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Report of the Working Group on the Draft Statute for an International Criminal Court

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Report of the Working Group on a draft statute for an international criminal court

A. INTRODUCTION

1. Pursuant to the decision taken by the International Law Commission at its 2298th meeting on 17 May 1993 to reconvene the Working Group on a draft statute for an international criminal court, 1/ the Working Group 2/ held 19 meetings between 17 May and 9 July 1993. 3/

2. The mandate given by the Commission to the Working Group was in accordance with paragraphs 4, 5 and 6 of General Assembly resolution 47/33 of 25 November 1992. In those paragraphs, the General Assembly had taken note with appreciation of chapter II of the report of the International Law Commission (A/47/10), entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction; had invited States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; and had requested the Commission to continue its work on the question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

1/ The Commission, at its two thousand three hundredth session, decided that the Working Group on the question of an international criminal jurisdiction should, henceforth, be called "Working Group on a draft statute for an international criminal court".

2/ The composition of the Working Group was as follows:

3/ This number does not include the meetings held by the various subgroups referred to in paragraph 5 below.

3. In performing its mandate, the Working Group had before it the report of the Working Group on the question of an international criminal jurisdiction included in the Commission's report at its previous session (A/47/10, Annex); the eleventh report of the Special Rapporteur on the topic "Draft Code of Crimes against the Peace and Security of Mankind", Minister Doudou Thiam (A/CN.4/449 and Corr.1 English only); the comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction (document A/CN.4/452 and Add.1); chapter B of the topical summary of the discussion held in the Sixth Committee of the General Assembly during the forty-seventh session, prepared by the Secretariat (A/CN.4/446); the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (document S/25704) and a compilation prepared by the Secretariat of draft statutes for an international criminal court elaborated in the past either in the framework of United Nations organs or by other public or private entities.

4. During the initial meetings, the Group, working as a whole, examined a series of draft provisions dealing with the more general and organizational aspects of a draft statute for an international criminal court, judges, Registrar, composition of chambers, etc., reaching, in many instances, a preliminary understanding on many of the draft provisions or at least on the basis on which a provision on those subject-matters could be drafted.

5. Subsequently, and in order to expedite its work, the Working Group decided to create three subgroups dealing, respectively and primarily with the following subject-matters:

I. Jurisdiction and applicable law

II. Investigation and prosecution

III. Cooperation and judicial assistance.

At a later stage, new subject-matters, identified as pertaining within the statute for an international criminal court, were also distributed among the various subgroups.

6. Further to the discussion of the reports of the various subgroups, which contained draft provisions on the various subject-matters allocated to them, the Working Group produced a preliminary and consolidated draft text for a statute which was submitted for further examination by the Working Group.

7. The preliminary consolidated text elaborated by the Working Group is divided into seven main parts: Part 1 dealing with the establishment and

composition of the court; Part 2 on jurisdiction and applicable law; Part 3 on investigation and commencement of prosecution; Part 4 dealing with the trial; Part 5 on appeal and review; Part 6 on international cooperation and judicial assistance and Part 7 on enforcement of penalties.

8. Some of the provisions or part of some provisions are still between square brackets because the Working Group could not yet find general agreement either on the contents of the proposed provision or on its formulation.

9. In numerous instances, the commentaries to the draft articles explain the special difficulties which the Working Group has encountered in drafting a provision on a given subject-matter, the various views to which it gave rise or the reservations which it aroused.

10. The Working Group feels that the views of the General Assembly would be particularly welcome on the points referred to in the preceding paragraph and it proposes that the Commission so indicate in its report to the General Assembly.

11. In laying down the general orientation of the draft statute, the Working Group was guided by the recommendations of the Commission at its preceding session and the report of its Working Group 4/ but also took into account the views expressed thereon by Governments either in the Sixth Committee 5/ or in their written comments. 6/

12. Following is the draft statute for an international criminal court prepared by the Working Group. It is understood that this is a preliminary version thereof; the Working Group intends to return to it, if reconvened by the Commission, at the Commission's next session.

4/ Official Records of the General Assembly, Forty-seventh session, Supplement No. 10 (A/47/10), para. 104 and Annex.

5/ A/CN.4/446, Chapter B.

6/ A/CN.4/452 and Add.1.

B. DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL AND COMMENTARIES THERETO

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DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL AND COMMENTARIES THERETO:

PART 1: ESTABLISHMENT AND COMPOSITION OF THE TRIBUNAL

Article 1

Establishment of the Tribunal

There is established an International Criminal Tribunal (hereinafter the Tribunal), whose jurisdiction and functioning shall be governed by the provisions of the present Statute.

Article 2

Relationship of the Tribunal to the United Nations

[The Tribunal shall be a judicial organ of the United Nations.]

[The Tribunal shall be linked with the United Nations as provided for in the present Statute.]

Article 3

Seat of the Tribunal

1. The seat of the Tribunal shall be established at ...

2. The [Secretary-General of the United Nations] shall, with the approval of [the General Assembly], conclude an agreement with the State of the seat of the Tribunal, which will regulate the relationship between that State and the Tribunal.

Article 4

Status of the Tribunal

1. The Tribunal is a permanent institution open to States parties and to other States in accordance with this Statute. It shall sit when required to consider a case submitted to it.

