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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (1994)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session prepared by the Secretariat

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2. Draft statute for an international criminal court

(a) General observations

1. A large number of delegations expressed appreciation to the International Law Commission for the completion of the draft statute for an International Criminal Court, and paid special tribute to the Working Group on a Draft Statute for an International Criminal Court and to its Chairman for their significant achievements. The draft was viewed as a definite improvement over the previous one and as a flexible and well-balanced document offering practical solutions for a number of fundamental issues. In particular, many delegations noted with satisfaction that by establishing a system of international criminal jurisdiction based primarily on the consent of the States concerned with the alleged crime and complementary to existing national jurisdictions and procedures for international judicial cooperation in criminal matters, the draft reconciled the need for an international criminal court and respect for State sovereignty.

2. Support was also expressed for the underlying premises in the draft that the Court should be a permanent institution, but should sit only when it was necessary to hear a case, and that it should be an independent judicial organ established by a treaty, but have a close relationship with the United Nations. The emphasis made in the draft on a basic guarantee of the rights of the accused was also welcomed.

3. Many delegations strongly endorsed the establishment of an international criminal court without delay. It was said that the atrocities committed in an ever increasing number of States had created an urgent need to establish a permanent criminal court which would ensure that the perpetrators of crimes against humanity were brought to justice and deter the occurrence of such crimes. It was noted that neither the principle of universal jurisdiction embodied in some national legislation nor the mechanism of international judicial cooperation was sufficient to achieve the said objective and that, while it was incumbent on Governments to bring such individuals to justice, the international community could complement and assist national efforts, in particular in situations where authorities were not in a position to maintain law and order.

4. It was noted that the establishment of ad hoc tribunals, such as the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and the International Tribunal for Rwanda - which clearly demonstrated the need for an international criminal jurisdiction - was useful but not entirely adequate for establishing a broad-based international criminal jurisdiction. Moreover, a proliferation of such ad hoc tribunals might give rise to inconsistencies in the elaboration and application of international criminal law. Thus, it was suggested that the creation of a single international criminal court would better serve the rule of law by offering fuller guarantees of the objective, impartial and uniform application of the

future Code of Crimes against the Peace and Security of Mankind than would ephemeral, ad hoc jurisdictions. The recent practice of establishing such ad hoc tribunals only by authorization of the United Nations Security Council was also viewed with concern.

5. It was further remarked that, given the decisive changes that had occurred on the international scene, and with the presence of the International Tribunal for the former Yugoslavia, the establishment of a permanent criminal court stood a realistic chance of success.

6. On the other hand, a number of delegations took the view that the idea of establishing an international criminal court had to be approached with some circumspection, particularly in view of the fact that such a court might require changes in national legislation and legal practice, and conditioned their support on the fulfilment of certain basic premises as regards its nature, jurisdiction and method of operation.

7. Above all, it was emphasized that the draft statute must provide further assurances that the proposed Court would be complementary to national courts and that the new system would not undermine existing law enforcement efforts. One representative drew attention to the fact that, increasingly, national courts were enforcing international legal instruments for punishing perpetrators of international crimes and that it should, therefore, not be felt that the granting of universal jurisdiction to national courts and judicial cooperation among States for the purpose of the administration of justice would no longer be valid after the establishment of the Court. Another representative noted that the draft statute lacked clarity in that there was no indication as to whether that complementary relationship would be a hierarchical type of relationship, or whether the international criminal court would be given an advisory role vis-à-vis national courts or even be competent to vary the decisions of the latter in application of international law.

8. Accordingly, it was suggested that guidelines must be established in order to determine which cases should be heard by the Court. It was noted that, while war crimes, crimes against humanity and genocide were the most compelling arguments for the establishment of a permanent court since they directly affected issues of peace and security, that need did not seem so clear in other situations. It was suggested that the key issue was to determine the extent to which a permanent court would ensure the prosecution of persons who had committed serious crimes and whether the court would help or merely hinder national efforts to that end. It was further suggested that, if the jurisdiction of the Court was to include crimes covered by terrorism conventions, cases should be initiated only with the consent of the States which had direct interests. Moreover, it was said, States which had signed extradition treaties or status-of-forces agreements with the custodial State should have the right to reject the jurisdiction of the Court. The suggestion was also made that drug-related crimes should not be included in the Court's jurisdiction, since the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was not specific enough to form the basis for criminal charges and that such cases should be submitted to national courts. According to this view, to establish that States with direct interests in terrorism cases should give their consent in order for the Court to assert

its jurisdiction would help to ensure that national efforts, including existing cooperation in extradition and mutual assistance, were not undermined.

9. The view was also expressed that the statute of the Court would have to be compatible with national judicial systems, which were subject to the constitutions of individual States. In that context, it was considered inappropriate for the statute to recognize the inherent jurisdiction of the Court in cases of genocide. Moreover, it was said, the obligation of States parties to submit evidence and to extradite criminals as well as the question of double jeopardy (non bis in idem) would need to be examined carefully in the context of national legal systems.

10. It was further pointed out that, for the Court to function properly and to be able to guarantee the rights of suspects and the accused, applicable substantive law and the procedural law, as well as the rules of the Court, would have to be clearly established. It was therefore suggested that the draft statute further articulate: first, the substantive law, by specifying the type of act that constituted a crime and the nature and limits of the penalty imposed for that crime; second, the procedural law, by providing in detail for the procedures of investigation and trial and establishing the rules of evidence; and, third, the Court's organization law, by specifying the required qualifications of judges, the procedures for disciplinary action against judges and the like. It was noted that since under the proposed international criminal court system individuals would be prosecuted by the international community, special attention should be paid to the protection of the rights of the accused, for in most cases the accused would be tried by judges from different cultural backgrounds.

11. Along similar lines, the remark was also made that, although the draft statute contained certain guarantees for the accused, it was not clear whether the question of the fairness of the whole system had been fully addressed. It was asked, for example, whether it would be fair to transfer the accused from a national to an international jurisdiction, particularly where the latter institution was permanent.

12. It was also emphasized that the establishment of an international criminal court must be contingent upon the support of the international community. The remark was made, in this connection, that the establishment of the Court must be approached in a flexible, realistic and gradual manner; the best possible statute must be sought, rather than the ideal statute, so that a large number of States would support it, thereby providing the vital basis for its legitimacy and universality.

13. One representative, drawing attention to the difficulties involved in eliciting such support, suggested that one solution to the problem of those States whose constitution had precedence over treaties, and which accordingly faced constraints in the adoption of the draft statute, was constitutional amendment. It was noted, however, that such remedy was neither simple nor universally available and that constitutional problems were therefore likely to cause such States to reject the statute, or at least to express reservations on it.

14. Another set of issues the examination of which was considered necessary before proceeding to the establishment of an international criminal court related to the financing of the Court. Thus, it was stated that the establishment of an international criminal court, with the subsidiary organs mentioned in article 5 and other infrastructures, would entail an enormous financial outlay which might be an extra burden for developing countries. It was also stated that careful consideration would have to be given to the fact that international judicial proceedings were extremely expensive; thus, States parties should understand in advance the financial consequences of establishing such a court. Along the same lines, the remark was made that, given the inevitably high costs of the Court's work, a serious cost-effectiveness study should be prepared to weigh the various financial considerations involved. It was further suggested that the issue of financing should be dealt with in the statute itself, including a clause relating to the budget.

15. One representative noted that experience with the International Tribunal for the former Yugoslavia, established under Security Council resolution 827 (1993), was particularly relevant in that regard. In his view, many questions were interconnected; for example, the demands on scarce resources for prosecutions and especially for investigations were dependent on the scope and reach of the Court's jurisdiction. He pointed out that, although the Commission had made an ingenious proposal in article 10 for the transition from a part-time to a full-time court if the need for its punitive function should turn out to be greater than the deterrent effect of its mere existence, major demands on resources came from investigation and prosecution (and subsequent punishment), not from adjudication as such. Governments were entitled to know what to expect; it was therefore hoped that a first attempt at budgetary estimating would be built into the preparatory process and that the secretariat would be tasked accordingly.

16. As regards the sources of financing, some representatives felt that the Court should be financed entirely by the United Nations. It was said that since the Court served the interests of the entire international community, it would be preferable to have it financed from the regular budget of the United Nations. Another delegation believed that the Court should be financed entirely by the United Nations rather than by the States parties to the statute, as the Commission had suggested in article 2.

17. As to the relationship between the draft statute and the draft Code of Crimes against the Peace and Security of Mankind, a number of delegations stressed the importance of the Code as substantive law, and noted that finalization and adoption of the draft Code would contribute substantially to advancing the work on the statute. Thus, it was considered essential to ensure the necessary coordination between the provisions of the statute and the draft Code. The remark was made that, in view of the seriousness of the international offences covered by the draft Code and the fact that the purpose of the Court was to strengthen international cooperation in dealing with such offences, those offences listed in the draft Code must be placed under the jurisdiction ratione materiae of the Court.

18. In this connection, it was noted with satisfaction that the Commission had rightly decided that a special mechanism should be set up to harmonize the draft

statute with the provisions of the draft Code. It was suggested further that at some future stage the statute might be linked to the Code, of which it might form an integral part. One representative pointed out, however, that the fact that the Commission did not cite, in the annex to the draft statute, subsequent treaties defining such crimes, might have foreclosed the possibility of incorporating the draft Code, once ratified by States, into the statute.

19. On the other hand, some delegations held the view that there was an inseparable link between the procedural law contained in the draft statute and the substantive law of the draft Code, and suggested that, for the Court to function effectively, it was essential to complete the work of the draft Code, which would substantially clarify the Court's jurisdiction ratione materiae.

20. Thus, one representative stated that, despite the urgency of the issue of the Court, he maintained that it would be inappropriate to rush into adopting the statute of the Court without first defining the applicable law. In his view, the approach adopted in the draft statute to avoid that difficulty, namely, the listing of the crimes under the jurisdiction of the Court in article 20, did not offer a satisfactory solution, since, of the five categories of crimes listed, only the crime of genocide presented no major obstacle, owing to the existence of the 1948 Convention on that subject. The other categories of crimes, except for aggression, had been included because they had been designated as crimes in the statute of the International Tribunal for the former Yugoslavia. It was paradoxical, in his opinion, that efforts were being made to create an international criminal court that would apply a law defined in the decision of a political organ (the Security Council), making it seem as though the latter were almost the supreme source of international law. He noted that international justice required independence from the decisions of political organs, and that, in the current state of positive international law, only by adopting the draft Code could there be a principal basis for the law to be applied by the future court.

21. Other delegations agreed with the Commission's position that work on the draft statute should not be delayed until such time as a generally acceptable code of crimes could be completed, and thus supported the adoption of the statute independently of the draft Code. While it was recognized that there was an undeniable interlinkage between the two instruments, these representatives favoured the detachment of the statute from the draft Code, particularly since, in their view, the current version of the draft Code was very controversial and consequently no agreement was likely to be reached for a long time to come. It was suggested therefore that, in the absence of a consensus, States should not insist on the draft Code of Crimes against the Peace and Security of Mankind, since including such crimes in the jurisdiction of the Court would raise a number of additional concerns.

22. One representative proposed that it might be appropriate to envisage drawing up a new code of international crimes, in accordance with the principle nullum crimen sine lege. He suggested that such a code might draw on the Commission's work on the draft Code, the crimes specified in international treaties and the other crimes referred to in article 20 of the draft statute.

23. On the question of future action, most delegations supported the recommendation of the Commission contained in paragraph 90 of its report 1/ that the General Assembly convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court. Endorsing the view that there was an urgent need for a permanent international body to take effective action against individuals responsible for serious crimes of international concern and that, in general, the draft provided an excellent basis for codification, a large number of delegations proposed that a decision to convene the conference be adopted at the current session of the General Assembly and that its time-frame be fixed at an early date, so that the statute might be adopted as soon as possible. In this connection, many suggested that the conference should be held no later than 1996, some advocating its immediate convening in 1995. One representative said that her Government was ready to host such a conference.

24. Some delegations expressed willingness to support any measures adopted by the Sixth Committee to stimulate discussion and arrive at an eventual approval of the draft statute, whether through a conference of plenipotentiaries or through the General Assembly.

25. Some other delegations, however, suggested a more cautious approach. They felt that it was premature to decide on the convening of a diplomatic conference at the current session of the General Assembly and proposed that a decision be made only on the establishment of an ad hoc preparatory committee to discuss issues related to the establishment of an international criminal court, including those that remained to be discussed among Governments rather than by the Commission, and to prepare a recommendation for the General Assembly on the question of the convening of the conference. In this connection, one representative stated that, while recognizing the usefulness of the work accomplished by the Commission on the draft statute, it would be overly optimistic to convene immediately a conference of plenipotentiaries to consider the draft statute. He emphasized that Governments and their various ministries must be given time to gain a full understanding of the draft provisions and their ramifications. In his view, if such a conference was to succeed, extensive pre-conference planning would be absolutely essential. The key issues should be identified in pre-conference papers together with the various alternative solutions proposed.

26. There was general support for the establishment of an ad hoc preparatory committee in the period preceding the conference. It was suggested that such a committee could review the statute for the purpose of arriving at generally acceptable solutions to questions that might give rise to difficulties at the conference. The suggestion was also made that the committee should prepare and submit to the conference provisions relating to the entry into force of the statute, general reservations relating to it, the settlement of disputes concerning its interpretation or implementation and the rules for its amendment.

1/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10).

27. One representative, in endorsing both the convening of a plenipotentiary conference and the setting up of a preparatory committee, stressed that the latter must prepare for the way to achieve the successful outcome of the conference rather than undermine it by fruitless and endless debate. For that reason, a clear and precise mandate for the committee was considered an essential precondition to its establishment.

(b) Preamble

28. The provisions of the preamble were generally endorsed, in particular the third paragraph, which emphasized that the Court was intended to be complementary, rather than superior, to national criminal justice systems.

29. One representative noted that, by emphasizing that the Court was intended to exercise jurisdiction only over the most serious crimes, and that it was intended to be complementary to national criminal justice systems, the provisions of paragraphs 2 and 3 reflected a delicate balance between those States which wished to see an international criminal court established to deal with a broad category of crimes of international concern and those that saw the Court chiefly as an instrument to combat certain crimes under general international law. In his view, provisions of that nature dealing with the jurisdiction of the Court should appear in the operative section of the draft statute, rather than in the preamble.

30. In the view of another representative, however, the preamble raised a number of fundamental questions concerning inter-State relationships and the relationship between the State and the individual, which would have to be addressed before the international conference of plenipotentiaries was convened to adopt the statute. It was said that the legal implications of the establishment of the Court for the development of international law would have to be assessed and the role of the Court in the international legal order envisioned. It was further remarked that the preamble must expressly provide that the Court would act with the authority and universality of the United Nations.

(c) Part 1 of the draft statute (Establishment of the Court: articles 1 to 4)

31. Article 1 concerning the establishment of the Court and article 2 on the relationship of the Court to the United Nations - two closely related issues - were commented on by a large number of delegations.

