UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/AC.244/1
20 March 1995
ORIGINAL: CHINESE/ENGLISH/
FRENCH/RUSSIAN/
SPANISH

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

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

Report of the Secretary-General

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I. INTRODUCTION

1. By its resolution 49/53 of 9 December 1994, the General Assembly, after noting that the International Law Commission had adopted a draft statute for an international criminal court at its forty-sixth session, 1/ decided to establish an Ad Hoc Committee to review the major substantive and administrative issues arising out of the draft statute prepared by the Commission, invited States to submit to the Secretary-General, before 15 March 1995, written comments on the draft statute, and requested the Secretary-General to invite such comments from relevant international organs.

2. The Secretary-General accordingly invited all States, by a note dated 23 December 1994, to submit written comments on the draft statute by 15 March 1995. He addressed a similar invitation, on 13 December 1994, to the President of 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 to the Director-General of the United Nations Office at Vienna with the request that the invitation be forwarded to the Crime Control and Criminal Justice Branch and any other unit within the Centre for Social Development and Humanitarian Affairs which might usefully contribute to the work of the Ad Hoc Committee.

3. The comments which had been received by 20 March 1995, further to the Secretary-General's invitation are reproduced below.

II. COMMENTS FROM STATES

BELARUS

[Original: Russian]

[7 March 1995]

1. Belarus firmly supports the establishment of an effective international organ to administer criminal proceedings which would make it easier to achieve substantial progress in creating a system of international criminal justice. This position has consistently been advanced in the written comments of Belarus, first, on the draft Code of Crimes against the Peace and Security of Mankind, which was adopted by the International Law Commission on first reading, and subsequently on the report of the Working Group on the question of an international criminal jurisdiction. The comments of Belarus on these matters appear in documents A/CN.4/448 and A/CN.4/452/Add.1 respectively.

2. Belarus welcomed the adoption by the General Assembly at its forty-eighth session of resolution 48/31 in which the Assembly, inter alia, requested the

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1/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), para. 88.

International Law Commission to continue its work on the elaboration of a draft statute for an international criminal court as a matter of priority, and it submitted its written comments on the first draft statute formulated by the Working Group on a draft statute for an international criminal court. Those comments appear in document A/CN.4/458.

3. Belarus welcomed the adoption by the General Assembly at its forty-ninth session of resolution 49/53 and, pursuant to paragraph 4 thereof and in amplification of its earlier comments, it submits the following comments on the revised draft statute. The order in which the comments are presented corresponds to the order in which the various issues are dealt with in the draft statute.

4. The revised draft includes a preamble, the contents of which demonstrate that the debate about the method of establishing the court has resulted in the choice of the best method, namely the conclusion of an international treaty. While Belarus supports this approach on the whole, it wishes to draw attention to the contents of the preamble, and particularly to the final provision thereof. The preamble should naturally reflect the close interconnection between the international criminal court and national judicial organs. But, at the same time, the complementarity and interaction of international and national jurisdictions should be stressed. The court has its own function, namely to conduct proceedings in respect of international crimes, and in so far as this function is concerned it is on an equal footing with national jurisdictions. This would seem to be the proper purpose of the proposed court.

5. Part 1 of the draft statute, dealing with the establishment of the court, merits its adoption. It is clear from its contents that the main difficulties connected with this question arise from the references made therein to the conclusion of agreements. Belarus therefore welcomes the provision in article 2 which states that any agreement concluded between the court and the United Nations is subject to the approval of the States parties to the statute. States may thus have some influence on the contents of the agreement. The approval procedure is, however, unclear at the present time. Obviously, a draft agreement would have to be discussed at a conference of States parties and approved by a decision of that conference (in accordance with the rules of the court). This issue should be sufficiently clarified by the time the statute is adopted.

6. The wording of article 2 should be tightened up; the conclusion by the President of an agreement with the United Nations on behalf of the court is not a matter of free choice, but an obligation. The same comment applies to article of the draft statute.