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

Commentary

(1) Part 1 of the draft statute, dealing with the establishment and composition of the Tribunal, may be considered, according to their subject-matter, in several groupings.

(2) Articles 1 to 4 refer to aspects closely linked to the nature of the Tribunal and deal with its establishment (article 1), its relationship with the United Nations (article 2), its seat (article 3) and its status (article 4).

(3) The purpose of the establishment of the Tribunal, contemplated in article 1, is to provide a venue for the fair trial of persons accused of crimes of an international character, in circumstances where other trial procedures may not be available or may be inadequate.

(4) The brackets around the two paragraphs of article 2 reflect two divergent views expressed in the Working Group, also reflected in the plenary discussion, 7/ of what the relationship of the Tribunal to the United Nations should be. While some members were in favour of the Tribunal becoming an organ of the United Nations, others advocated another kind of link with this Organization such as a treaty of cooperation along the lines of those between the United Nations and its specialized agencies, a separate treaty providing for the election of judges by the General Assembly, etc. It was generally believed that there would be advantage in at least some sort of a formal linking of the Tribunal with the United Nations, not only in the authority and permanence which the Tribunal would acquire thereby, but because a part of the Court's jurisdiction might depend upon decisions by the Security Council (see draft article 24). In this connection some members pointed out that such linkage might be conferred by the Tribunal's establishment as a subsidiary organ of the General Assembly, or in such other way as the United Nations might decide, and need not necessarily involve budgetary obligations for, or participation by, all Member States of the United Nations (see draft article 7 on election of judges).

(5) The bracketed portions of paragraph 2 of article 3 and the final language to be chosen are, of course, dependent on the solution to be adopted under article 2.

(6) For its part, paragraph 1 of article 4 reflects the virtues of flexibility and cost-reduction advocated by the report of the Working Group at the preceding session of the Commission. While the Tribunal is a permanent institution, it shall sit only when required to consider a case submitted to it (see article 36).

7/ See Report of the International Law Commission to the General Assembly on the work of its present session (A/48/10), supra, paras. _____ .

Article 5

Organs of the Tribunal

The Tribunal shall consist of the following organs:

(a) The Court, which shall consist of 18 judges elected in accordance with article 7;

(b) The Registry, appointed under article 12;

(c) The Procuracy, as provided in article 13.

Commentary

(1) Article 5 lays down the overarching structure of the international judicial system to be created, which is called "Tribunal" and its component parts, namely, the "Court" or judicial organ, the "Registry" or administrative organ and the "Procuracy", or prosecutorial organ. It was felt in the Working Group that, for conceptual, logistical and other reasons, the three organs had to be considered in the draft statute as constituting an international judicial system as a whole, notwithstanding the necessary independence which has to exist, for ethical and fair trial reasons, between the judicial branch (court) and the prosecutorial branch (procuracy) of that system.

(2) The name "Tribunal" was chosen for designating the international judicial system as a whole because of its well-established credentials in international criminal law, even though in some national criminal systems it might bring connotations of a court of a lower level, which is not, at all, the meaning which the word is given in the present draft statute.

(3) Special care was taken in various articles through the draft statute to refer, as the case may be, to the Tribunal as a whole, or to the Court, in particular.

Article 6

Qualifications of judges

The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Court, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 7

Election of judges

1. The judges shall be elected by majority vote of the States parties to this Statute.

2. Each State party to the Statute may nominate for election one person who possesses the qualifications specified in article 6, and who is willing and able to serve as may be required on the Court.

3. The election of judges shall be by secret ballot.

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

5. States parties should strive to elect persons representing diverse backgrounds and experience, with due regard to representation of the major legal systems.

6. Judges hold office for a term of 12 years and are not eligible for re-election. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.

7. At the first election, 6 judges chosen by lot shall serve for a term of 4 years and are eligible for re-election; 6 judges (chosen by lot) shall serve for a term of 8 years, and the remainder shall serve a term of 12 years.

Article 8

Judicial vacancies

1. In the event of a vacancy, a replacement judge may be elected in accordance with article 7.

2. Judges elected to fill a vacancy shall serve for the remainder of their predecessor’s term, and if that period is less than four years, are eligible for re-election for a further term.

Article 9

Independence of judges

In their capacity as members of the Court, the judges shall be independent. Judges shall not engage in any activity which interferes with their judicial functions, such as being a member of a Government or holding a post or exercising a profession which is likely to affect confidence in his independence. In case of doubt, the Court shall decide.

Article 10

Election of President and Vice-Presidents

1. The President, as well as the first and second Vice-Presidents, shall be elected by the judges.

2. The President and the Vice-Presidents shall serve for a term of three years or until the end of their term of office on the Court, whichever is earlier.

3. The President and the Vice-Presidents shall constitute the Bureau which, subject to this Statute and the Rules, shall be responsible for the due administration of the Court, and other functions assigned to it under the Statute.

4. The first or second Vice-President, as the case may be, may act in place of the President on any occasion where the President is unavailable or ineligible to act.

Article 11

Disqualification of judges

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

2. A judge who feels disqualified under paragraph (1) or for any other reason in relation to a case shall so inform the President.

3. The accused may also request the disqualification of a judge under paragraph 1.

4. Any question concerning the disqualification of a judge shall be settled by a decision of the majority of the chamber concerned.