32. With regard to the establishment of the Court under article 1, several delegations took the view that the Court should be established as an organ of the United Nations by an amendment to the Charter of the United Nations. It was stated that, if established under the Charter, the Court would be supported by the Organization's moral authority and its universality, and furthermore the unity of the international legal order in respect of criminal matters would be assured. On the other hand, such essential characters of the Court could not be assured if established by a treaty, given the uncertainty of wide acceptance of the treaty by States. The remark was also made that the establishment of an institution of such significance and scope clearly required an amendment to the Charter of the United Nations.

33. In the view of some representatives, amending the Charter should not present an insurmountable problem, particularly now that there was increasing recognition of the need to revise other aspects of the Charter. Views were expressed, therefore, that it did not seem far-fetched to propose that the Court should be established under the Charter, as part of the package of proposed reforms, and that it would be possible to invoke Article 109 and to convene a general conference for the purpose of reviewing the Charter.

34. Some other delegations favoured the establishment of the Court as a subsidiary organ of the United Nations, which would confer on the Court the universality, authority and permanence of the Organization. The remark was made that, although this could be achieved by a resolution of the General Assembly, it would be preferable for the Court to be established by a convention adopted by a conference of plenipotentiaries.

35. Most delegations, however, favoured the establishment of the Court as a separate organ by means of a multilateral treaty, and thus endorsed the recommendation of the Commission that the statute of the Court be attached to a treaty between States parties providing for the establishment of the Court. A treaty, it was said, would enable States to decide freely whether or not to accept the statute and the jurisdiction of the Court, thereby ensuring the necessary consensual basis which would guarantee the Court its legitimacy, authority and effectiveness as an independent judicial institution. It was also stated that the sensitive issue of national criminal jurisdiction, as well as the principle of State sovereignty, would make express prior consent of States a prerequisite for the establishment of the Court as a system of international criminal jurisdiction.

36. In supporting the treaty method, some representatives drew attention to the difficulties in resorting to alternative methods of establishing the Court. Thus, it was noted that creating the Court by an amendment to the Charter of the United Nations posed serious practical problems and entailed the risk of delay; establishing it, on the other hand, by a resolution of the General Assembly or of the Security Council was equally problematic, since the former was of a recommendatory nature and would not provide a sound legal basis for the establishment of a permanent judicial organ, whereas the latter would establish legally binding obligations but only in relation to a particular situation covered by Chapter VII of the Charter. The appropriateness of subjecting the establishment of a judicial organ to a political decision of the General Assembly or the Security Council was also questioned.

37. While not opposed to the establishment of the Court by a treaty, one representative cautioned that there was a risk that the interval between the adoption of the statute and its entry into force would be fairly long and suggested that a measure should be taken for the provisional application of the statute in situations threatening the maintenance of international peace and security as provided under Chapter VII of the Charter, upon a specific request to that effect by the Security Council.

38. As regards the relationship of the Court to the United Nations dealt with in article 2, there was general agreement on the importance of the Court's establishing a close link with the United Nations in order to ensure its

universal character and moral authority and to secure effective cooperation of the Organization in its functioning. In the view of one representative, the links between the Court and the United Nations were an essential aspect, to which more consideration needed to be given. He suggested that, while the provisions of article 2 appeared to provide all possible options, the question could not be resolved finally at the current stage, since it was linked to the nature of the Court, which was one of the most controversial aspects.

39. The view was also expressed that careful consideration should be given to the various models offered by the Commission in appendix III to the draft statute in order to ensure that the Court's judicial independence was not in any way compromised by making it subservient to a political body. It was further suggested that consideration also needed to be given to the question of how the Court could functionally be linked to the United Nations, as well as that of how the Court could administratively and financially be integrated into the United Nations system. One such link was the method of the Court's financing. It was noted that further internal links, all with the Security Council, and all having a direct connection either with the Court's jurisdiction or with the conduct of its judicial function, were established in article 23. Those issues, it was said, were of fundamental importance both for the role and prerogatives of the Security Council under the Charter and for the preservation of the integrity of the judicial process.

40. One representative reiterated the position of his delegation that there should be no relationship between the Court and the United Nations and its request for the revision of the articles that conferred upon the Security Council the right to refer certain matters to the Court. It was suggested that the retention of article 23 of the draft statute would mean that the Court would be subject to the political influence of the Security Council and would thus forfeit its independence and distinctive character. It was further remarked that the relationship between the Court and the Security Council would give the permanent and non-permanent members of the Security Council an advantage not enjoyed by the other States parties to the statute with regard to the initiation of criminal prosecution. Some representatives, however, supported the authority of the Security Council to submit complaints to the Court, whose jurisdiction could not depend entirely upon the consent of States.

41. With regard to the question of how the required relationship between the Court and the United Nations could be achieved, several delegations took the view that the Court should be brought into relationship with the United Nations by being given the status of an organ of the United Nations. It was suggested that the Court should preferably be a principal organ with authority comparable to that of the International Court of Justice. It was said that the United Nations system needed a judicial organ to deal with matters of international criminal law and to fill a legal vacuum, thereby avoiding recourse to special judicial bodies. Moreover, it was noted that the establishment of such bodies by the Security Council, a political organ, was not unanimously supported for constitutional reasons and considerations of strict adherence to the law.

42. Some other delegations favoured the Court becoming a subsidiary organ of the United Nations. It was stated that this method would ensure that adequate

resources were available to it without compromising its integrity or independence.

43. Still other delegations suggested alternative ways of establishing a link between the United Nations and the Court without the latter necessarily becoming an organ of the United Nations. Thus, one representative held the view that the Court, established by a treaty as an independent entity, could still be integrated into the structure of the United Nations. In order to reinforce such status, it was proposed that the phrase "within the framework of the United Nations" could be added after the words "is established" in article 1, the result being that the Court would not have the character of a judicial organ of the United Nations nor would there be any need to include a provision concerning its relationship with the Organization such as that in article 2, which could accordingly be deleted. This, it was said, would ensure the principle of universality and would confer on the Court the requisite legitimacy and political authority. The view was also expressed that the Court should be a permanent and autonomous body established by a treaty, but should also be integrated into the United Nations system, as the Permanent Court of International Justice had been at the time of the League of Nations. Another representative suggested that the treaty by which the Court would be set up should be adopted by the General Assembly, subject to subsequent ratifications. Yet another delegation proposed that consideration should be given to the idea that the United Nations itself could become a party to such a treaty, which would make it a direct participant in the establishment of the Court.

44. A large number of delegations, however, favoured the conclusion of a special agreement pursuant to article 2 of the draft statute. Under this procedure, as outlined in part B, I, of appendix III to the draft statute, the Court would be established by a treaty as a separate entity and would enter into relationship with the United Nations by means of an agreement between the Court and the United Nations, in a manner similar to the bringing of specialized agencies into relationship with the Organization by way of a cooperation agreement under Articles 57 and 63 of the Charter of the United Nations. This approach, it was said, would enable the Court to be linked to the principal organs of the United Nations without becoming a subsidiary organ. It was suggested that the precedents mentioned in the appendix should be studied carefully and possibly taken into account during the finalization of the treaty. In this connection, some delegations proposed that the relationship of the Court to the United Nations should be modelled on that between the United Nations and the International Tribunal for the Law of the Sea.

45. Also supporting the establishment of the Court's relationship to the United Nations by means of a special agreement, one representative pointed out that the other methods proposed in appendix III to the statute would give rise to serious difficulties. He first pointed out that the idea that the Court should be regarded as the principal judicial organ of the United Nations conflicted with Article 1 of the Statute of the International Court of Justice and would involve amending both the Statute and the Charter of the United Nations. He further noted that the second variant, namely, making the future Court a subsidiary organ of the International Court of Justice, had little chance of being accepted, given the differences of nature and jurisdiction between the two courts, which militated against a hierarchical relationship. As to the proposal

that the relationship to the United Nations should be established by a resolution of the General Assembly, the same representative said that that method had already been followed in the application of a number of international conventions. In that regard, he cited the cases of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. The situations involved, however, were radically different: by virtue of its status and the nature of its functions, the Court must command the highest degree of independence; furthermore it did not require any substantial administrative support from the Organization for its functioning, as in the case of the committees referred to above.

46. Some delegations, while supporting the conclusion of a special agreement as provided in article 2, felt that the provisions of article 2 called for further scrutiny. Thus, it was suggested that the phrase "appropriate relationship" left room for varying degrees of interpretation which could have a negative impact on universal acceptance of an allegiance to the Court. It was further suggested that article 2 could be merged with article 1 without jeopardizing the relationship of the Court to the United Nations. It was also pointed out that article 2 did not state what the mechanism for the establishment of an appropriate relationship between the Court and the United Nations should be. Furthermore, it was noted that, although article 2 provided that a special agreement should be approved by Member States, it stopped short of defining what procedure would be used to obtain such approval. The view was also expressed that it was not sufficient to allow the President, with the approval of the States parties, to conclude an agreement establishing an appropriate relationship between the Court and the United Nations. The suggestion was also made that the provisions of article 2 should clarify budgetary arrangements and that they should stipulate that the United Nations would assume the financing.

47. Article 3 on the seat of the Court, combined with article 32 on the place of trial, was viewed by one representative as generally constituting a good compromise that satisfied the interest of small States in having an international criminal court that would relieve them of the burden of a trial, while retaining the possibility of having trials and imprisonment take place in their territory in certain cases.

48. The suggestion was made that the provision of paragraph 3 of article 3 stipulating that the Court may exercise its powers and functions on the territory of a State party and, by special agreement, on the territory of any other State, and the provision of paragraph 2 of article 4 concerning the legal capacity of the Court to be enjoyed in the territory of a State Party, should be dealt with in a separate article entitled "Legal capacity of the Court", since any reference to that question in article 3, on the seat of the Court, seemed out of place. It was further suggested that in paragraph 3 of article 3, the term "protocol" would be preferable to "agreement".

49. With regard to article 4 concerning the status and legal capacity of the Court, there was broad agreement on the provision of paragraph 1 which would establish a permanent institution that would sit only when cases were submitted. One representative suggested that, taken together with the provision of article 17 whereby the judges would not be required to serve on a full-time basis, the proposed text would ensure a flexible and cost-effective approach

which seemed the most appropriate for the early establishment of the Court. He nevertheless stressed that such an arrangement should be without prejudice to the possibility of determining at a later stage that the judges would serve on a full-time basis, as envisaged in article 17, paragraph 4. Another representative also expressed her preference for a permanent body working on a full-time basis, given the nature, complexity and specific activities of the Court as well as the increasing number of cases that might come under its jurisdiction, but nevertheless supported a more flexible solution, bearing in mind the possible economic and practical difficulties involved.

50. In the context of the question of who might submit cases to the Court, one representative suggested that paragraph 1 of article 4 should be modified to read: "The Court is at all times open to States Members of the United Nations and to all other States in accordance with this Statute." That wording, it was said, would be more appropriate since, notwithstanding its characterization as a "permanent institution", the Court lacked a permanent structure. It was maintained that the reasons of flexibility and cost-reduction indicated in the report of the Working Group in its commentary to article 4 (A/CN.4/L.491/Rev.2/Add.1) were not very convincing.

51. The provision of paragraph 2 relating to the legal capacity of the Court gave rise to concern on the part of one delegation, which said that its authorities could not, for example, accept direct enforcement of the orders of the Court but instead would comply under mutual legal assistance arrangements as defined in international law.

(d) Part 2 of the draft statute (Composition and administration of the Court: articles 5 to 19)

52. There was general agreement on the proposed structure of the Court, including the establishment of the Procuracy as an independent organ, the separation of trial and appellate functions as well as the fundamental principle of independence of the judges and of members of the Procuracy.

53. One representative remarked that, with a view to avoiding any ambiguities, the provisions in respect of qualifications required by judges, disciplinary action they might be liable to and investigation and trial procedures must be specified in clearer terms.

54. Article 6 providing for the qualifications and election of the judges was expressly supported by some delegations. One of them noted that, together with article 4 stipulating that the Court would meet only when required to consider a case submitted to it, established a proper balance between the need for flexibility and the requirement of continuity. Another representative, while supporting the provisions of article 6, considered that further refinements were needed regarding the administration of the Court as a "semi-permanent" body. He stated that, although article 4 reflected a compromise solution between a permanent and an ad hoc court, the dangers to the stability and independence of a court established as a semi-permanent body should still be recognized. He therefore suggested that more safeguards guaranteeing the independence of the Court and its personnel might be required in the rules. The same representative

considered, moreover, that those rules should be included in the treaty, and not in the Rules of Court to be adopted by the judges.

55. On the other hand, a number of representatives expressed reservations on the provisions of paragraphs 1 and 2 of article 6 pertaining to the qualifications and election of judges. Thus, concern was voiced that too rigid a distinction was drawn between judges with criminal trial experience and judges with recognized competence in international law, with the result that, despite the statement to the contrary in paragraph (2) of the commentary to article 6, States would tend to nominate persons possessing just one of the two sets of qualifications rather than both. It was further suggested that such a rigid distinction would establish an unjustifiable system of quotas which had no precedent among existing international courts, and could raise practical problems at the time of both electing the judges and constituting an appeals chamber and trial and other chambers.

56. In the view of some representatives, the distinction was altogether unnecessary as it would be sufficient to require one or the other of those types of qualifications. One representative, however, suggested that, while he did not consider it an absolute requirement for all judges to have criminal trial experience, it was essential that a majority of judges should have such experience, in particular in the trial chamber.

57. Some other representatives expressed preference for the appointment of judges with expertise in both criminal and international law as a simpler solution. In this regard, reference was made to the precedent provided in article 13 of the Statute of the International Tribunal for the former Yugoslavia.

58. It was further suggested that the draft statute should establish the eligibility criteria and leave it to States to determine the question of judicial qualifications.

59. The provision of paragraph 3 of article 6 concerning the election of judges also gave rise to some reservations. It was in particular seen as too restrictive, since it limited the elective process to States parties to the statute. That function, it was suggested, should be conferred on the General Assembly and the Security Council, or on the General Assembly alone.

60. As regards the number of judges to be elected, two different views were expressed: one reserving the possibility that paragraph 3 might have to be amended in the future, in order to provide for a larger number of judges; and the other suggesting that the number of judges to be appointed should be revised downward from 18 to 11 (3 for each trial chamber and 5 for the appeals chamber), the solution adopted for the International Tribunal for the former Yugoslavia, which took into consideration the financial situation of many States.

61. As regards the question of representation of the principal legal systems of the world in the election of the judges, referred to in paragraph 5 of article 6, one representative insisted that the paragraph should specify what the principal legal systems of the world were and should mention Islamic criminal law.

62. Several representatives expressed the view that the principle of equitable geographical representation, as well as that of equitable representation of the main legal systems of the world, should be taken into account in the selection of judges. In this connection, it was proposed that the provision in article 6, paragraph 5, should be broadened and should read: "In the election of the judges, States should bear in mind that the representation of the main forms of civilization, the principal legal systems of the world and equitable geographical distribution should be assured." One representative, however, suggested that the concept of applying the principle of equitable geographical distribution was inappropriate for the purposes of the establishment of an international criminal court.