7. Part 2 of the draft statute is devoted to organizational and administrative matters. It is an interesting idea that the court should be composed of individuals with different areas of expertise: either criminal trial experience or competence in international law. The reason for this decision is clear: there are very few experts who satisfy both these criteria and it is doubtful whether this condition can be met in practical terms. This will inevitably lead to a gradation of judges. Difficulties will arise in connection with the constitution of chambers and the need to ensure a balance of criminal law

experts and international lawyers, especially in cases where some judges are disqualified. This matter requires further discussion, but the decision set out in article 13 of the statute of the International Tribunal for the former Yugoslavia seems more promising. Judges of the international criminal court should satisfy both requirements: they should possess experience in both criminal and international law, especially in international humanitarian law and human rights law.

8. Article 6 should include a mandatory provision stipulating that the panel of judges as a whole should represent the main forms of civilization and the principal legal systems of the world.

9. Part 3, which deals with matters affecting the jurisdiction of the court, constitutes the core of the draft.

10. Belarus welcomes the fact that genocide is singled out as a crime in respect of which acceptance of the court's jurisdiction is inherent in participation in the statute. This has, however, been based on the Genocide Convention of 1948. Clearly, the regime stipulated by that Convention does not apply to States which are not parties to it. And a State which is not a party to the Convention will not be bound by the provisions of the so-called "inherent jurisdiction"/"compétence propre" of the court in the event that it fails to comply with the statute. These provisions are, however, designed to ensure that all States parties are placed under such an obligation by the mere fact of becoming parties to the statute. The basis for the court's jurisdiction in respect of genocide should therefore be the statute itself rather than the Convention.

11. A similar regime could be established in respect of the crimes indicated in article 20, paragraphs (b) to (d).

12. In order to establish the court's jurisdiction in relation to crimes under general international law, all such crimes, including genocide, should be defined in the statute itself. A clear definition of such crimes is a sine qua non in efforts to curb criminal activity. From this perspective, it would seem appropriate to follow the example of the statutes of ad hoc tribunals in which the crimes falling within their jurisdiction are defined by general reference to a treaty source (for example, in the case of the crimes referred to in article 20, paragraph (c), the source is the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts and Additional Protocols I and II thereto) and/or reference to a non-exhaustive list of offences falling within the category of crimes in question.

13. By analogy with the provisions of the statutes of ad hoc tribunals established by the Security Council, it might be possible to establish the preferential jurisdiction of the court with respect to such crimes. Specifically, the court could be entitled to require, in accordance with the statute and rules of procedure, that national courts should refer a case to the international criminal court for consideration if the offence which gave rise to the institution of proceedings is regarded as a criminal offence of a general nature, if the national court is not independent or impartial or if proceedings have been initiated with a view to exempting a suspect from international

criminal liability. The adoption of such a proposal would require some changes in the powers of the Procuracy, which should be the initiator of such a referral on the basis of information collected beforehand, and also the powers of the Trial Chambers.

14. The list referred to in article 20, paragraph (e), seems incomplete. It could be extended by including the 1977 Additional Protocol II. Recent events have shown that most serious violations of international humanitarian law currently occur in armed conflicts of a non-international character.

15. Article 21, paragraph 1 (b), is noteworthy in that it establishes a category of States which must accept the jurisdiction of the court in order for it to exercise that jurisdiction. On this issue, Belarus prefers the previous arrangement set out in article 24 of the 1993 draft, namely, that the court may exercise jurisdiction (in other words be competent) if the court's jurisdiction with respect to a particular crime is accepted by the State in whose territory the suspect is present. This obviously means the State having jurisdiction with respect to a particular crime, but since the international criminal court exercises universal jurisdiction with respect to practically all crimes falling within its competence, this condition does not merit special mention. Without such acceptance, the court cannot exercise jurisdiction except with respect to the cases referred to in article 23.

16. The provision of article 23, paragraph 1, which enables the Security Council to make use of the Court on a permanent basis as an alternative to establishing ad hoc tribunals, deserves support. Paragraph 3 of that article, however, establishes a strict interrelationship between the actions of political and judicial organs in all situations involving a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter. This interrelationship encompasses a far broader category of relations than acts of aggression. It would seem that the court should only be bound by Security Council decisions when an act of aggression has been committed, as stipulated in paragraph 2. It would be advisable to delete paragraph 3 from the draft.

17. Belarus welcomes the detailed provisions contained in Part 4, dealing with investigation and prosecution.

18. It notes with satisfaction that the rules of the court will be approved by a conference of States parties.

19. As far as the relevant provisions of the draft statute are concerned, and taking into account the proposal that the court should have preferential jurisdiction, article 25 should establish the power of the Procuracy to initiate proceedings with respect to the crimes referred to in article 20, paragraphs (a) to (d), in an ex officio capacity, by analogy with the provisions of the statutes of the ad hoc tribunals established by the Security Council.

