimes, etc. on board aircraft. The major terrorist offences against the safety of international civil aviation are covered by the Hague and Montreal Conventions, which are included in the Annex.

- Convention on Psychotropic Substances. Vienna, 21 February 1971

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

- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, 10 April 1972

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

- United Nations Convention on the Prohibition of Military or any other Hostile Uses of Environmental Modification Techniques. New York, 10 October 1976

  Reason: The Convention merely prohibits use of environmental modification techniques in certain circumstances (article 4).

It does not create crimes as such, does not extend State jurisdiction over acts contrary to the Convention, and contains no provisions for extradition.

- Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts. Geneva, of 8 June 1977
  Reason: Protocol II prohibits certain conduct but contains no clause dealing with grave breaches, nor any equivalent enforcement provision.
- Convention on the Prohibition or Restriction of the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 10 October 1980
  Reason: The Convention prohibits certain conduct but does not treat that conduct as criminal or require it to be suppressed by criminal sanctions.
- International Convention against the Recruitment, Use, Financing and Training of Mercenaries. New York, 4 December 1988
  Reason: Articles 2 to 4 create offences "for the purposes of the Convention". Articles 9 (2) and 12 in combination impose an aut dedere aut judicare obligation on all States parties. The Convention is excluded from the Annex because it is not yet in force. If it were to come into force before the Statute is adopted, consideration could be given to adding the Convention to the list. In that case the following additional paragraph would be appropriate: "(i) crimes related to mercenaries as defined by articles 2, 3 and 4 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989."

(2) In the case of the 1988 Narcotic Drugs Convention, the problems of limiting that Convention to individual crimes of substantial international concern is discussed in the commentary to Part 3. The Working Group takes the view that only the offences referred to in article 3 (1) of the Convention should be included, and then only subject to the further qualification set out in the Annex, referring to the purpose of the 1988 Convention as stated in article 2. Without such a limitation, article 3 (1) would cover too wide a range of cases to justify its inclusion.

Appendix I

Relevant treaty provisions mentioned in the Annex (see art. 20 (e))

1. Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the field, 12 August 1989

Article 50

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

2. Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at sea of 12 August 1949

Article 51

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

3. Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949

Article 130

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

4. Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949

Article 147

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman

treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

5. 1977 Protocol I additional to the 1949 Geneva Convention, and relating to the protection of victims of international armed conflicts

Article 85 - Repression of breaches of this Protocol

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague, 16 December 1970

Article 1

Any person who on board an aircraft in flight:

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

(b) is an accomplice of a person who performs or attempts to perform any such act; or

commits an offence (hereinafter referred to as "the offence").

7. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971

Article 1

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

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

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

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

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

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

2. Any person also commits an offence if he:

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

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

8. International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973

Article II

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

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

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

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

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

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

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

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

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

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

9. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, New York, 14 December 1973

Article 2

1. The intentional commission of:

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

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

(c) A threat to commit any such attack;

(d) An attempt to commit any such attack;

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

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

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

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

10. International Convention against the Taking of Hostages, 17 December 1979

Article 1

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

2. Any person who:

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

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

likewise commits an offence for the purposes of this Convention.

11. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

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

...

Article 4

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

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

12. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988

Article 3

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

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2. Any person also commits an offence if that person:

(a) attempts to commit any of the offences set forth in paragraph 1; or

(b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) threatens with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

13. Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, Rome, 10 March 1988

Article 2

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

(a) seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or

(c) destroys a fixed platform or causes damage to it which is likely to endanger its safety; or

(d) places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or

(e) injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (d).

2. Any person also commits an offence if that person:

(a) attempts to commit any of the offences set forth in paragraph 1; or

(b) abets the commission of any such offences perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform.

14. United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances - Vienna, 19 December 1988

Article 2

SCOPE OF THE CONVENTION

1. The purpose of this Convention is to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

2. The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.

Article 3

OFFENCES AND SANCTIONS

1. Each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

(a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

(ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

(iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;

(iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(v) The organization, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;

(b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;

(c) Subject to its constitutional principles and the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;

(ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;

(iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

Appendix II

Outline of possible ways whereby a permanent international criminal court may enter into relationship with the United Nations

1. The way in which a permanent international criminal court may enter into relationship with the United Nations must necessarily be considered in connection with the method adopted for its creation.

2. In this respect, two hypotheses may be envisaged: (a) The court becomes part of the organic structure of the United Nations; (b) The court does not become part of the organic structure of the United Nations.