63. With reference to paragraph 6, some representatives welcomed the fact that the term of office for judges had been reduced from 12 to 9 years, thereby bringing the draft statute into line with the relevant provisions contained in the Statute of the International Court of Justice and in those of the ad hoc tribunals established or under consideration by the Security Council.

64. The provisions of article 9, paragraph 1, concerning the constitution of an appeals chamber reflected, in the view of one representative, the presumption that an appellate judge required more competence in international law than criminal trial experience, a fallacious presumption, since it was quite possible that an appeal might not raise any issue of international law and might deal solely with an issue requiring criminal trial experience, such as an assessment of the weight of evidence adduced at the trial. Conversely, the same representative argued, the provision of article 9, paragraph 5, stipulating that the judges of the trial chamber required more criminal trial experience than competence in international law, was also based on an incorrect premise. In most cases, it was said, the interrelatedness of the issues involved belied the dichotomy on which articles 6 and 9 were based.

65. Article 10 entitled "Independence of the judges" and the related commentary, which appeared to make civil servants ineligible for election to the court, gave rise to concern on the part of one representative. He stated that although there was a precedent for the practice in other international bodies, it was regrettable that the draft statute had adopted that approach, because it would prevent the Court from drawing on a vast pool of qualified persons. It was moreover noted that, in many countries, civil servants were not politicians and were only technically attached to the executive branch.

66. With regard to article 11, paragraph 3, which permitted the Prosecutor or the accused to request the disqualification of a judge in a case in which the judge has previously been involved in any capacity or in which his impartiality might reasonably be doubted on any ground, the remark was made that the ground for requesting such disqualification should be further specified.

67. Article 12 on the establishment of the Procuracy as an independent organ was generally endorsed. It was suggested, however, that in order to maintain its autonomy, the Procuracy should be governed by its own internal rules, rather than being subject to staff regulations being drawn up by the Prosecutor, as currently envisaged in paragraph 7 of article 12. The view was also stated that the Procuracy should be independent of the Court rather than being one of its

organs. In this regard, the wording "The Procuracy is an independent organ of the Court" in article 12 was viewed as involving a contradiction in terms.

68. On the other hand, concern was voiced that article 12 provided for the complete independence of the office of the Prosecutor. It was said that, to ensure the adequate representation of the international community's interests in the Court, the activities of the Prosecutor should be linked to the decisions of an organ of the United Nations in a way yet to be specified. Doubts were also expressed about the system under which the Prosecutor was responsible for both the investigation and the prosecution of an alleged crime. The remark was further made that article 12 failed to mention the number of Deputy Prosecutors to be elected by an absolute majority of the States parties. It was suggested that the article should be reworded so as to be more specific on that point.

69. With regard to article 15 concerning loss of office, one representative reiterated the reservations previously expressed by his delegation: it viewed as preferable the formula used in Article 18 of the Statute of the International Court of Justice (by virtue of which no member of the Court could be dismissed from office unless, in the unanimous opinion of the other members, he had ceased to fulfil the required conditions), which had the advantage of being general and avoiding reference refer to specific cases, which were bound to be very rare. In his view, in addition, the unanimity rule provided sounder guarantees than the rule of a two-thirds majority referred to in paragraph 2, because it would be conducive to the greater independence of the office of judge.

70. The remark was also made that the draft statute as it stood lacked provisions for preventing the misconduct of judges and other officials or providing recourse for those affected by such misconduct. It was pointed out that, since provisions for impeachment of judges could not be included in the Rules of the Court, which were to be formulated by the judges themselves, such provisions would have to form part of the treaty.

71. It was further suggested that provision should be made for the right of judges to resign, as provided for in the Statute of the International Court of Justice.

72. On the question of privileges and immunities dealt with in article 16, one representative observed that the provision whereby judges would enjoy privileges and immunities while holding office even when the Court was not in session appeared far-reaching in comparison with article 19 of the Statute of the International Court of Justice.

73. As regards article 19, entitled "Rules of the Court", some representatives took the view that regulations concerning the conduct of investigation and of the trial, particularly the taking of evidence, should be laid down in the statute itself. Other representatives, while recognizing the special importance of rules of evidence in a criminal trial, questioned the advisability of including such rules in the statute itself but agreed that the rules laid down in article 41, paragraph 1 (g), and in article 44 might usefully be amplified by including some of the basic rules of evidence.

74. One representative drew attention to the financial implications of the provision of paragraph 2 whereby the Rules of the Court were to be submitted to a conference of States parties and any amendments to the Rules subjected to the same procedure if the judges so decided. In his view, it seemed better to follow the example of the International Court of Justice and the International Tribunal for the former Yugoslavia, which had drafted their rules without recourse to States or to the Security Council.

75. Another representative, however, held the view that, in principle, the Rules of the Court, including the rules of evidence, should be approved by the States parties. He was therefore concerned that paragraph 3 established a summary procedure, whereby rules for the functioning of the Court would be transmitted to the States parties and might be confirmed by the Presidency unless a majority of the States parties had indicated their objections within six months. In his view, the explanation given by the Commission in paragraph 3 of its commentary to the article that the summary procedure, which was faster, would be used for minor amendments, in particular changes not raising issues of general principle, was an important clarification which should not be relegated to the commentary, but should be reflected in the text of paragraph 3 itself.

(e) Part 3 of the draft statute (Jurisdiction of the Court: articles 20 to 24)

76. Part 3, dealing with jurisdiction of the Court, was generally recognized as central to the draft statute and was extensively commented upon by delegations.

77. The proposed new version was generally viewed as a considerable improvement over the previous draft, although some delegations considered that it called for further clarification so that the commitment of States to a strict and restrictive legal regime might not be compromised.

78. Many delegations supported the revised structure of article 20 which consolidated the provisions on the jurisdiction ratione materiae of the Court into a single article and defined the crimes over which it had jurisdiction under the statute. In their view, the specification of crimes under general international law, and the elimination of the distinction between treaties defining crimes as international crimes and treaties suppressing conduct which constituted crimes under national law, reduced the complexity and ambiguity of the subject-matter jurisdiction of the Court considerably. It was stated in this connection that precision in the definition of a criminal court's jurisdiction was essential for the effective operation of the Court and for the fundamental guarantee of criminal justice, namely the principle nullum crimen sine lege.

79. While generally supporting the approach taken to the identification of the crimes within the jurisdiction of the Court, several representatives felt that certain crimes listed in article 20, especially the crime of aggression and crimes against humanity, lacked the precise definition that was required in criminal law. It was also suggested that the notion of treaty crimes constituting "exceptionally serious crimes of international concern" under subparagraph (e) was not entirely clear. One of the flaws of article 20 lay, according to one representative, in the fact that the crimes under the article were listed without reference to the international instruments in which they

were defined. That shortcoming, it was suggested, should be redressed, inter alia, in the light of the corresponding provisions of the statute of the International Tribunal for the former Yugoslavia, which made reference to a specific instrument or defined crimes on the basis of treaty law.

80. The fact that the statute was primarily a procedural instrument underscored, in the view of many delegations, the importance of developing an applicable substantive law to circumscribe more clearly the jurisdiction ratione materiae of the Court so that the two fundamental principles of criminal law, nullum crimen sine lege and nulla poena sine lege, might be respected. In this regard, some delegations reaffirmed their view that the draft Code was an essential complement to the draft statute. One representative stressed that, although the jurisdiction of the Court could be established, without waiting for the adoption of the Code, on the basis of the list of crimes appearing in article 20, the "substantial legislative effort" required in the preparation of the Code was possible and necessary. He therefore was of the opinion that the Commission should rise to the challenge and provide, through the future Code, the substantive law needed for the proper functioning of an international criminal jurisdiction. Other representatives maintained the view that, in its current form, the draft Code was too controversial to provide the substantive law to be applied by the Court.

81. On the question of the extent of the Court's jurisdiction ratione materiae, it was emphasized that the Court should have jurisdiction over the most serious crimes of concern to the international community, regardless of whether those crimes were covered by treaties specified in the statute or by general international law. It was further stressed that the Court must have jurisdiction over crimes under customary international law in order to avoid gaps which might place the perpetrators of atrocious crimes not provided for in treaties outside the jurisdiction of the Court. The question, however, warranted, in the view of some representatives, a further review, in order to ensure that the basic principles of criminal law, nullum crimen sine lege and nulla poena sine lege, were respected.

82. In this connection, it was proposed that three criteria would have to be met for offences to fall within the Court's jurisdiction ratione materiae: first, the offences would have to constitute a violation of fundamental humanitarian principles and outrage the conscience of mankind; secondly, they would have to be such that their prosecution would be more appropriate at the international than at the national level; and thirdly, it would have to be possible to hold one or more individuals personally responsible for the offences. According to these criteria, only the crimes of genocide and aggression, serious war crimes and systematic and large-scale violations of human rights were considered to come properly under the Court's jurisdiction. Such limitations, it was said, were necessary, since only in such exceptional cases were States ready to waive their sovereignty and yield to an international mechanism.

83. The suggestion was made that, if the Court's jurisdiction were to be limited to the crimes referred to in article 20 (a) to (d), it might be more appropriate to opt for the system of preferential jurisdiction. In the event of conflicting jurisdictions, the Court would then have priority in deciding

whether or not to deal with a case. If it decided not to try a case, competence would revert to national judicial bodies. It was also proposed that the jurisdiction of the Court should be limited, at the beginning, to what was described as inherent jurisdiction; it could then be extended as confidence in the Court grew and the need for wider jurisdiction was recognized.

84. On the other hand, the remark was also made that, in view of the Commission's continuing doubts concerning the applicability of general international law relating to the submission of cases of genocide, the proposal in the 1992 ILC report limiting the subject-matter jurisdiction of the Court to crimes defined in treaties in force should be adopted.

85. Attention was further drawn to the possibility of providing in the draft statute for advisory functions for the Court. It was noted that such advisory functions had been very useful in the context of other international instruments and had been of great help to national courts in interpreting international instruments they were required to apply.

86. With regard to the specific crimes enumerated in article 20, there was general agreement on the distinction made in the draft article between the two categories of crimes which fell within the jurisdiction of the Court, namely, crimes under general international law and crimes under treaties. Some representatives, however, pointed out that the distinction between treaty crimes and crimes under general international law could be difficult to draw and that, in this respect, article 20 raised some questions that would require further consideration.

87. Concerning the crime of genocide provided for in subparagraph (a), the importance of including it within the jurisdiction of the Court was recognized. One representative noted, however, that the power of any State party to refer the crime of genocide to the Court for investigation (article 25 (1)) and trial (article 20 (a)) was not sanctioned either by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide or under general international law, and further observed that some members of the Commission had argued that the provision represented a development of international law. In his view, while there was universal agreement on the need to deal firmly with the crime of genocide, it was questionable whether precedents in law should be created which totally ignored or even violated existing treaty arrangements: a possible solution was, therefore, to amend the Convention concerned.

88. With regard to the crime of aggression dealt with in subparagraph (b), the proposed provision met with a measure of support, but some delegations expressed concern that it might give rise to considerable difficulties in that aggression was not defined under any treaty and, notwithstanding the views of the Working Group, concerned States and Governments rather than individuals, as confirmed in General Assembly resolution 3314 (XXIX). It was stated that, while article 23 of the draft statute specified that the Security Council was the competent body to determine whether an act of aggression had been committed, it was not clear how an act for which a State was responsible could be transformed into an act for which one or more individuals were responsible. In this regard, emphasis was placed on the need to bring the provisions of article 20 into line with those of article 19 of Part One of the draft articles on State responsibility,

which distinguished between international crimes and offences and circumstances where the State, apart from being obliged to provide reparation for the crime committed, was also liable to sanctions. It was furthermore suggested that the definition of the crime of aggression be made consistent with article 15 of the draft Code of Crimes against the Peace and Security of Mankind.

89. As to subparagraph (c), the inclusion within the jurisdiction of the Court of serious violations of the law and customs applicable in armed conflict was welcomed, but the term "serious violations" was viewed as unclear. The remark was made in this connection that the term "grave breaches" used in the four Geneva Conventions and Additional Protocol I of 1977 applied, in reality, to all the cases listed in subparagraph (c). Those instruments, it was said, especially the four Geneva Conventions, unquestionably constituted the expression of a well-established international custom and, because of the large number of States that had ratified them, were on the same level as the Convention on the Prevention and Punishment of the Crime of Genocide, although they were not accorded the same moral and legal authority. Concern was also expressed that crimes associated with domestic armed conflicts, which were notorious for their brutality and for violating the most basic humanitarian laws, should not have been explicitly mentioned as falling within the jurisdiction of the Court. It was noted in this connection that, under article 5 of its statute, the International Tribunal for the former Yugoslavia had the power to prosecute persons responsible for crimes against humanity when committed in armed conflict, whether international or internal in character.

90. It was suggested that the list of crimes under general international law falling under the jurisdiction of the Court should include, in addition to the crimes enumerated in subparagraphs (a) to (d), such other crimes as torture, piracy, terrorism, apartheid and the illicit traffic in narcotic drugs.

91. With regard to treaty crimes, as provided in subparagraph (e), some delegations noted with satisfaction the inclusion of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the list of treaties contained in the annex.

92. One representative took the view that, although the various restrictions on the Court's jurisdiction laid down in subparagraph (e) in regard to treaty offences might be necessary in order to ensure that the Court would be seized only of exceptionally serious offences, they nevertheless might give rise to serious problems of interpretation and application. Another representative noted that the urgency of bringing those treaty crimes before the Court varied considerably among them.

93. It was suggested that the list of treaties in the annex should be supplemented through the inclusion of the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 24 February 1988, which had entered into force, of the Convention for the Protection of Cultural Property in the Event of Armed Conflict and of Protocol I Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts. Different views were expressed as regards the latter two instruments: according to one view, their inclusion in the list was justified because, although they contained neither clauses dealing

with grave crimes nor enforcement provisions, they were being increasingly considered as part of international humanitarian law. According to another view, Protocol I, unlike the Geneva Conventions, did not meet the requirement of widespread, if not almost universal, acceptance.

94. Some delegations stressed that the list of treaties contained in the annex should not be exhaustive. In their view, allowance should be made for the list of international crimes to be expanded so that States parties to the statute might agree at a subsequent stage on additional crimes, including crimes defined in conventions. In this context, reference was made to the United Nations Convention on the Safety of United Nations and Associated Personnel, adopted by General Assembly resolution 49/59 on 9 December 1994. The suggestion was made in this connection that a mechanism should be established to make it possible to include new treaties within the Court's jurisdiction without having to amend the statute in each case.

95. Some other delegations, however, considered that the list of crimes pursuant to treaties found in the annex was too long and in any case debatable. It was stated that giving the Court such wide jurisdiction might, at least initially, undermine its ability to fulfil its functions at a time when crimes such as genocide and other serious violations of humanitarian law were going unpunished. The view was also expressed that a more careful analysis had to be made of the crimes listed in the annex, since some of them could be better prosecuted through inter-State cooperation based on the principle aut dedere aut judicare. In this connection, it was stated that article 20 (e) broadened the scope of jurisdiction ratione materiae beyond the limits of what seemed to be currently acceptable, encompassing crimes that could be sufficiently well addressed by applying the principle aut dedere aut judicare. The remark was made that it was perhaps appropriate to draw a distinction between "individual" and "system" criminality. It was also noted that some of the treaties that had been listed in the annex regulated or prohibited conduct only on an inter-State basis and were therefore likely to raise problems connected with the different ways in which States perceived the relationship between municipal and international law.