20. According to article 26, paragraph 5, the category of parties which may request the court to review a decision of the prosecutor not to initiate an investigation or not to file an indictment would be restricted to complainant States and the Security Council. The category of parties should be broader. Any State party to the statute which accepts the jurisdiction of the court with

respect to a crime constituting the substance of a case, as well as the Security Council in all circumstances (even if it did not initiate the review of the case in the court), should be entitled to request the court to review such a decision. The criminal justice system should not simply satisfy the interests of one member of a community; it should restore peace and justice in the relations that exist between all the members of a community.

21. Article 29 gives rise to doubts about the advisability of including a provision concerning the possible release on bail of persons held in detention. It would seem that where grave crimes falling within the jurisdiction of the court have been committed, it would be inappropriate to employ the instrument of release on bail.

22. With regard to Part 5, article 34, paragraph (a), merits close attention. It would be preferable to avoid any reference to the poorly defined category of "interested States". The right of all States having jurisdiction with respect to a particular crime to challenge jurisdiction should be recognized. It would seem logical to establish a close link between States which are entitled to initiate proceedings in the court and States which are entitled to challenge the court's jurisdiction.

23. The inclusion of the accused among the parties entitled to request a review of a decision to rule a case inadmissible under article 35 gives rise to some doubts. The grounds listed in this article may, by their very nature, be used legitimately only by a State, or by a court on its own initiative. The matter is hardly worth considering on the basis of an application by the accused to the effect that the crime was duly investigated by a State or that it was of insufficient gravity.

24. With regard to the applicable penalties and taking account of the magnitude of the crimes in question, there seems little likelihood of an effective fine being imposed. In this instance, a penalty such as confiscation of property would be more appropriate, and this should be stipulated in article 47.

25. Among the questions relating to international cooperation and judicial assistance, the provisions dealing with the transfer of an accused to the court (article 53) is particularly noteworthy. If paragraph 3 of the present draft is retained, such transfers will operate in an extremely inefficient manner.

26. In accordance with article 30, paragraph 4, of the 1969 Vienna Convention on the Law of Treaties, the regime of the international jurisdiction to be established shall, in relations between States which accept the jurisdiction of the court with respect to a particular crime, replace or supplement the universal jurisdiction regime and the aut dedere aut judicare principle. Accordingly, the question will not be one of compliance with the provisions of any treaty requiring that a suspect be extradited or the case transferred to the competent authorities of the requested State, as indicated in paragraph 3, but one of compliance with the new regime based on the provisions of the statute.

27. The problem raised in paragraph 3 is nevertheless a pressing one, in relations between first, States which accept jurisdiction in respect of a particular crime and States which do not, and, second between such States and

States which are not even parties to the statute. For this reason it should be noted that with respect to international crimes, which occur as a category in international law on the basis of common agreement between all the members of the international community, any jurisdiction is treaty-based. The jurisdiction of any State in respect of offences recognized by that State as international crimes stems from an international treaty. The jurisdiction of the international criminal court will also stem from a treaty. However, the nature of international crimes makes them more suited to the jurisdiction of an international organ than to the jurisdiction of any individual State. It would therefore seem justified to accept the priority of the statute over other international treaties.

28. In any case, the transfer of an accused to the court despite a request for extradition by a State which is not a party to the statute but which is a party to the treaty in question cannot be viewed as a violation of the treaty principle of aut dedere aut judicare. The latter part of the obligation (aut judicare) should not be interpreted literally. It is designed to ensure that guilty parties are prosecuted through due legal process and that the prosecution is effective. This requirement will be satisfied if such persons are transferred to the international criminal court in compliance with all the procedures designed to safeguard their right to a fair trial. The same considerations also apply to article 21, paragraph 2.

29. With regard to Part 7 of the draft statute some revisions are required. Article 51, paragraph 2, and article 53, paragraph 1, deal with the court's right to transmit a request for cooperation to any State. The remaining provisions, however, mention only States parties. The articles in question should clearly refer to States parties in all cases.