Commentary

(1) Articles 6 to 11 deal with the first of the three organs making up the international criminal judicial system to be established, namely the Court. They deal with its composition and the way to achieve it as well as with the status of the judges and the Court’s Bureau and cover, in particular, the qualifications of judges (article 6); the election of judges (article 7), judicial vacancies (article 8), the independence of judges (article 9), the election of the Court’s President and Vice-Presidents (article 10) and the disqualification of judges (article 10).

(2) In connection with article 6 on qualifications of judges, it was understood, in the Working Group, that the notion of "qualifications required in their respective countries for appointment to the highest judicial offices" contained in the draft article, included the idea of having exercised judicial office in a criminal trial court, competent to try the most serious offences.

(3) As regards article 7, providing for the election of judges by majority vote of the States parties to the Statute, it originally contained in its paragraph 3 some terminology between brackets to the effect that the election would be conducted by [the Secretary-General of the United Nations] in accordance with a procedure laid down by the [General Assembly]. Given the lack of definition at this stage and as explained in the commentary to article 2 of the kind of link that the Court will have with the United Nations, the Working Group decided to delete those phrases.

(4) As to the relatively long period of 12 years for the term of office of the judges provided for in paragraph 6 of article 7, it was agreed in the Working Group that this should be considered as a sort of trade-off for the prohibition of their re-election. It was felt that, unlike judges of the International Court of Justice, the special nature of an international criminal institution advocated in favour of the non-re-election principle. The only exceptions are contained in paragraph 7 and article 8 (2) on judicial vacancies.

(5) In drafting article 9 on independence of the judges, the Working Group took into account on the one hand the desirability that such an independence be effectively ensured and, on the other hand, the fact that the projected court is not a full-time body and therefore, in accordance with article 17, judges are not paid a salary but only a daily allowance and expenses related to the performance of their functions. This is why article 9, without ruling out altogether the possibility that the judge may perform other salaried functions (as also contemplated in article 17 (3)), also endeavoured to define the criteria concerning activities which might compromise the independence of the judges and from the exercise of which the latter should abstain. In case of doubt, the Court shall decide.

(6) Article 10 on election of the President and the Vice-Presidents of the Court is important because they compose the Court’s Bureau which is given specific functions under the draft statute. Some members of the Working Group argued strongly that the Court should have a full-time President, who would

reside at the seat of the Court and be responsible under the Statute for its judicial functioning. Others stressed the need for flexibility, and the character of the Court as a body which would only be convened as necessary: in their view a requirement that the President be full-time might unnecessarily restrict the range of candidates for the position. It was agreed that the provision would not prevent the President becoming full-time if circumstances required it. The question concerning the possibility of election by postal ballot was discussed in the Working Group and not ruled out, but it was felt that this was a matter for the internal rules of court to decide.

(7) Article 11 on disqualification of judges contains, in its paragraph 1, the general grounds which should lead to the disqualification of a judge in any given case. It was understood in the Working Group that the words "in any case in which they have previously been involved in any capacity whatsoever" covered also the judge's participation in the same case as Prosecutor or defence lawyer. Paragraphs 2 and 3 of the draft article deal with who may initiate the disqualification process, namely the judge himself (para. 2) or the accused (para. 3). The decision, according to paragraph 4, always rests with the chamber concerned.

Article 12

Election of Registrar

1. On the proposal of the Bureau the judges of the Court shall elect the Registrar, by secret ballot, who shall be the principal administrative officer of the Court.

2. The Registrar:

(a) shall be elected for a seven year term;

(b) is eligible for re-election;

(c) shall be available on a full-time basis, but may with the permission of the Bureau exercise such other functions within the United Nations system as are not inconsistent with his office as Registrar.

3. The Bureau may appoint or authorize the appointment of such other staff of the Registry as may be necessary.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar, so far as possible in conformity with the United Nations Staff Regulations and Staff Rules and approved by the Court.

Article 13

The Procuracy

1. The Procuracy shall be composed of a Prosecutor, a Deputy Prosecutor and such other qualified staff as may be required.

2. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. They shall be elected by a majority vote of the States parties to this Statute from among candidates nominated by the States parties thereto for a term of five years and be eligible for re-election.

3. The State parties to the Statute shall, unless otherwise decided, elect the Prosecutor or Deputy Prosecutor on a standby basis.

4. The Prosecutor shall act independently, as a separate organ of the Tribunal. He or she shall not seek or receive instructions from any Government or any source.

5. The Prosecutor shall appoint [in consultation with the Bureau] such staff as are necessary to carry out the responsibilities of the office.

6. The Prosecutor, upon receipt of a complaint pursuant to article 28, shall be responsible for the investigation of the crime alleged to have been committed and the prosecution of the accused for crimes referred to in articles 22 and 26.

7. The Prosecutor shall not act in relation to a complaint involving a person of the same nationality. In any case where the Prosecutor is unavailable or disqualified, the Deputy Prosecutor shall act as Prosecutor.

Commentary

(1) Article 12 on appointment of the Registrar and article 13 on the Procuracy deal with the two other organs which compose the international judicial system to be established.

(2) The Registrar, who is elected by the Court, is the principal administrative officer of the Court and is, unlike the judges, eligible for re-election. He performs important functions under the Statute such as notifications, reception of declarations of the Court’s jurisdiction, etc. Article 12 regulates not only the election of the Registrar but also the appointment of the Registry staff and the rules which apply to the latter.