96. With regard to article 21 setting out the preconditions to the exercise of the Court's jurisdiction, a number of delegations supported the revised formulation contained in the draft statute, which combined inherent jurisdiction in respect of the crime of genocide, and optional jurisdiction in respect of the other crimes referred to in article 20. It was noted that the draft established a proper balance between the current willingness of States to accept compulsory jurisdiction with respect to the crime of genocide, and the need to ensure that such "inherent" jurisdiction was limited to a small area of its subject-matter jurisdiction.

97. The inherent jurisdiction of the Court in respect of the crime of genocide under subparagraph 1 (a) was endorsed by a large number of delegations. It was said that acceptance of inherent jurisdiction by States would show to what extent the international community was prepared to make the Court a genuinely effective body, and that if States failed to accept even the minimum inherent jurisdiction proposed under the current draft, the Court's effectiveness would be called into question. In this regard, concern was expressed that, under the

proposed system, a State which was party to the Convention and which had ratified the statute of the Court, did not accept ipso facto its jurisdiction over the crime of genocide, with the result that the statute remained ambiguous with regard to the Court's "inherent" jurisdiction over the crime of genocide.

98. In the view of some delegations, however, the approach taken by the Commission to the jurisdiction of the Court was too restrictive and, in particular, the requirement of prior acceptance by States was likely to frustrate its operation in many cases. Accordingly, one of them stated that the preconditions to the exercise of jurisdiction set forth in article 21, which required, first, that the State bringing the complaint must be a party to the statute and, secondly, that that State must have accepted the Court's jurisdiction in respect of the crime under consideration, created needless obstacles to access to the Court. In his view, accession by a State to the statute should automatically imply acceptance of the Court's jurisdiction in respect of the crimes listed in article 20, without the need for any additional formal acceptance thereof. International criminal law, it was said, could not be entirely subordinate to the consent of States; it was also subject to the requirements of international public order. That concept of public order should determine the differences between the statute of an international criminal court and the Statute of the International Court of Justice - the latter Court dealing chiefly with disputes between States in which international public order was not necessarily an issue. Consequently, it was argued, any attempt to model the statute of an international criminal court on the Statute of the International Court of Justice, as suggested by the Commission, would be both futile and dangerous. The small, weak States, it was said, needed an international criminal court, to the mandatory jurisdiction of which all States would be subject.

99. Also expressing doubts about the analogy drawn by the Commission between the International Court of Justice and the Court, another representative suggested that the analogy was legally erroneous and politically deplorable for three reasons: firstly, because the International Court of Justice was an early-twentieth-century institution, whereas the criminal court could belong to the next century, and much change had taken place between those two times, especially in the field of international criminal law. Secondly, the Statute of the Court was annexed to the Charter of the United Nations and, consequently, the States parties to the Charter were ipso facto parties to the Statute of the International Court of Justice; it was, therefore, understandable that States were allowed to choose whether to accept the optional jurisdiction of the Court, whereas, according to the Commission's recommendation, the statute of the proposed new Court would be a completely autonomous international convention which could regulate, for example, the Court's jurisdiction. Thirdly, the jurisdiction of the International Court of Justice was general and could encompass any type of legal dispute, whereas the jurisdiction of the proposed Court would be specialized in the humanitarian field, since its mission was to punish the most serious international crimes against the fundamental interests of humanity. It was furthermore noted that the crimes listed in article 20 of the draft statute were violations of well-established norms of general international law of a peremptory nature (jus cogens).

100. Some delegations took the view that the inherent jurisdiction of the Court which, according to article 20 of the draft statute, was restricted to the crime of genocide, should be extended to the crimes listed in article 20 (b), (c) and (d) and that the Court should exercise its jurisdiction over those crimes without any special declaration of acceptance by the State party of the Court's jurisdiction in respect of them. It was further remarked that the inherent jurisdiction should be extended inasmuch as the system of declarations of acceptance could lead to the Court exercising no or very few practical functions, owing to an insufficient number of declarations, even though a sufficient number of States had agreed to its establishment.

101. Other delegations felt that the statute went too far in granting inherent jurisdiction even with regard to the crime of genocide. In this context it was noted that, since international criminal law was not a fully developed area and since the statute of the Court was certain to have an impact upon national legal systems, the jurisdiction should be established on a consensual basis in full regard to the fundamental principle of sovereignty, which should be reflected in all its provisions. Doubts were therefore expressed as to whether the preconditions to the exercise of jurisdiction set forth in article 21, subparagraph 1 (b), and article 25, paragraph 2, could be dispensed with in relation to genocide but not to the other crimes mentioned under article 20, subparagraphs (b) to (d), which were also supposedly crimes under general international law. To do so, it was said, would mean that neither the State that had lodged the complaint, nor the State which had custody of the suspect, nor the State on whose territory the act was committed, need have accepted the jurisdiction of the Court over the crime of genocide. Moreover, it was noted that the Court's exercise of inherent jurisdiction over the crime of genocide could in practice be achieved through the normal application of the preconditions for acceptance of its jurisdiction set forth in the above-mentioned articles, bearing in mind that there were 110 States parties to the Genocide Convention and that most of them were likely to become parties to the statute and to accept the jurisdiction of the Court over the crime of genocide.

102. The remark was also made that becoming a party to the Genocide Convention did not automatically mean acceptance of international criminal jurisdiction, particularly as the proposed Court was to be established by treaty. It was therefore considered necessary to determine how those provisions of the statute were to be reconciled with the provisions of relevant international treaties and with the character of the Court, a matter that needed to be studied further.

103. With regard to subparagraph (1) (b) setting out the preconditions to the exercise of the Court's jurisdiction in respect of the crimes listed in article 20, subparagraphs (b) to (e), some delegations supported the requirement that both the custodial State and the State on whose territory the crime was committed should have accepted the Court's jurisdiction. It was further stated that the custodial State should be the State in which the accused had actually been detained and not the State or States to which orders for detention had been sent because they were believed to have jurisdiction to hear the case.

104. In this connection, one representative noted that the idea that the exercise of the jurisdiction of the Court with respect to a crime should be preconditioned on the acceptance of that jurisdiction by the State which had

custody of the suspect raised the question of when a State had custody sufficient to ground the jurisdiction of the Court. He expressed concern that the statute might be used to sanction (or be interpreted as sanctioning) the acquisition of custody through means that could very well violate the fundamental principles of international law concerning sovereignty and territorial integrity. He therefore suggested that the statute should acknowledge as a basic principle that custody should not be acquired in breach of international law, and that the phrase "in accordance with international law" should be inserted at the end of article 21, subparagraph 1 (b) (i).

105. Another representative said that he would have preferred to retain the provisions of article 24 of the 1993 draft statute, under which the court could exercise its jurisdiction if it was accepted by the State having jurisdiction under the relevant treaty, apart from the exceptions indicated in article 23 of the same draft concerning acceptance by States of the Court's jurisdiction. The remark was also made that, since most of the treaties listed in the annex were based on the principle of universal jurisdiction, acceptance of the jurisdiction of the Court by any State which was party to the relevant treaty should, in theory, be adequate to establish the Court's jurisdiction. In practice, however, it was considered best to clarify that the acceptance of two specific States was needed, as had been done in article 21 (b).

106. It was further observed that expanding that list of States any further would make the preconditions too cumbersome and would limit the Court's effectiveness.

107. The view was however expressed that the provisions of subparagraph 1 (b) should be complemented by a provision on acceptance of the Court's jurisdiction by the State of which the accused was a national, since nationality represented a specific significant link for purposes of loyalty and jurisdiction. It was noted in this connection that paragraph 2 of article 21 dealt with that question partially, since in many cases the State requesting the surrender of a suspect would be the State of nationality. One representative nevertheless supported the idea that the State of the accused's nationality should not be required to accept the Court's jurisdiction. That State, it was said, could not replace the territorial State, particularly in criminal matters, or the custodial State, for practical reasons. He considered that, if the State of the accused's nationality was added to the list of States which were required to accept the jurisdiction of the Court, that would unnecessarily complicate the function for which the Court was to be established. On the other hand, he agreed that, although acceptance of the Court's jurisdiction by the State which initiated an extradition procedure might seem excessive, that was totally consistent with the general spirit of the draft statute that the Court was complementary to national courts.

108. As regards the Court's jurisdiction ratione personae, support was expressed for the provisions of article 21 which limited the Court's jurisdiction to individuals. One representative was of the view that the issue of jurisdiction ratione personae needed to be addressed in a separate article, in an unambiguous manner. Recognizing that only individuals could be tried by the Court, whose jurisdiction was, moreover, exclusive, another representative pointed out that it was possible for the accused to be tried by the custodial State, by another

State with which there was an extradition agreement, or by the Court. In his view, States should have the option of handing accused persons over to the Court or trying them in accordance with their own national law.

109. With reference to article 22 on acceptance by States of the court's jurisdiction over crimes listed in article 20, many delegations supported the proposed "opt-in" system under which a State party to the statute of the Court accepted its jurisdiction by means of a special declaration, except in the case of the crime of genocide, or in the case of referral by the Security Council. Such a system met with approval as it would provide greater flexibility and freedom of choice for States in deciding to become parties to the statute or to accept the Court's jurisdiction overall or in part, thereby facilitating its broader acceptance, and would better reflect the consensual basis of that jurisdiction.

110. A number of delegations, while expressing their continued preference in principle for a system whereby some crimes could be excluded from the Court's jurisdiction which would otherwise be compulsory for the States parties to the statute, i.e. the "opting-out" system, recognized that the "opting-in" system, despite the risk of its imposing excessive limitations on the Court's jurisdiction by the sum of individual States, had the advantage of encouraging a greater number of States to become parties to the statute and accordingly expressed readiness to support it. Thus it was stated that, although the ideal would be for the Court to have binding jurisdiction, and hence a system of exclusion or "opting-out", the provisions proposed by the Commission were more realistic because they would remove some of the obstacles in the way of the early establishment of the Court.

111. As regards article 23 on action by the Security Council, many delegations agreed in principle that the Security Council should be entitled to refer cases to the Court in view of its primary responsibility in the maintenance of international peace and security and therefore supported the provision of paragraph 1. Such a link, it was said, would strengthen the relationship between the Court and the United Nations and would enable the Court, without the need for acceptance by States of its jurisdiction, to consider crimes perpetrated even in States which were not parties to the statute where there was no possibility of administering justice through national courts. It was also suggested that the use of the Court by the Security Council, as an alternative to establishing ad hoc tribunals in each specific case, would prevent the proliferation of ad hoc jurisdictions and thereby ensure the establishment of coherent international case law. As to the question of possible abuse by the Security Council, it was noted that it was for States to exercise vigilance and to ensure that the Council did not exceed its power. The delegations in question therefore supported the view that, on the understanding that the Security Council would confine itself to referring a "matter", and not a "case", to the Court and that the Court would initiate the investigation and decide by itself whether prosecution should be instituted, it was entirely appropriate that the Council should have the prerogative of referring particular matters to the Court.

112. It was further suggested that the right to refer matters to the Court should not be reserved exclusively to the Security Council and should extend to

the General Assembly in respect of matters falling within its mandate, in proper recognition of its being the most representative body of the United Nations and bearing in mind that, because of the use of the veto, the Security Council was not always able to exercise its authority. More broadly, it was proposed that international organizations, particularly those active in the defence of human rights and humanitarian law, should also be able to bring a complaint before the Court where grave and deliberate violations were involved.

113. Some delegations felt that more careful consideration should be given to the prerogative in question, and suggested that the competence of the Security Council to refer particular matters to the Court must be without prejudice to a State's entitlement to accept the jurisdiction of the Court. One representative pointed out in this connection that there could conceivably be cases in which the Court decided to waive its jurisdiction on the ground that the international conventions referred to in the statute and the annex had not been breached or that a Security Council decision to refer a matter to the Court had actually been made on the basis of political pressure even though the Council had given the maintenance of international peace and security as the reason. Noting that there was still disagreement among States as to whether the Security Council was authorized to set up a compulsory jurisdiction under the Charter and that, with respect to the International Tribunal for the former Yugoslavia, some States had expressed reservations to that effect, another representative expressed doubts as to whether it was wise to base the statute on such a controversial assumption. In his view, the statute should provide for the possibility that the Security Council might make use of the Court in specific circumstances, but it should do so only in ways that were compatible with the character of the Court as an independent international judicial body and the principle of voluntary State acceptance of its competence. He therefore suggested that it would probably be helpful to provide, in cases where the Security Council decided to make use of the Court, for prior acceptance by the States concerned of its jurisdiction.

114. The view was also expressed that the current wording of the article did not seem appropriate, as it made it possible for an international criminal court to be subordinate to a political decision adopted by an organ such as the Security Council, in which the right of veto of some States could impede the initiation of proceedings.

115. On the other hand, some delegations expressed serious reservations regarding any involvement of the Security Council in the activities of the Court. Thus, it was stated that only States parties to the statute could and should be entitled to lodge a complaint with the Court and that the Security Council, being a political body, should on no account play any role in the prosecution of individuals. The remark was also made that conferring on the Security Council the authority to bring a complaint directly to the Court under Chapter VII of the Charter was not consistent with the fundamental rule laid down in article 21 (which made the Court's competence contingent on State acceptance) and lacked a sound legal basis. Furthermore, it was stated, the consequences of the significant expansion of the functions of the Security Council under the Charter and, in particular, the implications of such expansion for the application of article 23 had not been given enough thought. It was

therefore suggested that article 23 be deleted altogether from the draft statute.

116. The prior limitations which article 23 would impose on the prerogatives of national jurisdictions were viewed as likely to raise concern and to increase States' hesitations about becoming parties to the statute. It was suggested accordingly that, in lieu of article 23, it would be preferable to include in the statute a preambular paragraph, modelled on the one contained in the annex to General Assembly resolution 3314 (XXIX) on the Definition of Aggression, stating that nothing in the instruments concerned should be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations.

117. Concern was further expressed that authorizing the Security Council to refer matters to the Court would introduce a substantial inequality among States parties to the statute, between States members of the Security Council and non-members, and between the permanent members of the Security Council and other States - which would discourage the widest possible adherence to the statute.

118. In the view of one representative, it was also in the interests of the Security Council itself to have no interaction whatsoever with the Court, since there was no guarantee that the cases it might bring before the Court would be declared admissible. A series of challenges to admissibility by the Court, it was said, would weaken the Security Council's authority in the matter in question and might well place it in open conflict with the Court, a situation which would do little to enhance its reputation.

119. Paragraph 2, which made the exercise of the Court's jurisdiction dependent on a determination by the Security Council that a State had committed an act of aggression, was supported by some delegations as being consistent with the mandate of the Council. One of them viewed the provision as purely procedural, with no implications for substantive law.