30. Article 53, paragraph 6, allows a State party to file an application with the court requesting it to set aside its request for the transfer of an accused. It does not seem sufficient merely to indicate that such an application should be filed on specified grounds. It would be preferable to define those grounds in the statute itself.

31. As far as Appendix I is concerned, the idea that the statute and the covering treaty should require a substantial number of States parties before it enters into force merits support. Otherwise the court would simply be unable to function effectively.

32. Financial questions relating to the establishment of the court should be considered at the present stage of the discussion of the matter. The court should be established as an independent organ with close ties to the United Nations. Its relationship to the United Nations could be established through the adoption of resolutions by the General Assembly and the Security Council. That would allow the court to be financed by the United Nations.

33. The covering treaty should stipulate a fairly inflexible procedure for amendment of the statute, thus guaranteeing the stability of its provisions. The view is expressed in paragraph 3 (d) of Appendix I that the list of crimes falling within the jurisdiction of the court may be extended only through a review of the statute to take account of newly adopted conventions. It would

appear that an alternative method of extending the jurisdiction of the court would be simply to incorporate in the text of any newly adopted convention a provision specifying the court's jurisdiction over any crimes defined therein and allowing for the possibility of the expression of reservations to that provision. Such a provision should take effect only if a sufficiently large number of parties to the convention have accepted the court's jurisdiction in respect of the crime in question. Accordingly, with regard to the Annex to article 20, paragraph (e), it should be understood that the list contained therein may be supplemented as indicated above.

34. Belarus supports the view that the statute has been conceived as an integral whole and that any possible reservations to it and its covering treaty should be strictly limited.

35. Matters that have not been reflected in the revised draft statute include the question of giving the court an advisory jurisdiction and the question of giving the court jurisdiction with respect to the consideration of disputes between States in connection with the application of treaties, on which the court's jurisdiction will be based ratione materiae. These questions need to be discussed in the context of the continuing work on the draft statute.

36. It should be noted that these are preliminary comments, and Belarus reserves its final position on the draft statute.

CHINA

[Original: Chinese]

[7 March 1995]

1. General comments

1. Because the establishment of an international criminal court has implications for the judicial sovereignty of individual States and is therefore politically sensitive as well as legally and technically complex, the Government of China is of the opinion that any proposal for the establishment of such a court must be approached with great prudence and caution. The Government of China wishes to stress the following points: first, in the area of jurisdiction over and trial of international crimes, each State's domestic system of criminal jurisdiction and the current international universal jurisdictional system should retain their positions of primary precedence. Second, the court's jurisdictional authority can only be based on the assent of the States, and should not be coercive in nature. Third, the way in which the court is set up should guarantee its independence, impartiality and efficient functioning.

2. In the view of the Government of China, the draft statute for an international criminal court as elaborated by the International Law Commission of the United Nations is generally balanced and practical, and can serve as a working foundation for further deliberations on this topic. The Government of China would like to take this opportunity to express its appreciation for the International Law Commission's highly efficient work in this area.

3. The current draft of the statute is a marked improvement on the initial draft, as the following examples will illustrate. First, in view of the nature of the court, the draft statute determines that the court will be established by treaty. Second, the current draft statute calls for the matter of the court's relationship to the United Nations to be settled separately, by means of a specialized relationship agreement between the court and the United Nations. Third, the draft statute provides clear and definite examples of crimes that fall within the court's jurisdiction, thereby avoiding the vagueness of the concept of "crimes under general international law" and further defining the substance of the court's jurisdiction ratione materiae. Fourth, article 22 of the current draft statute adopts a system of elective jurisdictional acceptance ("opting in") that reserves to States the right and option to choose whether or not to accept the court's jurisdiction. In the view of the Government of China, these improvements to the statute are worthy of endorsement.

2. Comments on specific articles

4. Owing to the complex nature of the problems entailed by the establishment of an international criminal court, especially the enormous differences between the theory and application of criminal law in the various States, the Government of China is of the opinion that several specific provisions of the draft statute require further revision in order to enhance the statute's completeness and enforceability.

5. In connection with the preamble to the draft statute, the Government of China is of the view that the purposes of establishing an international criminal court are to complement the operation of national criminal justice systems and to make up for imperfections in existing international systems of cooperation in matters of criminal justice, while not affecting the rights enjoyed by States under those systems. However, preambular paragraph 4 (beginning with the phrase "Emphasizing further") does not fully and completely reflect these goals and principles. Considering the function of preambular paragraphs, the Government of China suggests that the fourth paragraph of the preamble should be revised accordingly.