(3) As to the Procuracy, provided for in article 13 and composed of the Prosecutor, a Deputy Prosecutor and such other qualified staff as may be required, great emphasis has been placed in the Working Group in the sense that, although being an organ pertaining to the global international judicial system to be created, it should be independent in the performing of its functions and it should be separate from the Court's structure. This is why the article proposes that the election of the Prosecutor and Deputy Prosecutor be carried out not by the Court but by a majority of States parties to the Statute. It should however be noted that paragraph 4 also provides that the Prosecutor shall not seek to receive instructions from any Government or any source, as it acts, really, as a representative of the whole international community.

(4) The words [in consultation with the Bureau] in paragraph 5 are between brackets because some members felt that the need to consult with the Court's Bureau for appointing the Registry's staff might compromise the Prosecutor's independence.

(5) Paragraph 6 spells out the main functions of the Prosecutor, namely the investigation of the crime and the prosecution of the accused. Paragraph 7, however, in keeping with the preoccupation of the Working Group to preserve the Prosecutor's independence, provides that the Prosecutor shall not act in relation to complaint involving a person of his/her nationality.

Article 14

Solemn undertaking

Before first commencing to exercise their functions under this Statute, members of the Tribunal shall make a public and solemn undertaking to do so impartially and conscientiously.

Article 15

Loss of office

1. Judges shall not be deprived of their office unless, in the opinion of two thirds of the court, they have been found guilty of proved misconduct or in serious breach of this Statute.

2. Where the Prosecutor, the Deputy Prosecutor or the Registrar is found in the opinion of two thirds of the court, guilty of proved misconduct or in serious breach of this Statute, he or she shall be removed from office.

Article 16

Privileges and immunities

1. Judges shall enjoy, while performing their functions in the territory of States parties, the same privileges and immunities as those accorded to judges of the International Court of Justice.

2. Counsel, experts and witnesses shall enjoy, while performing their functions in the territory of States parties, the same privileges and immunities as those accorded to counsel, experts and witnesses involved in proceedings before the International Court of Justice.

3. The Registrar, the Prosecutor, and other officers and staff of the Tribunal shall enjoy, while performing their functions in the territory of the States parties the privileges and immunities necessary to the performance of their functions.

4. The judges may, by a majority revoke the immunity of any person referred to in paragraph 3 other than the Prosecutor. In the case of officers and staff of the Tribunal, they may do so only on the recommendation of the Registrar or Prosecutor, as the case may be.

Article 17

Allowances and expenses

1. The President shall receive an annual allowance.

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

3. The judges shall receive a daily allowance during the period in which they exercise their functions, and shall be paid for the expenses related to the performance of their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 9.

Article 18

Working languages

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

Commentary

(1) Articles 14 to 18 deal with aspects related to the beginning and end of the judges' functions, and to the work of the judges and the court and the performing of their functions. They deal with solemn undertaking (article 14), loss of office (article 15), privileges and immunities (article 16), allowances and expenses (article 17) and working languages (article 18).

(2) Article 14 on the solemn undertaking to be made by members of the Tribunal before first commencing to exercise their functions under the Statute is a provision heavily indebted to article 20 of the Statute of the International Court of Justice which provides for a similar obligation for members of that court.

(3) Article 15 on loss of office contains, in both its paragraphs, essentially the same provision for Judges, the Prosecutor, the Deputy Prosecutor or the Registrar, namely:

(a) removal from office due to proved misconduct;

or breach of the Statute, in cases in which

(b) a decision to that effect is taken by two thirds of the judges.

Some members observed that this provision differed from the corresponding article of the Statute of the International Court of Justice (article 18) which, in the case of a judge only accepted dismissal if, in the unanimous opinion of the other members of the court, he had ceased to fulfil the required conditions. One member, in particular, found it strange that the Prosecutor could be removed by an organ different from that which had elected him, and thought that this might compromise his independence before the court.

(4) Article 16 refers to the privileges and immunities of judges, counsel, experts and witnesses as well as the Registrar, the Prosecutor and other officers and staff of the Tribunal, while performing their functions in the territory of States parties to the court's statute. For the purposes of privileges and immunities, judges of the court are equated by article 16 to judges of the International Court of Justice, which according to article 19 of the Court's statute enjoy diplomatic privileges and immunities when engaged on the business of the Court. An equation with the International Court of Justice is also made in the case of counsel, experts and witnesses. In this connection, article 42 (3) of the Statute of the International Court of Justice states that the agents, counsel and advocates of parties before the court shall enjoy the privileges and immunities necessary to the independent exercise of their duties. The functional criterion is also used in paragraph 3 of draft article 16 for the privileges and immunities of the Registrar, the Prosecutor and other officers and staff of the tribunal, even though those privileges and immunities may be revoked by a majority of the judges on the recommendation of the Registrar or Prosecutor, as the case may

be. To ensure his independence, the immunities and privileges of the Prosecutor cannot be revoked.

(5) Article 17 on allowances and expenses reflects the fact that, while the proposed court would not be a permanent institution, its President, as explained in the commentary to article 10, may become full time, if circumstances require it. Hence the distinction between the daily or special allowance proposed for the judges and the vice-presidents and the annual allowance proposed for the President.