120. The provision, however, gave rise to objections on the part of several delegations. The view was expressed that, by making the judicial process subject to the political process, the provision of paragraph 2 curtailed the independence of the Court. Although legitimate under Article 39 of the Charter, determination by the Security Council of an act of aggression was subject to the exercise of the veto power. That situation, it was said, would greatly limit the operation of the Court, particularly since there could be a number of other crimes directly related to an alleged act of aggression which would also fall within the Court's jurisdiction but might not be referred to it.

121. It was further stated that the political question of whether a country had perpetrated an act of aggression was in principle separate from the legal question of whether an individual from a particular country could be held responsible for the act and that the Court would be perfectly capable of taking note of an act of aggression without the Security Council having first determined it. In this connection, it was noted that no such limitation had been placed on the International Court of Justice itself; its jurisdiction extended to all matters specially provided for in the Charter of the United Nations, including matters having to do with the threat or use of force. The

deletion of paragraph 2 was therefore suggested. It was further proposed that a less radical solution be adopted, whereby if the Security Council made a positive or negative decision, the Court would be bound by that decision, whereas if the Security Council made no decision, the Court would be at liberty to exercise its jurisdiction.

122. Similar concerns about the possibility of judicial proceedings being politicized as a result of action taken by the Security Council were voiced with regard to paragraph 3. One representative suggested that the Security Council had the competence to determine the existence of threats to the peace and breaches of the peace, but did not have a monopoly on the consideration of the situations arising therefrom. In his view, the jurisdiction of the Court would be excessively limited if it was barred from trying suspects while the Security Council was considering such situations. Furthermore, in recent years, the Security Council had tended to interpret the notion of "threat to the peace" increasingly broadly so as to bring within its orbit practically all situations liable to give rise to the crimes categorized in the statute. It did not seem logical to him, therefore, to impede the operation of the machinery provided for in the statute on the basis of political statements made in other forums. He consequently suggested that paragraph 3 should be deleted.

123. Another representative proposed that, in view of the binding and overriding character of the Security Council's determination of threats to international peace and security by virtue of Articles 25 and 103 of the Charter, guidelines should be established as to the circumstances in which the provision of paragraph 3 should be invoked. Noting, for example, that a State's obligation under the statute to transfer any suspect to the Court could be nullified if there were a contrary determination by the Council to surrender a given suspect to a particular State, he felt that the best solution for safeguarding the proper functioning of the Court would simply be to delete article 23; or to delete article 23 and include in the preamble a clause preserving the functions and powers of the Security Council under the Charter; or to delete paragraph 1 of article 23 and amend paragraph 3 to ensure that a prosecution under the statute was prohibited only when the Council had taken action under Chapter VII of the Charter in relation to the relevant matter.

124. The remark was on the other hand made that the provision of paragraph 3 was supportable, inasmuch as it recognized simultaneously the priority assigned to the Security Council and the need to coordinate the activity of the Council and that of the Court. Moreover, it was observed, the substantial inequality between States members of the Security Council and those that were not members which article 23 appeared to introduce derived from the composition of the Council, not from an imbalance created by the provision in question.

(f) Part 4 of the draft statute (Investigation and prosecution: articles 25 to 31)

125. The provisions of part 4 concerning investigation and prosecution were viewed by some representatives as generally acceptable. They were viewed as providing a firm basis for the conduct of future international criminal proceedings, even though some details remained to be fine-tuned, and as laying

down a satisfactory system consistent with the principles of justice and protection of the fundamental rights of the accused.

126. The provisions in question were, however, criticized as being too general. In this context, one representative pointed out that the draft lacked provisions on requirements for the issuance of a warrant, procedures for its execution, requirements for admissibility of evidence and the time period allowed for appealing the judgement. Moreover, the period of pre-trial detention, which should be the minimum, could be indefinite if approved by the Presidency. Concern was expressed that, since the crimes subject to prosecution by the Court would in many cases be submitted in the context of political turmoil, the judicial procedure might be abused for political ends. It was therefore suggested that the adoption of safeguards, including the need to impose sanctions, should be considered.

127. With regard to article 25 on complaint, it was widely agreed that resort to the Court under paragraph 1 should be limited to States parties and to the Security Council acting under Chapter VII of the Charter. One representative noted, in this connection, that a more liberal system might discourage States from becoming party to the statute or accepting the Court's jurisdiction out of fear that other States which had not done so might abuse their privileges. The same representative insisted, however, that even if it did not accept the Court's jurisdiction, a State party to the statute was bound by certain obligations which effectively complemented the system of jurisdiction.

128. Another representative remarked that the view which had prevailed that the Prosecutor should not be authorized to initiate an investigation in the absence of a complaint was correct. In his opinion, the autonomy of the Prosecutor was superfluous in international law, and reinforced the principle that the complaint was the mechanism that triggered the investigation. Once the complaint had been declared admissible, the Prosecutor enjoyed the necessary autonomy to initiate proceedings against the persons suspected of having committed an international crime. The requirement that the Presidency must confirm the indictment drawn up by the Prosecutor was welcomed as an additional guarantee of the rights of the accused. Only on the basis of that confirmation did the suspect become an accused. Naturally, it was noted, confirmation of the indictment could not prejudge the decision of the Court.

129. On the other hand, some representatives felt that, in regulating access to the Court, article 25 was too limitative. Thus the restriction in paragraph 1 whereby the right to lodge a complaint of genocide was limited to States which were party to the Genocide Convention was viewed as unwarranted: genocide was considered in the statute to be a crime under general international law and was the only crime within the inherent jurisdiction of the Court. Accordingly, any State party to the statute of the Court should be entitled to lodge a complaint relating to genocide. Noting that for crimes other than genocide, the text as it stood restricted the right to lodge a complaint to the State that had custody of the suspect or the State in the territory of which the crime was committed, one representative favoured a broader approach such as allowing complaints to be lodged by States whose nationals had been victims of a crime, which had an interest in lodging a complaint and which were willing to do so.

130. The view was further expressed that the possibility of giving access to the Court of a State that was not a party to the statute called for further consideration inasmuch as all States should be encouraged to have recourse to an international jurisdiction the role of which would be to ensure peace through application of the rule of law.

131. With reference to article 26 relating to investigation of alleged crimes, emphasis was placed on the need to ensure that, during the preliminary phase of an investigation, a person suspected of an offence should have all his rights guaranteed, as was provided for in the International Covenant on Civil and Political Rights.

132. The provision of paragraph 5 which allowed the Presidency to review a decision of the Prosecutor not to initiate an investigation or not to file an indictment gave rise to objections on the part of one representative, as it could substantially undermine the independence of the Prosecutor. Another representative expressed concern that the provision of paragraph 5 did not indicate what would happen if the Prosecutor stood by his decision: in his opinion it seemed preferable to leave the decision entirely to the discretion of the Prosecutor or to allow the parties concerned to appeal against it before a body fulfilling the function of an appeals chamber.

133. With respect to prosecution, dealt with in article 27, the view was expressed that the Prosecutor should be authorized to amend the indictment upon leave by the Presidency.

134. Article 28 on arrest was, in the view of one representative, far from satisfactory: the statute should set forth unambiguous conditions for the arrest of suspects and ensure that they were brought before the competent judge within a short time. The remark was also made that there seemed to be a need to reconcile the provisions of articles 28 and 52 as regards provisional arrest. It was observed that the statute was silent on the matter of how to proceed if a formal request had not been made within the time-limits prescribed. In that respect, it was said that, although analogies with extradition could be misleading, the fact remained that, under most extradition treaties, any suspect who had been provisionally arrested was entitled to be released if a formal request for extradition was not made within a specified period (usually 40 days).

135. Article 29 concerning pre-trial detention or release was criticized by one representative who questioned the appropriateness of providing for the possibility of release on bail, given the gravity of the crimes concerned.

(g) Part 5 of the draft statute (The trial: articles 32 to 47)

136. Some representatives endorsed part 5 as a whole, which, in the view of one representative, established a satisfactory system consistent with the principle of justice and protection of the fundamental rights of the accused. The suggestion was however made that the relevant provisions should be kept as simple as possible, while satisfying the requirements for a fair trial.

137. Article 32 concerning the place of trial was favourably commented upon by one representative who considered that the wording of article 32, together with the provisions of article 58, would offer a practical response to the concerns of some small States, which feared that the trial and imprisonment of certain international criminals, such as those engaged in large-scale drug trafficking, could overwhelm their judicial systems and pose a serious threat to their security.

138. Article 33 on applicable law was generally endorsed. One representative welcomed the provision which, in her view, would ensure the preservation of the nullum crimen sine lege principle. Different views were, however, expressed as to the exact scope of the applicable law to be covered under the article.

139. Thus, some representatives held that the law applied must be international public law that was well defined and generally accepted by the international community. In this connection, reference was made to the need to finalize as soon as possible the draft Code of Crimes against the Peace and Security of Mankind which, it was stated, should inter alia establish specific penalties for each crime that fell under the Court's jurisdiction. One representative expressed surprise at the absence of any reference in article 33 to other sources of substantive international law, and suggested that it be redrafted to broaden the range of applicable rules, so that over and above the statute, the Court could apply the draft Code, treaties relating to certain specific crimes, principles and rules of international law, the relevant acts of international organizations and, if necessary, any rule of national law. Along the same lines, another representative remarked that, although treaty law and customary law should be regarded as the main sources of international criminal law, secondary sources, such as international legal doctrine and jurisprudence, including the new sources of international law such as the resolutions of international organizations, should also be taken into account.

140. As regards the "principles and rules of general international law" referred to in subparagraph (b), some representatives, while recognizing that they formed the basis of the applicable law, considered that the contents of such rules and principles needed to be more clearly defined. One representative felt it necessary to specify that paragraph (b) referred exclusively to international law norms and therefore expressed disagreement with the comment made by the Commission in paragraph (2) of the commentary to the effect that the principles and rules there cited included the whole corpus of national law. He observed that, even if paragraph (b) had referred to "general principles of law" as opposed to "general principles of international law", the reference would have covered only the most general principles, and certainly not the whole corpus of national law. Another representative expressed concern that subparagraph (b), as currently drafted, referred to customary law of a too general and too imprecise nature to lend itself to systematic application. He suggested that, if the purpose of the article was to set forth general principles of law in the area of criminal procedure, that should have been expressly stated.

141. The reference to applicable national law in subparagraph (c) was considered as inappropriate by some representatives in the context of an international criminal court. In the view of one representative, the application of the statute, the relevant treaties and the principles and rules of general

international law would leave very few lacunae to be filled by national law: in the first place, the treaties referred to in article 20, subparagraph (e), all contained very full and clear provisions calling for the application of international law; and secondly, the commentary stated that the expression "principles and rules of general international law" included "general principles of law, so that the Court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needed guidance on matters not clearly regulated by treaty".

142. Several other representatives took the view that national law was of some relevance in the current context. One representative, while pointing out that the Court would naturally be limited in terms of the rules of national law that it might apply, since clearly such rules could not be applied where they failed to conform with international law, and while recognizing that the characterization of an act or omission as a crime under international law must be independent of national law, bearing in mind the primacy of international law over national law, observed that jurisdiction ratione materiae included crimes defined by international instruments which provided for the suppression of those crimes initially by means of national law. He added that all States had a common fund of law in the areas of the protection of fundamental rights and criminal procedure, so that, while international law provided an adequate basis in terms of jurisdiction ratione materiae, related questions might necessitate recourse to national law. Another representative pointed out that the idea of applying national law at the level of international law to compensate for lacunae in substantive criminal law as regards the constituent elements of crimes and the penalties to be imposed was worth considering, although the manner in which that was effected would require careful study.

143. The above notwithstanding, the wording of subparagraph (c) providing that the Court should apply "to the extent applicable, any rule of national law" was considered as too vague by some representatives, who called for more specific language bearing in mind that international law did not yet contain a complete statement of substantive and procedural criminal law. It was suggested that reference be made to "applicable rules of criminal law and jurisdiction". It was further suggested that article 33 be moved to part 3.

144. Noting that the mention in article 33 of rules of national law was viewed by the Commission as important, because some treaties which had been included in the annex explicitly envisaged that the crimes to which the treaty referred were none the less crimes under national law, one representative stated that, if the article aimed at emphasizing the issue of double jeopardy, it should do so more explicitly.

145. With regard to the relationship between the applicable law and the rules of evidence, the view was expressed that if rules of evidence were part of substantive law, then, in principle, article 33 should govern the making of those rules, which would be based both on international practice and on national law, where that was appropriate. Thus it was suggested that, although rules of evidence would generally be subject to the approval of States parties, it might be useful for the statute to provide that in formulating those rules, the Court should be guided by the provisions of article 33, unless the assumption was made

that rules of evidence constituted substantive law, in which case article 33 would apply in any event.

146. The provisions of article 34 on challenges to jurisdiction were viewed by one representative as extremely important, inasmuch as they would facilitate the determination of the Court's jurisdiction. He considered it necessary, however, to define the term "interested State", because too broad an interpretation of that term might hamper the work of the Court and could stymie its operation. Another representative argued however that all States with jurisdiction in relation to a given crime should be able to challenge the jurisdiction of the Court.

147. One representative found article 35 on issues of admissibility superfluous inasmuch as two other articles (24 and 34) provided an opportunity to ensure that the Court's jurisdiction was confined to the purposes set out in the preamble. He further suggested that, if article 35 were to be retained, it would be better to provide in article 34 that challenges to jurisdiction could also be made on the three grounds set out in article 35. Another representative, after pointing out that the draft statute contained no provisions on statutory limitations or on their non-applicability, observed that, if a permanent international criminal court was to become a reality, the Court's jurisdiction ratione temporis would have to be determined in order to preserve the principle of legal safety. She recalled that the crimes listed in anti-terrorist conventions, over which the Court had jurisdiction, were outside the category of war crimes and crimes against humanity, for which the non-applicability of statutory limitations was prescribed by the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and by the domestic criminal legislation of many States, including that of her own country. She further remarked that, while the Court would naturally have jurisdiction ratione personae over natural persons on the basis of their individual criminal responsibility, no general rules on the matter had been formulated. That was, in her view, a deficiency, given that the statute of the International Tribunal for the former Yugoslavia contained provisions regarding personal jurisdiction and individual criminal responsibility, including the responsibility of government officials and responsibility for crimes committed by order of a superior.

148. Article 37 concerning the principle of trial in the presence of the accused was generally welcomed by representatives as embodying a fundamental legal safeguard. Favourable views were expressed, particularly with regard to the emphasis placed on the presence of the accused and on the exceptional nature of the circumstances in which the trial could proceed in the absence of the accused, which provided a balanced formula much more elaborate than that previously proposed. The remark was made in this connection that departures from the general rule that an accused person should be present at his trial should be allowed only in clearly defined exceptional cases, such as those mentioned in paragraph 2 of the article and that, in the absence of the accused, all his rights must be respected. It was noted further that although international law did not prohibit, from a strictly legal standpoint, trials in absentia, the current trend in human rights was to limit that type of trial, as indicated in article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights.