A. The Court becomes part of the organic structure of the United Nations

3. Under this hypothesis the court, as a result of the very act of its creation, is already in relationship with the United Nations. This may be achieved in two ways:

I. The Court as a principal organ of the United Nations

4. This solution would attach the maximum weight to the creation of the court by placing it on the same level with the other principal organs of the United Nations and, in particular, the International Court of Justice. It would also facilitate the ipso jure jurisdiction of the court over certain international crimes. Under this solution, the financing of the court would be provided for under the regular budget of the Organization.

5. On the other hand, this solution could give rise to potential obstacles in that it would require an amendment to the United Nations Charter under its Chapter XVIII (Arts. 108-109). It should be noted, in this connection, that there is no precedent for the creation of any additional principal organ in the history of the Organization.

II. The Court as a subsidiary organ of the United Nations

6. By contrast, there is a well-developed practice whereby United Nations principal organs create subsidiary organs under the relevant Charter provisions, (in particular Arts. 22 and 29 of the United Nations Charter), for the performance of functions conferred upon them or upon the Organization as a whole, by the Charter. There is practice along these lines even in the jurisdictional field. An early example is the establishment of the Administrative Tribunal of the United Nations, by General Assembly resolution 351 (iv) of 24 November 1949 (see document A/AC.65.2). A more recent example is the creation of the Tribunal for crimes committed in former Yugoslavia by Security Council resolution 827 of 25 May 1993 (document S/25704).

7. Normally and as concerns most fields of competence, the establishment of a subsidiary organ is essentially auxiliary in nature. The subsidiary organ's decisions will usually be in the nature of recommendations which the relevant principal organ is free to accept or reject.

8. In the judicial field, however, the subsidiary nature of an organ reflects itself mainly in the fact that its very existence, as well as the cessation of its functions, depends upon the relevant principal organ of the Organization. As regards the exercise of its functions, however, the very nature of the latter (judicial) makes them incompatible with the existence of hierarchical powers on the part of the principal organ which established the court or tribunal. Therefore, the principal organ has no power to reject or amend the decisions of the tribunal or court established. This was clearly ruled by the ICJ as regards the Administrative Tribunal of the United Nations ("Effect of awards of compensation made by the United Nations Administrative Tribunal" ICJ reports, 1954, p. 62) and also arises from certain articles of the Statute of the Tribunal for former Yugoslavia (arts. 13, 15, 25, 26, etc.) (see also document S/25704, para. 28).

9. As regards financing, the activities of a subsidiary organ of the Organization are financed from United Nations sources, whether budgetary allocations, assessed contributions or voluntary contributions (see, as an example, General Assembly resolution 48/251 of April 1994).

10. It should also be noted that, occasionally, the General Assembly has set up tribunals as subsidiary organs, on the basis of provisions contained in treaties concluded outside the United Nations. This was the case of the United Nations Tribunal for Libya and the United Nations Tribunal for Eritrea set up, respectively, by General Assembly resolutions 388 (V) of 15 December 1950 and 530 (VI) of 29 January 1952. Although the matters dealt with by these tribunals were, broadly speaking, part of the generic competence of the General Assembly under Article 10 of the United Nations Charter, the provision which led to their creation was contained in the Treaty of Peace with Italy, Annex XI, paragraph 3. (see document A/AC.65.2, sect. II).

11. The cases referred to in the preceding paragraph should be distinguished from those referred to in paragraphs 15 to 17 below in which the General Assembly undertakes certain functions with respect to organs established by the parties to a multilateral treaty.

B. The court does not become part of the organic structure of the United Nations and is set up by a treaty

12. Under this hypothesis the court would be created by a treaty binding on States parties thereto. There are two possible ways whereby such a court could be brought into relationship with the United Nations: (I) by means of an agreement between the court and the United Nations; (II) by means of a resolution of a United Nations organ (e.g. the General Assembly).

I. The court comes into relationship with the United Nations by means of an agreement between the court and the United Nations

13. Cooperation agreements are the typical way whereby specialized agencies and analogous bodies enter into relationship with the United Nations under Articles 57 and 63 of the United Nations Charter. Agreements are concluded between the specialized agency concerned and the Economic and Social Council of the United Nations and are subject to the approval of the General Assembly. The agreements regulate, inter alia, matters of collaboration with the

United Nations in the respective fields of action of each specialized agency and questions related to a common system as regards personnel policies. Each specialized agency constitutes an autonomous international organization with its own budget and financial resources.

14. A case in point is article XVI of the Statute of the International Atomic Energy Agency, dealing with "Relationship with other organizations", which provides that the Board of Governors, with the approval of the General Conference, is authorized to enter into an agreement or agreements establishing an appropriate relationship between the Agency and the United Nations and any other organizations the work of which is related to that of the Agency. The agreement regulating the relations between the Agency and the United Nations was approved by the General Assembly in resolution 1145 (XII) of 14 November 1957 and is annexed to that resolution. The agreement, inter alia, regulates the submission of reports by the Agency to the United Nations, the exchange of information and documents, matters of reciprocal representation, inscription of items in the respective agendas, cooperation with the Security Council and the International Court of Justice, coordination and cooperation matters, budgetary and financial arrangements and arrangements concerning staff.