(6) Article 18 which makes English and French the working languages of the Tribunal should be read in conjunction with articles 38 and 43 1(f) and 2.

Article 19

Rules of the Tribunal

1. The Court may by a majority of the judges and on the recommendation of the Bureau, make rules for the functioning of the Tribunal under this Statute, including rules regulating:

(a) the conduct of pre-trial investigations, in particular so as to ensure that the rights referred to in articles 38 to 44 are not infringed;

(b) the procedure to be followed and the rules of evidence to be applied in any trial;

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

2. The Rules shall forthwith be notified to all States parties, and shall be published.

Article 20

Internal rules of the court

Subject to this Statute and to the Rules of the Tribunal, the court has the power to determine its own rules and procedures.

Commentary

(1) Both articles 19 and 20 deal with the making of rules. Article 19 refers to rules of the Tribunal relating to pre-trial investigations and the conduct of the public trial itself, and it involves matters concerning the respect of the rights of the accused, procedure, evidence, etc. Article 20, on the other

hand, refers to rules necessary for the internal functioning of the court, such as methods of work, ways to conduct the Court's internal sessions, etc.

(2) Great emphasis was placed by some members in the distinction between both kinds of rules and this position predominated in the Working Group. Some members, however, were unconvinced about the existence of a substantive difference between both kinds of rules.

(3) In connection with paragraph 1(b) of article 19, one member felt that the matter concerning the adoption of rules of evidence was too complex and involved enactment of substantive law. Therefore, it should, in principle, not be part of the Tribunal's competence. It was also observed by one member that a provision should be added to the article to the effect that in cases not covered by the Rules on procedure and evidence adopted by the Tribunal, the Tribunal should apply customary standards in this area. Some members felt that paragraph 1(b) was intended to cover the most fundamental rules and general principles concerning procedure and evidence.

(4) It was understood that article 20 also covered the power of each chamber to elaborate some procedures.

Article 21

Review of the Statute

A Review Conference shall be held, at the request of at least [...] States parties after this Statute has been in force for at least five years:

(a) To review the operation of this Statute;

(b) To consider possible revisions or additions to the list of crimes contained in article 22 by way of a Protocol to this statute or other appropriate instrument and in particular, the addition to that list of the Code of Crimes against the Peace and Security of Mankind, if it has then been concluded and has entered into force.

Commentary

The place of article 21 on "Review of the Statute" is still provisional. The article could be part of the final clauses of the statute.

Subparagraph (b) of the draft article is especially related to Section 2 on the Jurisdiction and applicable law as it would provide the basis for enlarging the strand of jurisdiction contained in article 22 (see following paragraphs) incorporating new conventions into its scope, including the draft code of crimes against the peace and security of mankind.

PART 2: JURISDICTION AND APPLICABLE LAW

Article 22

List of crimes defined by treaties

The Court may have jurisdiction conferred on it in respect of the following crimes:

(a) genocide and related crimes as defined by articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;

(b) grave breaches of:

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

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

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

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

(v) Protocol I additional to the Geneva Conventions of 12 August 1949 and relating to the protection of Victims of International Armed Conflicts of 8 June 1977, as defined by article 85 of that Protocol;

(c) the unlawful seizure of aircraft as defined by article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970;

(d) the crimes defined by article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971;

(e) apartheid and related crimes as defined by article 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973;

(f) the crimes defined by article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973;

(g) hostage-taking and related crimes as defined by article 1 of the International Convention against the Taking of Hostages of 17 December 1979;

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

Commentary:

(1) Part 2 of the draft Statute, dealing with jurisdiction and applicable law, is the central core of the draft statute. From the point of view of the crimes which may give rise to the court's jurisdiction, articles 22 to 26 lay down, basically, two strands of jurisdiction, which are based on a distinction drawn by the Working Group between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. An example of the first category of treaties is the International Convention against the taking of Hostages of 17 December 1979. Examples of the second category of treaties are the 1963 Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft (14 September 1963) as well as all treaties dealing with the combating of drug-related crimes, including the 1988 United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances (19 December 1988).

(2) Articles 22, 23 and 24 are devoted to the fist strand of jurisdiction mentioned above. The crimes and the treaties concerned under this strand of jurisdiction are listed in article 22. In the view of the Working Group, the two main criteria which led to considering the crimes contemplated in the treaties listed in article 22 as crimes under international law were (a) the fact that the crimes are themselves defined by the treaty concerned in such a way that an international criminal court could apply a basic treaty law in relation to the crime dealt with in the treaty and (b) the fact that the treaty created, with regard to the crime therein defined, either a system of universal jurisdiction based on the principle aut dedere aut judicare or the possibility that an international criminal tribunal try the crime, or both.

(3) Subparagraph (b) of article 22 does not include the 1977 Protocol II of the 1949 Geneva Conventions on Humanitarian Law because this protocol contains no provision concerning grave breaches.

(4) Article 22 does not list the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989 because this Convention is not yet in force. If the Convention came into force before the Statute is adopted, consideration could be given to adding the Convention to the list. The following wording would be appropriate:

(i) crimes related to mercenaries as defined by articles 2, 3 and 4 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989.

(5) As to drug-related crimes, including the crimes referred to in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, for the reasons expressed under (1) and (2) above, they have not been listed in article 22, even though the international criminal court may acquire jurisdiction in their respect under the other strand of jurisdiction contemplated in article 26 (2) (b).