149. Some representatives, while generally supporting the purport of the article, considered that further clarifications were necessary as regards the criteria applied to cases where trials in absentia were permitted. One representative felt that the criteria applied were too narrow and arbitrary. In his view, the criterion used in article 44 (h) of the 1993 draft statute 2/ seemed preferable. He also emphasized that once the presence of the accused had been secured, the trial would have to be reopened to allow the accused to take advantage of all the rights guaranteed by universally recognized human rights instruments. Another representative noted that in her country trials in absentia were permitted in exceptional circumstances, where the accused intentionally avoided standing trial and gave pre-trial testimony, but were not allowed in the case of a juvenile perpetrator of a criminal act. While recognizing that a fundamental element of an efficient international judicial system was the ability to bring the accused to Court, she cautioned that the Constitution of her country forbade the extradition of its citizens.

150. One representative stressed that his Government continued to endorse the possibility of contumacious judgements and welcomed the fact that such possibility had been provided for in article 37 of the statute. In his view, the article as a whole provided enough guarantees to reassure those States which were unfamiliar with the system of trials in absentia.

151. With regard to paragraph 2 (c), surprise was expressed at the fact that paragraph 2 (c) permitted trial in absentia if the accused had escaped from lawful custody or had broken bail, whereas the Court was not afforded such possibility if the accused had never been arrested. The remark was made that the reasons for that distinction, and its consequences, were viewed as unclear, while the principle enshrined in article 14 of the International Covenant on Civil and Political Rights that the accused must be "tried in his presence" should be duly respected, it might be in the interest of the international community to give the Court the possibility to conduct a trial by default, to bring some of the facts to the knowledge of world public opinion and to at least identify and outlaw the perpetrators of heinous crimes, the more so as it might be possible in such cases not to apply automatically the sentence pronounced by default and to await the appearance of the accused before the Court and a revised verdict.

152. As regards paragraphs 4 and 5, one representative stressed that, while his delegation welcomed the modifications to article 37 and the formulation of the rule excluding trials in absentia as a principal rule, the paragraphs in question should be considered further to avoid any challenge based on international human rights instruments.

153. Article 39 embodying the principle of nullum crimen sine lege was generally supported, but some aspects of the proposed text gave rise to criticism. Thus it was stated that the differentiation in articles 20 (a) to (d) regarding application of the principle of nullum crimen sine lege might lead to controversy, and that it would be far more sensible to lay down in article 39 a

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2/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10).

uniform rule which could read: "No one shall be held guilty on account of any act or omission which did not constitute a crime under international law at the time it was committed."

154. Regarding subparagraph (a), it was suggested that the provision should be made more specific and that the "unless" clause should read "unless the act or omission in question constituted a crime under article 20" or "unless the act or omission constituted a crime under the relevant treaty at the time the act or omission occurred". The remark was also made that subparagraph (b) was not clear as to how it would be determined that a treaty was applicable to the conduct of the accused at the time the act or omission occurred: would it suffice for the treaty to have been in force at the international level, or would the treaty also have to have been fully incorporated in the domestic legal system; and would it be required that the countries which would need to recognize the Court's jurisdiction be parties to the treaty in question?

155. Article 40 on the presumption of innocence was recognized as embodying an accepted principle in criminal law, which placed on the Prosecutor the onus of establishing guilt beyond a reasonable doubt. It was noted however that the burden of proof was also cast upon the accused, namely the burden of proving the common-law defences of consent, duress, self-defence or justification generally.

156. Article 41 pertaining to rights of the accused was also endorsed as generally providing the necessary international guarantees of a fair trial, including the right of the accused to be present at the trial.

157. The remark was made, however, that the article might require additional inputs, in order to provide the necessary psychological guarantees to offset any handicap that an accused person might encounter when appearing in an alien and culturally different environment to respond to criminal charges. It was further observed that regulations on legal assistance, particularly for cases in which the Court had to assign defence counsel, should be added.

158. One representative, referring to paragraph 1 (g), pointed out that under the law of his country, the accused enjoyed the right of silence and the right to refrain from giving evidence, but that such silence might be interpreted as adding to the weight of evidence for the prosecution and providing corroboration of such evidence where such corroboration was required.

159. Article 42 concerning the non bis in idem principle was generally supported as embodying a fundamental principle of criminal law. Reservations were however expressed on some aspects of the proposed text. Thus, concern was voiced that paragraph 2 left open the possibility that, under certain circumstances, a person who had already been tried by one court could in fact be tried under the statute, which not only violated the principle of non bis in idem but also placed the Court in a superior position vis-à-vis national courts. The view was also expressed that subparagraphs (a) and 2 (b) were in blatant contradiction with article 14, paragraph 7, of the International Covenant on Civil and Political Rights, and that account should also be taken of the fact that the purpose of an international criminal court was to be complementary to national criminal justice systems, as stated in the preamble to the draft statute. As regards subparagraph (a), it was noted that the application of the principle

depended not so much on how a criminal act was characterized as on whether the act itself was the subject of renewed prosecution proceedings. With regard to subparagraph (b), the remark was made that the provision dealing with the principle of res judicata should be critically reappraised, since some States might consider it to be a derogation of their sovereign powers with regard to criminal trials.

160. The suggestions were made: (a) to restrict the application of the article to States which had accepted in advance the jurisdiction of the Court; (b) to redraft paragraph 2 (a) and paragraph 3 to ensure the cooperation of the national courts, whose justice the international court must supplement, without taking over their functions or disregarding their judgements or decisions; and (c) to improve the wording of paragraph 2, particularly the phrases "ordinary crime" and "not diligently prosecuted".

161. Article 44 relating to evidence was supported by one representative who endorsed, in particular, the proposal to exclude any evidence obtained by illegal means.

162. While agreeing with the underlying principle, some other representatives said that the proposed text required further scrutiny. Thus it was noted that paragraph 2 did not appear to be sufficient to deal with cases of perjury and that competence should be conferred on the Court itself in such cases.

163. Concern was also expressed that, if the anticipated cooperation was unavailable, a vital component of the adjudication procedure would be incapacitated. In this regard, article 19, paragraph 1 (b), was considered to be more effective on the question of the rules of evidence to be applied.

164. The suggestion was made to provide in paragraph 3 that the ruling on the relevance or admissibility of evidence should be made after hearing the parties or their representatives. One representative, while recognizing that the provisions on evidence contained in article 44 constituted a via media between those who felt that the issue should not be covered in the statute and those who felt that basic provisions should be included, nevertheless maintained that the provisions needed to be more stringent, and suggested that paragraph 5 should be amended to read: "Evidence obtained directly or indirectly by unlawful means, or in a manner contrary to the rules of the statute or of international law, shall not be admissible." It was further suggested that a paragraph should be added to article 44, reading: "Other rules of evidence shall be made under the rules of evidence to be included in the Rules of Court made under article 19."

165. Different views were expressed on certain aspects of article 45 on quorum and judgement. With regard to paragraph 1, the view was expressed that it should provide for all members of the Trial Chamber to be present at all stages of the trial, in which case paragraph 3 could be deleted, because all trial chambers would then be composed of an uneven number of judges. Another view was held that paragraph 3 was unacceptable. The remark was made in this connection that a case which could not be decided by a trial chamber should not be retried by the same chamber and the question was raised whether the failure to agree on a decision did not amount to acquittal.

166. With regard to paragraph 5, some representatives considered it important not to allow any dissenting or separate opinions in the decision lest the authority of the Court be eroded. Others remarked that, since the Court would have available to it limited case-law and precedent in international criminal law, it was surely important, for the sake of consistency and for the purposes of appeal, to allow for dissenting decisions, particularly at the trial level. The remark was made in this connection that if the Appeals Chamber was given the opportunity to review the case fully, looking at it from the perspectives of both the majority and the minority of the judges of the Trial Chamber, it would have available to it all the arguments presented in the lower court.

167. Article 46 regarding sentencing gave rise to some reservations. One representative insisted that the paragraph must include more objective criteria, particularly in paragraph 2. Another representative held that the provisions of the article should make it clear that the essential basis was the offender's guilt, while the individual circumstances of the convicted person and the gravity of the crime played only a supplementary role.

168. With regard to article 47 concerning applicable penalties, some representatives supported the exclusion of the death penalty from the scope of possible penalties established in paragraph 1, an approach which, according to one representative, was in line with the trend towards abolition that was reflected in several human rights instruments. It was further pointed out that, although it might be difficult for some States to accept a provision excluding the death penalty, the provision could not be faulted in view of the fact that the death penalty had been condemned by the United Nations.

169. The view was, however, expressed that due account should be taken of the fact that many criminal systems continued to impose the death penalty on the perpetrators of the most heinous crimes, in particular those mentioned in the draft statute. It was suggested that the option of determining the length of a term of imprisonment or the amount of a fine should be extended to determination of the penalty generally.

170. Paragraph 1 as a whole was supported by one representative, who welcomed the addition of a provision for imprisonment for a specified number of years as well as for life imprisonment. On the other hand, some representatives expressed continued dissatisfaction with the treatment of the issue of penalties given in the paragraph. In their view, the proposed text did not duly respect the principle of nulla poena sine previa lege laid down in article 15, paragraph 1, of the International Covenant on Civil and Political Rights, which prohibited the imposition of a penalty heavier than the one that was applicable at the time when the criminal offence was committed. One representative felt that it did not seem logical to offer judges the alternative of imposing a sentence of life imprisonment or imprisonment for a specified number of years on the one hand, and a fine on the other. Nor was it right, in his view, that crimes of the seriousness of those dealt with in the draft statute could be punished by a mere fine or that a fine could be imposed but terms of imprisonment of months were excluded. Of even more serious concern to him was the vagueness of article 47, which made a mockery of the requirement of nulla poena sine lege since it did not specify either the duration of the term of imprisonment or the amount of the fine.

171. Several representatives expressed reservations on paragraph 2 for its lack of certainty regarding the applicable penalties. Concern was voiced that, since its current drafting did not indicate the relative importance of subparagraphs (a), (b), and (c), conflicts might arise if the penalties mentioned differed from one State to another. One representative held the view that the wording of paragraph 2 would be acceptable if the words "the Court may have regard to" were replaced by "the Court must have regard to". Another representative suggested that the expression "may have regard to" [the penalties provided for by national law] was extremely vague: on the one hand, it allowed the Court not to take such laws into account; on the other hand, it allowed the Court to choose from among several national legislations without offering any criteria for making the choice. It was thus argued that the best solution, as in the precedent of the International Tribunal for the former Yugoslavia, was to apply a single national legislation, that of the State in whose territory the crime had been committed. Along the same line, the view was also expressed that there should be the utmost certainty regarding the applicable penalty and that the accused should be sentenced in the first place in accordance with the rules obtaining in the State in which the crime was committed and where the accused should have been brought to justice. Concern was expressed that, as drafted, the provisions of paragraph 2 did not, contrary to what was prescribed in article 15 of the International Covenant on Civil and Political Rights, exclude the possibility of imposing on the accused a penalty that was heavier than the one that was applicable at the time when the criminal offence was committed. It was suggested that in order to solve the problem the Court should be required to refer to national law. In this connection, it was recalled that at the previous session of the Committee, the following sentence had been proposed for inclusion at the end of paragraph 2: "In no case may a penalty involving imprisonment of greater duration than that specified in any of the laws referred to in subparagraphs (a), (b) and (c) or a fine exceeding that specified in any such law be imposed on the accused."

172. Noting the limited scope of the applicable penalties, one representative called for a vigorous application of penalties such as the fines provided for in article 47, paragraph 3. The suggestion was further made to authorize the transfer of portions of fines to any State in which a convicted person was serving a sentence of imprisonment. It was also said that the draft text should provide for rules regarding the restitution of items which had come into the possession of the convicted person illegally.

(h) Part 6 of the draft statute (Appeal and review: articles 48 to 50)

173. It was generally agreed that two levels of jurisdiction should be provided for. The remark was made that those two levels, one for trial and the other for appeal against the decisions taken at the trial level, afforded an opportunity to establish in a universal manner the principle of dual jurisdiction recognized in the covenants on human rights as a basic procedural guarantee. The combination of appeal and cassation within the Court, it was observed, was in response to the concern for rapidity of proceedings, as was also the provision assigning to the Presidency the power of revision, thus closing the entire procedural cycle and meeting the desire for equity expressed by the international community in the Covenants.

174. Recognizing that the appeal, through a blend of appeal and annulment, sought to ensure control of legality - a control that would be exercised over errors of fact and errors of law, and also over procedure and the submission of evidence (error in processando and error judicando) - one representative suggested that such broad powers could certainly be granted to an appeals chamber, provided more precise rules of evidence than the current ones were included in the statute. He noted in particular that delicate procedural questions, such as errors of law in the weighing of evidence, presented real difficulties for any jurist, whether judge or counsel, and that, for that reason, the relevant provisions of the statute would have to be refined.

175. Article 48 concerning appeal against judgement or sentence drew criticism on the part of one representative, who considered that the distinction made, in paragraph 1, between grounds of procedural error and errors of fact or of law was confusing in that a procedural error, which could be a simple breach of a procedural requirement or some form of procedural impropriety, was really an error of law. He proposed, therefore, that the reference to "procedural error" in article 49, paragraph 2, be deleted and the chapeau redrafted to read: "If the Appeals Chamber finds that the error of act or law has vitiated the decision, it may ...", so as to bring the draft closer to article 25 of the statute of the International Tribunal on the former Yugoslavia. Another representative suggested that the provisions of article 48, in so far as they permitted appeal against acquittal, warranted further consideration.

176. With regard to article 49, the view was expressed that, subject to article 50, paragraph 3, and save in cases where evidence was wrongfully excluded by the Trial Chamber, the Appeals Chamber should not hear evidence. The suggestion was accordingly made that a provision be added in subparagraphs (a) and (b) of paragraph 2 empowering the Appeals Chamber to remit the case to the Trial Chamber with such instructions as it deemed fit, including the hearing of new evidence and the issuance of a new judgement.

177. It was also suggested that the provisions of article 49 would need to be further clarified as to whether the Court would be bound by its own decisions, particularly at the appeal level. The view was expressed in this connection that, for the sake of consistency, the Court should, at the very least, be bound by its appeal decisions.

(i) Part 7 of the draft statute (International cooperation and judicial assistance: articles 51 to 57)

178. The provisions of part 7 were viewed as generally acceptable by some representatives, who emphasized the importance of mutual assistance and cooperation between national criminal jurisdictions and the current criminal jurisdiction, particularly in investigation, provision of evidence and extradition of presumed criminals. One representative cautioned, however, that any such cooperation must take due account of national criminal jurisdiction, bearing in mind that it was not the aim of the Court to supplant national courts in the sphere of criminal jurisdiction.

179. With regard to article 51 on cooperation and judicial assistance, one representative held that the Court should have the power to demand the temporary

transfer of a witness for purposes of confrontation and adduction of evidence, with the necessary provision for subsistence and travel expenses.

180. Emphasis was placed on the need to reconcile, as far as provisional arrest was concerned, the provisions of article 52 on provisional measures and those of article 28 concerning arrest. The remark was made that the statute was silent on the matter of how to proceed if a formal request had not been made within the time-limits prescribed. In that respect, attention was drawn to the fact that under most extradition treaties any suspect who had been provisionally arrested was entitled to be released if a formal request for extradition was not made within a specified period (usually 40 days).