15. The conclusion of an international agreement with the United Nations is also the way being envisaged by the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea to bring the projected tribunal into relationship with the United Nations. The final draft of that agreement (see document LOS/PCN.SCN.4/WP.16/Add.4) contemplates, inter alia, matters of legal relationship and mutual recognition, cooperation and coordination, relations with the International Court of Justice, relations with the Security Council, reciprocal representation, exchange of information and documents, reports to the United Nations, administrative cooperation and personnel arrangements. The draft agreement would also recognize "the desirability of establishing close budgetary and financial relationships with the United Nations in order that the administrative operations of the United Nations and the International Tribunal shall be carried out in the most efficient and economical manner possible, and that the maximum measure of coordination and uniformity with respect to these operations shall be secured".

II. The court comes into relationship with the United Nations by means of a resolution of a United Nations organ

16. Finally, a court created by a multilateral treaty could also be brought into relationship with the United Nations by means of a resolution of a United Nations organ. In the case of a permanent international criminal court such a resolution could be adopted by the General Assembly, perhaps with the concurrent involvement of the Security Council.

17. It is in the field of the protection of human rights that international practice offers the most relevant examples of treaty organs coming into relationship with the United Nations by means of a General Assembly resolution. Typically, the treaty creating the organ already contains some provisions resorting to the United Nations Organization for the performance of certain functions under the treaty: e.g. the role of the United Nations

Secretary-General in circulating invitations to States parties for the election of the treaty organ, request to the United Nations Secretary-General to provide the necessary staff and facilities for the effective performance of the functions of the treaty organ, etc. The United Nations, in its turn, takes such functions upon itself, by a resolution of the General Assembly which "adopts and opens for signature and ratification" the multilateral convention in question. Such a procedure has been followed, for instance, in the case of the Human Rights Committee (General Assembly resolution 2200 (XXI) of 16 December 1966); the Committee on the Elimination of Racial Discrimination (General Assembly resolution 2106 (XX) of 21 December 1965) and the Committee against Torture (General Assembly resolution 39/46 of 10 December 1984).

18. The adoption of such resolutions will usually have financial implications for the United Nations, making necessary the intervention of the Fifth Committee in the decision-making process. For instance, in the case of the Human Rights Committee, the 1966 Covenant provides not only and inter alia, that "the Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present covenant" (art. 36), but also that "the members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions, as the General Assembly may decide, having regard to the importance of the Committee's responsibilities" (art. 35).

19. The conventions establishing the Committee on the Elimination of Racial Discrimination (art. 10 (3-4)) and the Committee against Torture (art. 18 (3)) also provide that the Secretariat of the Committees (staff and facilities) shall be provided by the Secretary-General of the United Nations, even though the Torture Convention provides that "the States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses such as the cost of staff and facilities incurred by the United Nations". Unlike the 1966 Covenant, however, these two conventions place upon the States parties and not upon the United Nations "the expenses of the members of the Committee while they are in the performance of their duties" (Racial Discrimination Convention, art. 8 (6); Torture Convention, art. 17 (7)).

20. In practice the General Assembly may accept, with regard to such committees created by treaty, additional obligations than those already contained in the treaties concerned. Thus, by resolution 47/111 of 16 December 1992, the General Assembly decided to "endorse the amendments to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and request the Secretary-General to take the appropriate measures to provide for the financing of the committees established under the conventions from the regular budget of the United Nations, beginning with the budget for the biennium 1994-1995" (art. 9).

NOTE ON POSSIBLE CLAUSES OF A TREATY TO ACCOMPANY THE DRAFT STATUTE

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

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

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

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

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

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

(d) Amendment and Review of the Statute: The covering treaty must of course provide for amendment of the Statute. It should in the Working Group's view provide for a review of the Statute, at the request of a specified number of States parties after, say, five years. One issue that will arise in considering amendment or review will be the question whether the list of crimes contained in the Annex should be revised so as to incorporate new conventions establishing crimes. This may include such instruments in the

course of preparation as the Code of Crimes Against the Peace and Security of Mankind, and the proposed convention on the protection of United Nations peacekeepers.

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

(f) Settlement of disputes: The Court will of course have to determine its own jurisdiction (cf. arts. 24, 34), and will accordingly have to deal with any issues of interpretation and application of the Statute relating thereto. Consideration will need to be given to ways in which other disputes, arising between States parties to the Statute, should be resolved.