(6) One member, for the reasons explained in the commentary to article 26, felt that the crimes dealt with in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances met all the characteristics to be included in the list of article 22. Some members also felt that the crime of torture as contemplated in the Convention against the Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment of 10 December 1984, also qualified for inclusion in that list.

Article 23

Acceptance by States of jurisdiction over crimes listed in article 22

1. A State party to this Statute may, by declaration lodged with the Registrar, at any time accept the jurisdiction of the Court over one or more of the crimes referred to in article 22.

2. A declaration made under paragraph (1) may be limited to:

(a) particular conduct alleged to constitute a crime referred to in article 22 or

(b) conduct committed during a particular period of time, or may be of general application.

3. A declaration may be made under paragraph (1) for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case six months notice of withdrawal must be given to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

4. A State not a party to this Statute may, by declaration lodged with the Registrar, at any time accept the jurisdiction of the Court over a crime referred to in article 22 which is or may be the subject of a prosecution under this Statute.

Commentary

(1) Article 23 deals with the ways and modalities in which States may accept the court's jurisdiction over crimes listed in article 22. Paragraphs 1, 2 and 3 deal with acceptance by State parties to the court's statute and to the respective treaties concerned. Paragraph 1 provides for the possibility of a general declaration very much along the lines of the optional clause contained in article 36 of the Statute of the International Court of Justice. Such declaration, according to paragraph 2, may be general or subject to certain limitations ratione materiae or ratione temporis. In the latter case, however, paragraph 3 provides for certain restrictions inspired by the principle of good faith.

(2) The system described above could be characterized as an "opting in" system whereby jurisdiction over certain crimes is not conferred automatically on the court by the sole fact of becoming a part to the Statute but, in addition, a special declaration is needed to that effect. The Working Group incorporated this system into the draft article because it felt that it was the one which best reflected the consensual basis of the Court's jurisdiction and best translated into a formulation the flexible approach to the Court's jurisdiction which characterized the recommendations of the Working Group at the Commission's previous session. Some members, however, would have preferred an approach which, in their views, would have rendered more meaningful the status of being a party to the Court's Statute. They advocated a system whereby a State, by becoming party to the Court's Statute, would automatically confer jurisdiction to the Court over the crimes listed in article 22, although they would have the right to exclude some crimes from such jurisdiction (opting out system). A proposal presented by one member in this connection read as follows:

"Article 23

1. A State party to this Statute may, by declaration lodged with the Registry, at any time accept the jurisdiction of the Court.

2. Unless otherwise specified, a declaration of acceptance under paragraph 1 shall be deemed to confer jurisdiction on the court with regard to all of the crimes listed in article 22.

3. A declaration of acceptance under paragraph (1) may be limited to: (the rest of the provision as in paragraphs 2, 3 and 4 of the draft)".

(3) Paragraph 4 of article 23 deals with the possible acceptance of the court's jurisdiction over the crimes referred to in article 22, by States parties to the respective treaties concerned which are not parties to the court's statute.

Article 24

Jurisdiction of the Court in relation to article 22

1. The Court has jurisdiction under this Statute in respect of a crime referred to in article 22, provided that the State or States identified in paragraph (2) have accepted under article 23 the jurisdiction of the Court over the suspect in relation to the crime.

2. The State or States referred to in paragraph (1) are:

(a) any State on whose territory the suspect is present, and which has jurisdiction under the relevant treaty to try the suspect for that crime before its own courts;

(b) in relation to a suspected case of genocide, any State party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 on whose territory the suspect is present;

(c) in any other case:

(i) any State with jurisdiction under the relevant treaty to try the suspect for that crime before its own courts, and, in addition

(ii) in the case where the suspect is present either on the territory of the suspect's State of nationality, or on the territory of the State where the alleged offence was committed, that State.

Commentary

(1) Article 24 spells out the States which have to accept the court's jurisdiction in a given case under article 22 for the Court to have jurisdiction, in other words, which States have to consent.

(2) In relation to article 24, the Working Group considered three possible alternatives ranging from a very broad one to a very narrow one.

(3) The broadest one was that any State party to the relevant treaty and which would have jurisdiction over the crime under the treaty, independently of whether it had custody of the accused, could commence proceedings before the court. This could have placed a very considerable stress on the transfer

provisions because the transfer provisions would have been the main way of getting the accused before the court. This of course, unless an extensive in absentia jurisdiction had been envisaged. But the Working Group was divided as to the desirability of an in absentia jurisdiction as reflected in the note under article 43 (h). For purposes of comparison, this alternative text, which the Working Group considered, is reproduced below:

"ALTERNATIVE A

The Court has jurisdiction over a prosecution under this Statute in respect of a crime referred to in article 22, provided that:

(a) in the case of genocide, a State party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;

(b) in any other case, a State with competence to try the accused for the crime before its own courts, has accepted under article 23 the jurisdiction of the Court over the person or persons concerned in relation to the crime."

(4) The narrowest form of jurisdiction would have required in every case the consent both of the State where the crime was committed and of the State of nationality of the accused. The Working Group felt that such a restrictive system was not in accordance with the object and purpose of the creation of an international criminal jurisdiction. Also for purposes of comparison, this alternative text, which the Working Group considered, is reproduced below:

"ALTERNATIVE B

The Court has jurisdiction over a prosecution under this Statute in respect of a crime referred to in article 21, provided that the State of which the suspect is a national, and the State in whose territory the crime is presumed to have been committed, have declared under article 22 that it recognizes the jurisdiction of the Court over the suspect in relation to the crime."