181. With regard to article 53 concerning the transfer of the accused to the Court, one representative expressed the view that the accused should be given the right to challenge the warrant for arrest and transfer in the manner and in accordance with the procedures generally provided for under extradition conventions and that there should also be provision for release on bail, pending transfer. The remark was made that paragraph 4 of the article raised the question of giving priority to a request from the Court over those from requesting States under existing extradition agreements. It was therefore suggested that the requested State be given an option in that context.

182. Several representatives questioned the scope of application of article 54 relating to the obligation to extradite or prosecute. In the opinion of one representative, it was not clear whether the obligation to extradite was owed to any State that made the request, whether it was a State party or not. The same question applied to the reference to "requesting State" in article 53, paragraph 2 (b). In his view, it seemed that those two provisions should be reconciled. Some other representatives expressed concern that, in the text of the statute, the obligation did not extend to the crimes provided for in article 20, subparagraphs (a) to (d), namely crimes covered by general international law. Although that could be explained in respect of the crime of genocide, since only the State in which the crime had occurred had jurisdiction, the draft statute must provide for the obligation to extradite or prosecute in respect of the other crimes listed. It was noted that while, generally speaking, the International Law Commission was justified in finding it difficult to impose an equivalent obligation on States parties for crimes under international law in articles 20, subparagraphs (b) to (d), in the absence of a secure jurisdictional basis or a widely accepted extradition regime, the basis of the aut dedere aut judicare obligation was not the treaties referred to in article 20, subparagraph (e), but article 54 of the statute itself.

(j) Part 8 of the draft statute (Enforcement: articles 58 to 60)

183. The provisions relating to enforcement contained in part 8 of the draft statute were viewed by one representative as a cause for concern, inasmuch as they would raise important constitutional issues for many Member States. As an alternative, it was suggested that the Court orders could be carried out in conformity with the various provisions defined under international law.

184. With regard to article 59 concerning the enforcement of sentences, one representative proposed the inclusion in the article of a provision for the enforcement of sentences through levies against assets in States parties.

(k) Appendix I (Possible clauses of a treaty to accompany the draft statute)

185. Several delegations commented on the Commission's recommendations in appendix I concerning the possible content of a treaty to accompany the draft statute, in relation to such matters as entry into force, administration, financing, amendment and review of the statute, reservations and settlement of disputes.

186. As regards the entry into force of the treaty, one representative, reiterating the view that an excessively low number of accessions would deprive the Court of the necessary representativeness and authority to act on behalf of the international community, whereas an excessively high number could cause undue delay in its establishment, suggested that a balanced solution would perhaps be found in setting the number somewhere between one third and one quarter of the States Members of the United Nations. Another representative, however, took the view that the statute was equivalent to the constitutive instrument of an international organization, in the meaning of article 20, paragraph 3, of the Vienna Convention on the Law of Treaties, and that therefore its entry into force should be based on a large number of ratifications.

187. On the question of review, the remark was made that, for the statute to adapt to any changing requirements of the international community, it must be accompanied with a flexible review or modification procedure. In this regard, one representative questioned the five-year moratorium for revision of the statute, as proposed by the International Law Commission, pointing out that such a moratorium would exclude from the jurisdiction of the Court a number of relevant international instruments, such as the Convention on the Safety of United Nations and Associated Personnel, which could enter into force in the near future.

188. Regarding the question of reservations, one representative expressed concern that the proposal to authorize only reservations of a limited nature might considerably reduce the number of future States parties. Noting that the treaty to which the draft statute would be attached was a fundamental element in the establishment of a treaty-based international criminal court, he suggested that the issue should be approached very seriously. He stressed that it would be desirable to take a more flexible position regarding reservations, since incorporation of the provisions of the statute into national law was bound to raise fundamental issues of constitutional law.

C. The law of the non-navigational uses of international watercourses

1. General observations

189. Several representatives praised the Commission for its outstanding work in completing the draft articles on the law of the non-navigational uses of international watercourses and the resolution on confined transboundary groundwater. It was noted that since there were few States that did not qualify as watercourse States, the legal and functional range of the draft articles - which might be called the future Magna Carta on international watercourses - was therefore almost universal and should be approached with corresponding devotion and care.

190. According to those representatives, the final draft adopted by the Commission was a comprehensive and balanced document setting out general guidelines for the negotiation of future agreements on the utilization of international watercourses.

191. Many representatives also commended the Commission on the simplicity and directness of style in which the draft articles were cast and for the clarity of the commentaries. They also welcomed the fact that the draft articles provided explicit rules under which watercourse States were entitled to enter into bilateral or multilateral agreements, tailored to their specific needs, provided that they respected the general principles set forth in the articles. This flexible approach would guarantee that international watercourses were developed and used to the fullest. The draft would also have the advantage of leaving room for the continued application of bilateral or multilateral agreements already concluded. States could, of course, if they so desired, modify existing agreements in accordance with the general principles set forth in the draft articles.

192. Some representatives, while expressing support for the draft articles as a whole, wished to ensure that existing bilateral arrangements continued to be applied. In that connection, they considered it important that wording to except existing treaties and customary rules from the application of the draft articles, such as that contained in the Helsinki Rules on the Uses of the Waters of International Rivers, should be inserted into the first article. In their view, by protecting existing treaties, such a proviso would moreover attract more States to become parties to the proposed framework agreement.

193. Some representatives found the draft articles, on the whole, as having duly taken into account existing treaty law and precedent and welcomed the incorporation of rules relating to environmental protection, which in their view was in line with a number of recently adopted international conventions. Other representatives felt that the draft articles should include additional concepts which had been formulated and developed in recent international instruments, such as the 1992 Rio Declaration on Environment and Development, which contained a group of articles dealing with the concept of sustainable development. Chapter 18 of Agenda 21, which dealt with protection of the quality and supply of freshwater resources and application of integrated approaches to the

development, management and use of water resources, was cited as containing necessary elements which could also be included in the draft articles.

194. A view was also expressed that the draft articles should envisage environmental impact studies as a means of anticipating foreseeable consequences for the watercourses and the ecosystem as a whole.

195. With regard to the use of the term "significant harm", several representatives endorsed the replacement in the draft articles of the words "appreciable harm" with "significant harm", which in their view was clearer and more straightforward. According to them, that usage was in line with other international instruments dealing with environmental protection and would therefore be found to be more acceptable by States. The new wording did not, however, preclude the possibility that States would apply more rigorous standards in practice.

196. One representative expressed the view that, from the standpoint of terminology, it would be advisable to highlight the difference between contiguous or adjacent and successive watercourses, as each system had its own specific features, and that a particular rule could not be assumed to be applicable to both types of watercourses.

2. The final form which the draft articles should take

197. Most representatives who referred to this question expressed support for the adoption of a framework convention which contained general legal principles regulating the use of watercourses in the absence of specific agreements and provided guidelines for negotiating future agreements. At the same time, such a convention would allow States to adjust the articles to the characteristics and uses of particular international watercourses.

198. A number of representatives considered that the final form of the draft should be in the form of model rules or guidelines since, in addition to the necessary general principles, the draft contained provisions which could affect existing treaties or unduly restrict the discretion or flexibility of action of watercourses States.

199. Others felt that there was no incompatibility between a framework convention approach and model rules or recommendations and were ready to support either of the two approaches.

200. Some representatives expressed doubts concerning the precise nature of the instrument. According to them, despite the language used in the commentary to article 3 of the draft, what was involved seemed closer to model rules than to a framework agreement. Moreover, it was said, there was no provision clearly stating that the draft articles were applicable even in the absence of special agreements; rather, States were invited to apply the provisions of the future convention and adapt them to the characteristics and uses of a particular watercourse. In their view, if the draft articles were to become a convention, States would need to know what commitments they were assuming when becoming parties to it. Moreover certain provisions, such as those of article 5, were

nevertheless binding and directly applicable, since they could be considered to be general rules of customary international law.

3. The question of the forum for the adoption of the convention

201. Some representatives who spoke on the question believed that the most appropriate forum for the adoption of the convention was a conference of plenipotentiaries, in which not only jurists and diplomats but also technical experts would be able to participate.

202. Other representatives considered that the forum for further elaboration of the convention should be through the General Assembly on the basis of the draft articles prepared by the Commission.

203. A proposal was made by some representatives that, prior to the convening of a diplomatic conference and before the General Assembly adopted the final document, a meeting of governmental experts should be convened to resolve existing difficulties.

4. The question of unrelated confined groundwaters

204. Some representatives noted with approval the Commission's decision not to include unrelated groundwaters but instead to recommend that States should consider applying the principles contained in the draft articles to confined transboundary groundwater. That recommendation, in their view, reflected an emerging trend towards comprehensive management of global water resources and integrated protection of the environment. In the view of those representatives, while the question of groundwaters unrelated to surface waters of international watercourses required further study, some of the general principles laid down in the draft articles could usefully be applied by States in regulating and sharing unrelated groundwaters.

205. A number of representatives expressed the view that in the light of the need to gather further scientific information on confined groundwater, it was altogether appropriate that the Commission had adopted a flexible approach on that subject. The recommendation adopted by the Commission could be used for the elaboration of a future agreement on transboundary confined groundwater.

206. Other representatives stated that the future discussion on the subject should focus on the link between confined and non-confined groundwaters. A proposal was made in this connection that it might be possible, for example, to have a convention-based legal system which dealt exclusively with surface waters and a resolution-based legal regime which dealt with all types of groundwater.

5. Comments on specific articles

Part I (General principles)

Article 1 (Scope of the present articles)

207. According to some representatives, the use of international watercourses for navigational purposes was not entirely excluded from the text, but was merely not regulated by it. In their view, article 1 implied that the articles became operational for the navigational use of an international watercourse in cases of conflict between navigational and non-navigational uses of the watercourses. It was assumed under this provision that such a conflict of interest should be resolved according to the principle of equitable and reasonable utilization of an international watercourse.

208. One representative stated that it was her understanding that the draft articles also applied to pollution of watercourses arising from navigational uses.

209. To ensure the continued applicability of existing watercourse agreements, one representative recommended adding to the draft, at the end of article 1, paragraph 1, the words "except as may be provided otherwise by convention, agreement or binding custom among the watercourse States".

Article 2 (Use of terms)

210. One representative stated that in article 2, as in other draft articles, the Commission had incorporated the views of States. The definition of a watercourse now successfully combined two differing approaches: that in favour of retaining the words "flowing into a common terminus" and that in favour of eliminating those words, by using "normally flowing into a common terminus". The new wording provided a scientifically accurate definition of a water system and a better definition of the geographic scope of a watercourse.

211. Another representative expressed the view that the definition of the relationship between watercourse States adopted in article 2 did not explain the concept of an "international watercourse" except to state that "a 'watercourse' means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus". The use of the word "system" was intended, however, to cover a number of different components of the hydrological system through which water flowed, including rivers, lakes, aquifers, glaciers, reservoirs and canals. So long as those components were interrelated, they formed part of the watercourse by virtue of being a unitary whole. The definition in article 2 (b) also referred to "flowing into a common terminus" as another criterion for determining an international watercourse. Again, that criterion was essentially included to delimit the scope of the draft articles and thus to limit the legal relationship between two or more watercourse States. That criterion had been slightly modified on second reading with the addition of the word "normally" in response to the submission that some rivers divided themselves into surface waters and groundwaters before reaching the sea and therefore might not be regarded as having met the criterion of "flowing into a common terminus". In

the view of the same representative, by including the word "normally" the Commission had made it clear that the burden of proof lay upon States which wanted to apply the current draft articles to regulate rivers not flowing into a common terminus on the ground that there existed a physical relationship and a unitary whole for the major part of the length of the watercourses.

212. According to one representative, by the definition contained in article 2 (b) that a watercourse was a system of surface waters and groundwaters constituting a unitary whole and flowing into a common terminus, confined groundwater would thus be excluded from the draft articles. While that approach was understandable, confined groundwater should be included, to the extent that its utilization had repercussions on the system. The alternative, proposed in the draft resolution on confined transboundary groundwater, was not, in his view, an ideal approach to the question.

Article 3 (Watercourse agreements)

213. One representative stated that, according to paragraph (2) of the commentary to draft article 3, the Commission expressly recognized that optimal utilization, protection and development of a specific international watercourse were best achieved through an agreement tailored to the characteristics of that watercourse and to the needs of the States concerned. He firmly believed that the establishment of a legal regime regulating the non-navigational uses of an international watercourse should be left to the discretion of the States concerned.

214. Another representative expressed the view that according to the commentary, the words "to a significant extent" in article 3, paragraph 2, had been chosen in order that the effect of the action of one watercourse State on another watercourse State could be measured by objective evidence. Yet the requirement of objective evidence was not reflected in the actual wording of article 3. It was considered that a precise definition, based on objective criteria, of what was meant by the words "to a significant extent" was needed; it was particularly important because that was one of the key phrases in the draft text which was also included in article 7.

215. With regard to article 3, paragraph 3, on consultations with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements, one representative considered that the negotiating process itself should be obligatory. That view, according to her, was borne out by paragraphs (18) and (20) of the commentary to article 3, which contained a discussion of the decision in the Lake Lanoux case.

Article 4 (Parties to watercourse agreements)

216. According to one representative, article 4, paragraph 1, should also include an obligation for watercourse States participating in consultations, negotiations or the drafting of a watercourse agreement to notify other watercourse States as soon as possible if the watercourse might be affected to a significant extent by an existing or proposed use.

217. Another representative considered that the need was not entirely clear for the restriction under article 4 that in order for a watercourse State to participate in consultations and negotiations relating to a proposed watercourse agreement, implementation of the agreement would have to affect "to a significant effect" the use of water by that State. In her view, any adverse effect on the use of water by a State which arose from a proposed watercourse agreement should entitle that State to participate in the negotiations.

218. The view was expressed by one representative that since the future convention on the topic was envisaged by the Commission as an umbrella convention, apart from part II (General principles), the draft articles should be viewed as being of a dispositive nature. The possibility for watercourse States to become parties to watercourse agreements would, in her view, contribute to the strengthening of cooperation between watercourse States and thus diminish the likelihood of disputes. Viewed from this standpoint, she believed that draft article 4, paragraph 2, was not clear and should be carefully reconsidered before its final adoption.

Part II (General principles)

219. A number of representatives expressed the view that part II of the draft was the core of the text. In particular, they considered that the principle of "equitable and reasonable utilization" and the "due diligence" obligation not to cause significant harm were well grounded in State practice and in general international law. In their view, the Commission had struck the necessary balance between the two principles, thus guaranteeing optimal utilization by watercourse States, which was the main objective of the draft.

Article 5 (Equitable and reasonable utilization and participation)

220. One representative expressed agreement with the Commission that the counterpart of the concept of equitable and reasonable use was that of protection of international watercourses. In his view, the principle of the balance of interests, as embodied in draft article 5, was the cornerstone of any international watercourse regime, especially as applied to small countries which had larger, more powerful neighbours.

221. According to another representative, the principle of equitable and reasonable utilization and participation, enshrined in article 5, should be understood as a balancing factor between the watercourse State's sovereignty over its portion of an international watercourse and the legitimate uses and interests of other watercourse States. She endorsed the view expressed in the commentary that the principle of optimal utilization did not necessarily mean the "maximum" use of a watercourse, but the most economically feasible and, if possible, the most efficient one, since an international watercourse was not an inexhaustible natural resource.