(5) The system which the Working Group recommends in article 24 is an intermediate system which places a considerable amount of emphasis on the State in whose territory the accused is found because the Working Group envisages that, primarily, the court's jurisdiction will function over accused persons who are actually before the court. Therefore, it is necessary, and politically realistic, that the jurisdiction of the court be tied to a procedure that would ensure that the accused is brought before the court in most cases.

(6) The article is based on the distinction whether the accused is or is not present in the territory of the State which, having in principle jurisdiction under the relevant treaty, wishes nevertheless to bring proceedings before the court.

(7) It is clear under paragraph 2 (a) and (b) of the draft article that, if the accused person is present in the territory of a State with jurisdiction under the relevant treaty to try the suspect for that crime under its own courts, and that State wishes to bring the case before the court, then the consent of that State suffices for the Court to have jurisdiction.

(8) In this connection, it was made clear in the Working Group that the phrase "over the suspect" in the fourth line of paragraph 1 was intended to cover both, cases of a general declaration of acceptance of the court's jurisdiction over a crime under paragraph 1 of article 23 and cases of a declaration limited to a particular conduct under paragraph 2 (a) of article 23. The phrase, therefore, should not be interpreted as requiring in all cases the consent of the State of nationality of the suspect, or of the State where the crime took place, neither as requiring always a specific consent with respect to each suspect.

(9) A special mention is made of the Genocide Convention in paragraph 2 (h) because unlike other treaties listed in article 22, the Genocide Convention is not based on the principle of universal jurisdiction (aut dedere aut judicare) but on the principle of territoriality. Article VI of said Convention provides that persons charged with genocide or any of the other acts enumerated in the Convention shall be tried by a competent tribunal of the State in the territory of which the act was committed. However, as a counterpart to the non-inclusion of the principle of universality in the Convention, article VI also provides that the above-mentioned persons could also be tried by such international penal tribunal as may have jurisdiction with respect to those contracting Parties which shall have accepted its jurisdiction. This can be read as an authority by States parties to it who are also parties to the Statute to allow an international criminal court to exercise jurisdiction over an accused who has been transferred to the Court by any State. The travaux of article VI support that interpretation. 8/

8/ See Report of the Ad Hoc Committee on Genocide, 5 April-10 May 1948 (ECOSOC Official Record 3rd year 7th session Supp. No. 6 (E/794, 1948) 11-12).

(10) The consent of the State which, having jurisdiction under the relevant treaty to try the suspect for that crime under its own courts, prefers nevertheless to initiate proceedings before the court, does not suffice for the court to have jurisdiction, only in the case in which the accused, not being in the territory of that State is, instead, present either on the territory of the suspect's State of nationality or on the territory of the State where the alleged crime was committed. In such a case, for the court to have jurisdiction, the consent of one or the other of those two States, as the case may be, is also necessary.

Article 25

Cases referred to the Court by the Security Council

1. Subject to paragraph (2), the Court also has jurisdiction under this Statute over cases referred to in Articles 22 or 26 (2) (a) which may be submitted to it on the authority of the Security Council.

2. A person may not be charged with a crime of or directly related to an act of aggression unless the Security Council has first determined that the State concerned has committed the act of aggression which is the subject of the charge.

Commentary

(1) Article 25, as clearly arises from its paragraph 1, does not constitute a separate strand of jurisdiction from the point of view of the kind of crimes which may give rise to the court's jurisdiction. It, rather, broadens the category of subjects which may bring to the court the crimes referred to in articles 22 and 26 (2), by providing the Security Council of the United Nations also with this right. The Working Group felt that a provision such as this one was necessary in order to enable the Security Council to make use of the Court, as an alternative to establishing tribunals ad hoc.

(2) Paragraph 2 sets out the relationship between the Security Council and the proposed international criminal court. The Working Group was of the view that, if an act of aggression occurs, the responsibility of an individual would pre-suppose that some State had been held to be guilty of aggression, and such a finding would be for the Security Council to make. The consequential issues of whether an individual could be indicted, as having acted on behalf of that State and in such a capacity as to have played a part in the planning and waging of the aggression would be for the Court to decide.

Article 26

Special acceptance of jurisdiction by States in cases not covered by Articles 22 or 25

1. The Court also has jurisdiction under this Statute in respect of other international crimes not covered by Articles 22 or 25 where the State or States identified in paragraph (3) notify the Registrar in writing that they specially consent to the Court exercising, in relation to that crime, jurisdiction over specified persons or categories of persons.

2. The other international crimes referred to in paragraph (1) are:

(a) a crime under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals;

(b) a crime under national law which gives effect to a provision of a multilateral treaty aimed at the suppression of such crimes, and which having regard to the terms of the treaty constitutes an exceptionally serious crime.

3. The State or States referred to in paragraph (1) are:

(a) in relation to a crime referred to in paragraph (2) (a), the State on whose territory the suspect is present, and the State on whose territory the act or omission in question occurred;

(b) in relation to a crime referred to in paragraph (2) (b), the State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts.