222. The view was expressed by some representatives that article 5, paragraph 1, should further refine the concept of optimal utilization and benefits, and should explicitly introduce the principle of sustainability.

Article 6 (Factors relevant to equitable and reasonable utilization)

223. One representative proposed the inclusion in article 6, paragraph 1, of a subparagraph referring to a balance between the benefits and the harm that a new use or a change in an existing use might bring for the watercourse States. Furthermore, in article 6 (1) (g), the expression "of corresponding value" might be clarified, or replaced by the idea of other viable alternatives having a comparable cost-effectiveness ratio.

224. A proposal was made to include in article 6, paragraph 2, an obligation to negotiate having regard to the factors set forth in paragraph 1, with a view to establishing what was equitable and reasonable in any given case. Furthermore, the proposal was made to delete from paragraph 2 the phrase "when the need arises", since it was considered desirable that consultations should take place in every case. Otherwise, a State might consider by itself that its utilization of the watercourse was equitable and reasonable, which might then cause significant harm to other watercourse States.

225. According to another representative, while article 6, paragraph 2, stipulated that watercourse States should, when the need arose, enter into consultations in a spirit of cooperation, bearing in mind the principle of equitable and reasonable utilization of international watercourses, the criteria for equitable and reasonable utilization, enumerated in article 6, paragraph 1, mainly concerned the so-called horizontal conflicts of utilization, namely, where the parties involved were using the watercourse for similar purposes. There were no provisions for dispute settlement between parties using a watercourse for different purposes, although an attempt had been made in article 10, paragraph 2, to offer a procedural solution. The proposal was therefore made to provide substantive guidelines to supplement the procedural solution and make the outcome of the dispute more predictable.

226. One representative, while questioning the ability of the draft articles to provide adequate environmental protection for international watercourses, wondered in particular whether the emphasis on optimal utilization did not overshadow the objective of leaving a watercourse in a pristine state. As social and economic development required a sustainable environment, he preferred a better balance between utilization and protective measures. He proposed that, in addition to the factors relevant to equitable and reasonable utilization listed in article 6, other factors must be included to promote sustainable use and provide for the protection of the watercourse, similar to those in article 5 of the Helsinki Rules.

Article 7 (Obligation not to cause significant harm)

227. Several representatives commented on the provisions of draft article 7. A number of representatives noted that draft article 7 and its relationship to draft articles 5 and 6 were the heart of the matter, and that the way found by the Commission to make the two principles - the obligation not to cause significant harm as against equitable and reasonable utilization and participation - seemed an ingenious solution to a most difficult problem.

228. Some representatives expressed the view that the obligation of watercourse States not to cause significant harm to other watercourse States, which was an important manifestation of the basic principle sic utere tuo ut alienum non laedas, had been formulated as an obligation of behaviour and not of result, by requiring that watercourse States exercise "due diligence". They believed that though the juridical concept involved was vague, the introduction of the idea of due diligence deserved support, given the impossibility of establishing more precise criteria. They found the reference to the principle of equitable and reasonable use in the same article also to be appropriate, as it implied that the obligation not to cause significant harm was subordinate to that principle.

229. One representative noted with satisfaction that the concept of due diligence, which was the core of the provision, was also embodied in the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. 3/ In his view, it was important to understand the basis for the use of that term. He noted that in paragraphs (5) and (6) of its commentary to article 14 of the draft articles on international liability, the Commission stated that due diligence was manifested in reasonable efforts by a State to inform itself of factual and legal components that related foreseeably to a contemplated procedure and to take appropriate measures in a timely fashion to address them; and further, that the standard of due diligence against which the conduct of a State should be examined was that which was generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. In his view, those concepts should further be thoroughly explored.

230. One representative proposed that, prior to the implementation of measures which could be harmful to an international watercourse, an environmental impact study should be carried out and an agreement negotiated with other States likely to be affected. It was proposed that draft article 7 should therefore be reworded to include that obligation.

231. The same representative also stated that whenever a State which used an international watercourse knew in advance that such use might cause significant harm, that State should be required to suspend the harmful activity, pay compensation and negotiate with the affected State or States with a view to adopting the measures required to enable the activity to continue without causing harm.

232. Some representatives stated that the change introduced into article 7 had destroyed a compromise solution which had been arrived at after many years of work. As a result, everything depended on the notion of "due diligence", and a State could legally cause significant harm to other watercourse States provided that it did so within the limits of that "due diligence". In the current version, what counted was diligent action, a subjective element, rather than the objective element of significant harm. In their view, by applying the due diligence test, the Commission had taken the position that a State was not strictly responsible for its conduct or for damage resulting from activities

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3/ See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), chap. V.

under its sovereignty. It was also noted that the draft articles were silent with regard to watercourse States' liability for damage. For these reasons, it was proposed that the new version should be rejected in favour of the previous version.

233. According to some representatives, paragraph 2, and in particular subparagraph (b), should be interpreted to mean that the harm caused should be eliminated or mitigated, and compensation for it should be compulsory if circumstances so warranted. Moreover, according to them, the "no harm" principle was especially important in connection with articles 20 and 21 of the draft. That link, they said, as well as the link between article 5 and the two articles mentioned above, had been reaffirmed by recent developments in treaty law, in particular the Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Both the Convention and the Rio Declaration on Environment and Development stressed environmental protection and went so far as to rule out lack of scientific certainty as grounds for postponing action to prevent damage to the environment.

234. Another representative expressed the view that the obligation set forth in article 7 did not prejudice questions of liability. She also welcomed the fact that paragraph 2 (b) of that article mentioned the possibility of compensation for harm caused in spite of the exercise of due diligence.

235. The view was expressed by one representative, with regard to the balance between articles 5 and 7, that reasonable and equitable utilization of a watercourse should be subject to the obligation to ensure that any particular use was sustainable. He suggested that a review of those articles should be made to reflect the principles of sustainable development. In his view, those concerns could be dealt with without affecting the integrity of the proposed regime.

Article 8 (General obligation to cooperate)

236. One representative expressed the view that article 8 enshrined a well-established practice on cooperation between States.

237. Another representative proposed that article 8 should include the principles of good faith and good-neighbourliness.

Article 9 (Regular exchange of data and information)

238. As in article 8, one representative believed that article 9 also enshrined a well-established practice on exchange of information between States.

239. Another representative stated that ensuring respect for the principle of the common responsibility of all watercourse States was the fundamental aim of the draft articles. For that reason, he proposed that article 9 should be elaborated further.

Article 10 (Relationship between different kinds of uses)

240. The view was expressed by one representative that article 10 required special attention, stipulating as it did that no use of an international watercourse enjoyed inherent priority over other uses. Although the text admittedly stated that special regard should be given to the requirements of vital human needs, she preferred the point to be made with more emphasis, given the fact that drinking-water was a basic need closely related to the right to life.

241. With reference to paragraph 2, one representative proposed that it might be useful to include a reference to the required procedures for arriving at a settlement of the conflict, and to provide for the obligation of negotiations.

Part III (Planned measures)

242. One representative proposed that the draft articles should provide for an obligation to carry out studies of the possible effects of planned measures upon the current or future uses of an international watercourse and to transmit the results of such studies to other watercourse States.

Article 12 (Notification concerning planned measures with possible adverse effects)

243. According to one representative, the State which implemented the planned measures should not have sole discretion in determining whether they might have a significant adverse effect upon other watercourse States.

244. Another representative welcomed the consultation mechanism elaborated in articles 12 and following. However, he wondered whether those procedures met the criteria for a fair trial and whether they might lead to delays which could have adverse effects, including infringement of civil rights.

Article 16 (Absence of reply to notification)

245. One representative considered that the draft articles had established a balanced relationship of rights and obligations for those States notifying others about the possible effects on watercourses of the measures they might take and for those States being notified about such measures.

Article 17 (Consultations and negotiations concerning planned measures)

246. One representative proposed that article 17, paragraph 3, should provide for suspension of the planned measures until such time as an agreement establishing a deadline for negotiations was reached; if no solution was found, recourse could be had to other methods of peaceful settlement, including court settlement, if necessary.

Article 18 (Procedures in the absence of notification)

247. One representative stated that he shared the same considerations as those regarding article 17, paragraph 3, which should also be applied to article 18, paragraph 2.

Article 19 (Urgent implementation of planned measures)

248. With regard to paragraph 2 of article 19, one representative stated that, in lieu of the formal declaration referred to in that paragraph, it would be preferable to notify all watercourse States so that each of them could evaluate the extent to which it had been affected. Once the state of urgency had passed, the State which implemented the measures should negotiate a final solution to the problem in cooperation with other watercourse States. Furthermore, the State which implemented the measures should provide other watercourse States with compensation for any harm which might have been caused. In addition, any watercourse States, especially those which were notified, should be entitled to inspect the works being carried out in order to determine whether they were in conformity with the plans submitted.

Part IV (Protection, preservation and management)

249. Regarding part IV of the draft, one representative noted with satisfaction that the provisions relating to the protection, preservation and management of the ecosystems of international watercourses were in keeping with the integrated approach to water resources management and environmental protection endorsed by the United Nations Conference on Environment and Development and reflected in Agenda 21.

Article 20 (Protection and preservation of ecosystems)

250. One representative proposed replacing the word "or" by "and" in the phrase "individually or jointly".

251. According to one representative, it would be useful to refer to the principle of environmental non-discrimination, in other words, that watercourse States should not make a distinction between their environment and that of other watercourse States in respect of the drafting and application of legislative and regulatory provisions concerning prevention of and compensation for pollution. It was further proposed that the draft should also provide for the liability of the State which polluted an international watercourse and should bar States from invoking immunity from jurisdiction in case of harm caused by the use of an international watercourse.

Article 21 (Prevention, reduction and control of pollution)

252. Similar to a proposed amendment of article 20, in paragraph 2 of article 21 one representative suggested replacing the word "or" by "and" in the phrase "individually or jointly".

Article 23 (Protection and preservation of the marine environment)

253. A number of representatives stated that, in view of increasing threats to the marine ecosystem and its related food resources, the international community urgently needed to protect the marine environment, in particular from land-based pollution, which accounted for a major part of marine pollution. They referred to article 192 of the United Nations Convention on the Law of the Sea, which stipulated that States had the obligation to protect and preserve the marine environment. Article 23 of the draft articles on international watercourses carried the obligation for watercourse States not to pollute the marine environment. However, that obligation applied only to States in whose territory part of an international watercourse was situated and did not apply to States through whose territory watercourses ran on their way to the sea. In the view of the same representatives, the latter States might gain an unfair advantage from regulations relating to land-based pollution. For that reason, it was said, article 23 should be eliminated entirely.

254. One representative expressed concern over the provisions of article 23 which, according to him, introduced the long-distance water pollution approach to the use of international watercourses. In his view, according to international legal theory and State practice, States' obligations with regard to transboundary harm on the one hand and long-distance pollution on the other differed. Apart from article 23, the draft articles basically applied to transboundary effects caused by one watercourse State on another. He found it problematic that under the provisions of draft article 23, a watercourse State which was not necessarily a coastal State of the sea area where the common terminus flowed, or even a land-locked State, faced the possibility of having to take part in measures to protect or preserve the marine environment.

Article 24 (Management)

255. According to one representative, cooperation among watercourse States would ensure their own protection and would maximize benefits for all the watercourse States concerned. He believed therefore that article 24 was intended to facilitate consultations between States on the management of international watercourses, including the establishment of a joint organization or other mechanisms. While endorsing the provisions of article 24, he noted that multilateral and bilateral commissions for managing international watercourses were, moreover, on an increase in developing countries.

Article 28 (Emergency situations)

256. One representative expressed the view that there should be more detailed rules on assistance to watercourse States affected by an emergency situation and that effective contingency planning should be an essential part of any environment-oriented agreement.

Article 29 (International watercourses and installations in time of armed conflict)

257. One representative endorsed the inclusion in the draft articles of provisions on international watercourses and installations in time of armed

conflict. In his view, those provisions should also be applied to cases of reprisals in time of war.

Article 32 (Non-discrimination)

258. According to one representative, the provisions of article 32 dealing with non-discrimination appeared to be based on those contained in the International Covenant on Civil and Political Rights. In his view, not only must non-discrimination be guaranteed, but the right of all persons to have immediate and swift access to judicial procedures in the courts of their own countries as well as to those in other countries, must also be ensured.

259. Another representative stated that the principle of non-discrimination in favour of foreign nationals had no place in the proposed convention, even if there was some justification for redressing injury to foreign nationals, since the draft articles essentially concerned the relationship between co-riparian States. Moreover, he said, where planned measures were involved for the development of a State, any priorities concerning the utilization of its natural resources should be confined to matters of policy and the interests of the nationals of that State.

Article 33 (Settlement of disputes)

260. Many representatives considered it most fitting that the Commission had proposed rules relating to the settlement of disputes, particularly because the use of freshwater was often subject to intense disagreements. They also found the mechanism for initiating the settlement process satisfactory. Moreover, according to the same representatives, all multilateral law-making treaties concluded under the auspices of the United Nations should encompass an effective and expeditious dispute settlement procedure. On the whole, it was observed, the Commission had done an excellent job of codifying existing law on the subject and fostering its progressive development.

261. According to some representatives, the dispute settlement procedure would be even more effective if States were encouraged to submit their disputes to binding arbitration. Such an approach would also have a preventive effect in that States would be more willing to conform to legal requirements if they were aware that other States could resort to binding third-party settlement procedures. It was therefore proposed to reformulate the draft article in such a way as to provide for mandatory recourse to methods of peaceful settlement leading to the solution of a dispute.

262. Some representatives supported, in particular, the inclusion of provisions relating to fact-finding, and also endorsed the provisions which required States to settle disputes initially through consultations and negotiations and which, where such efforts failed, provided States with recourse to various legal procedures.

263. Other representatives stated that, while they welcomed the inclusion of provisions on settlement of disputes, they would have preferred for the Commission to have concentrated more on existing settlement procedures rather than the time-consuming procedure of establishing a fact-finding commission. It

was felt that the current wording of draft article 33, according to which the findings of such a commission were not binding on the parties and the other procedures mentioned, required the agreement of all the parties to the dispute, represented a step backward, especially in an area as subject to litigation as that of the allocation of natural resources.

264. One representative expressed the view that, given the extraordinary importance attributed by draft article 3 to "watercourse agreements", the Commission ought not to have ignored the fact that many similar agreements already in force contained more effective dispute settlement clauses than those proposed by the draft articles. In his view, the Commission should also have included in article 33 some obligation to include dispute settlement provisions in watercourse agreements.

265. One representative considered that, while making the establishment of a fact finding commission compulsory represented a step forward, the optional character of recourse to conciliation constituted a step backward with respect to the conventions on codification concluded in recent decades.

266. Another representative was of the view that a rule for a compulsory fact-finding commission comprising three members reflected the need for a comprehensive and compulsory dispute settlement procedure. Such an arrangement, in his view, required greater discussion and elaboration, even though the essence was that disputes should be resolved peacefully and by mutual agreement.