Commentary

(1) Article 26 lays down the second strand of jurisdiction referred to at the beginning of section 2 of the present draft statute, in the commentary to article 22 above. It allows States concerned to confer jurisdiction on the court in respect of other international crimes not covered by article 22 when they specially consent to the court exercising, in relation to that crime, jurisdiction over specified persons or categories of persons. The two categories of crimes envisaged by this article are contemplated in its paragraph 2.

(2) Paragraph 2 (a) refers to "crimes under general international law" and defines this category, probably for the first time in connection with individual responsibility, as "crimes under a norm of international law

accepted and recognized by the international community of States as a whole as being of such fundamental character that its violation gives rise to the criminal responsibility of individuals". This paragraph is intended to cover international crimes which have their basis in customary international law and which would otherwise not fall within the court's jurisdiction ratione materiae such as aggression, which is not defined by treaty, genocide, in the case of States not parties to the Genocide Convention, or other crimes against humanity not covered by the 1949 Geneva Conventions. It seemed inconceivable to the Working Group that, at the present stage of development of international law, the international community would move to create an international criminal court without including crimes such as those mentioned above, under the court's jurisdiction.

(3) Some members, however, expressed reservations on paragraph 2 (a). A possible alternative, which attracted some support in the Working Group, would be to delete paragraph 2 (a) and to cover the problem by Article 25, that is to say by allowing such crimes to be referred to the Court by the Security Council. In the case of the crime of aggression, this would be a solution which took account of the fact that a determination of aggression by a State, which would be a pre-condition to individual responsibility of those engaged in the planning or waging of a war of aggression, would in any event rest with the Security Council. Moreover, this would not be inconsistent with the Nuremberg Judgment, which considered crimes against humanity only to the extent that such crimes were linked to crimes against the peace (aggression) or war crimes proper. If this solution were adopted Article 25 would have to read "over cases of the kind referred to in Articles 22 or 26, or over crimes under general international law, which may be submitted ..."

(4) The other category of crimes contemplated by article 26 is contained in paragraph 2 (b) and is related to the distinction referred to in paragraphs 1 and 2 of the commentary to article 22, between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. The latter category is defined by the paragraph as "a crime under national law which gives effect to a provision of a multilateral treaty aimed at the suppression of such crimes, and which having regard to the terms of the treaty constitutes an exceptionally serious crime".

(5) Given the process whereby the question of the possible creation of an international criminal court was sent by the General Assembly to the International Law Commission, the Working Group believes it is especially important to note that this is the provision through which the international criminal court could acquire jurisdiction to deal with drug-related crimes. It is also to be noted, however, that in order to prevent the court from being overwhelmed with minor cases, the subparagraph has placed a limit, by restraining the category to crimes which "having regard to the terms of the treaty constitute(s) an exceptionally serious crime".

(6) One member of the Working Group expressed serious reservations with regard to this approach which included drug-related crimes in a separate strand of jurisdiction from those crimes contemplated by article 22. In his view, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988, could be equated to the Conventions listed in article 22 of the draft Statute under any of the following criteria: (a) The constitution of the offence as a crime under international law; (b) the provisions designed to make the offence punishable under internal law; (c) provisions concerning jurisdiction over the crime by States other than those in whose territory the crime was committed; (d) provisions requiring prosecution and trial of the offender present in the State's territory if the latter decides not to extradite (aut dedere aut judicare) and (e) provisions concerning extradition and mutual legal assistance. In view of the foregoing, this member advocated in favour of the inclusion of the above-mentioned 1988 Convention in the list contained in article 22. Other members disagreed mainly on two grounds: (a) drug-related crimes referred to in the 1988 Convention were not sufficiently defined in the Convention for them to constitute a basic treaty law to be applied directly by the Court without reference to national law, and (b) the obligation to try or extradite provided for in the 1988 Convention would function not simply on the basis of the sole operation of the Treaty provisions but only between parties which would have made crimes referred to in the Convention punishable under their internal laws.

(7) As to the consent of which State or States is required for the jurisdiction of the court to be effective under article 26, two different criteria have been recommended by the Working Group. For crimes under national law which give effect to a provision of a multilateral treaty aimed

at the suppression of such crimes, the criterion recommended is the same as that of article 22 (2) (a), namely the only consent required for the court to have jurisdiction is that of the State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts.

(8) More restrictive is the criterion recommended as regards crimes under general international law. In this case, the Working Group recommends that both the consent of the State on whose territory the suspect is present and that of the State on whose territory the act or omission in question occurred be required, for the court to have jurisdiction.

Article 27

Applicable law

The Court shall apply:

(a) this Statute;

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

(c) as a subsidiary source, any applicable rule of national law.

Commentary

(1) The first two sources of applicable law mentioned by the draft article are this Statute and applicable treaties. It is understood that, in cases of court's jurisdiction on the basis of article 22, the indictment will specify the charges brought against the accused by reference to particular treaty provisions, which will, subject to the Statute, be the basic elements in any prosecution.

(2) The mention of the rules and principles of general international law is particularly relevant in the light of paragraph 2 (a) of article 26. Furthermore, it is also understood that the expression "rules and principles of general international law" include "general principles of law", so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.

(3) The mention in the draft article of "any applicable rule of national law" also acquires special importance in the light of paragraph 2 (2) of article 26.