6. Article 20, dealing with the jurisdiction ratione materiae of the court, constitutes a significant improvement over the previous version, but is still not completely satisfactory. First, genocide and crimes that seriously violate the laws governing armed conflict are also covered by treaty provisions. Second, practical definitions of aggression and crimes against humanity are still lacking. Moreover, some disagreement persists as to the scope of the particular crimes provided as examples under this article; for example, further study is required as to whether apartheid, serious crimes of international terrorism or the soon-to-be-adopted draft Code of Crimes against the Peace and Security of Mankind, are to be included.

7. The stipulations of articles 33 and 47 of the draft statute are highly imprecise with regard to what laws are applicable by the court. Considering the complexity and sensitivity of problems in this area, the Government of China expresses its concern as to how the court intends to satisfy the requirements of the basic principle of criminal law known as nullum crimen sine lege.

8. In connection with preconditions to the exercise of the court's jurisdiction, article 21 of the draft statute treats genocide as "inherently" falling under the court's jurisdiction, and accordingly makes special provisions in the areas of prosecution and judicial assistance. However, it is debatable whether this is consonant with the basis of the court's jurisdiction, i.e., the prior consent of the States affected, or with provisions of article VI of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. How the court is to exercise its jurisdiction effectively without the consent and cooperation of the State on whose territory the crime occurred is another real difficulty which cannot be ignored. Because of the extremely serious nature of genocide and the threat it poses to international peace and security, it is already covered under the draft statute's provisions for action by the Security Council, which is an adequate guarantee that such crimes will receive effective punishment. In order to enhance the draft statute's enforceability, the problem of whether genocide requires special arrangements of the kind specified should be further studied.

9. The Government of China notes that some States continue to disagree on article 23 of the draft statute regarding action by the Security Council. The Government of China is of the opinion that there is a need to make certain arrangements in the draft statute that would allow the Security Council to use the court to investigate and prosecute specific international crimes that threaten international peace and security. However, such arrangements should not prejudge or influence the functions of the Council under the Charter of the United Nations; moreover, they should not interfere with or influence the independence that the international criminal court should have as an international judicial organ.

10. With regard to the qualification and election of judges, the Government of China is of the opinion that the problem of judges' universal representativity and equitable geographic distribution should be considered in conjunction with that of the procedures for nominating candidates. Moreover, the overall number of judges should be somewhat reduced.

11. With regard to the privileges and immunities of judges, article 16 of the current draft statute does not make a clear provision as to whether judges should also enjoy diplomatic privileges and immunities in legal conflicts arising in the course of their other professional activities. Further study is also required on how to guarantee judges' independence and still accommodate the legitimate rights and interests of the other parties involved in such disputes.

12. The unconditional prohibition against trial <u>in absentia</u> is not only explicitly stipulated in article 14 of the International Covenant on Civil and Political Rights, but has also become a shared fundamental principle of the criminal law of many States. Thus article 37 of the draft statute will present a political and legal obstacle for many countries when the times comes for them to ratify the statute, and could also damage the prestige of the international criminal court. The Government of China suggests that appropriate modifications should be made in the relevant provisions of the draft statute.

13. The provisions regarding the principle of <u>non bis in idem</u> in article 42 of the draft statute appear to actually contradict the requirements of that

principle, and run the risk of turning the international criminal court into a de facto superior court or appeals court for the domestic court systems of individual States. This is not consonant with the nature of the international criminal court or with the requirements of the concept of its "supplementarity". The Government of China therefore suggests that the provisions of this article should be reformulated.

14. With regard to international cooperation and judicial assistance, paragraph 1 of article 51 of the draft statute is overly coercive, and does not grant the States parties the leeway they require for determining how much assistance they wish to provide in international criminal matters. The Government of China suggests that this section should be rephrased to read "shall make the utmost effort to cooperate", in accordance with the phrasing used in the relevant provisions of previous international agreements.

15. Moreover, paragraph 2 (a) of article 53 regarding transfer of an accused requires further consideration as well. The Government of China is of the view that, in principle, since the international criminal court stands in "supplementary" relationship to the domestic courts of an individual State, even if a State party has accepted the jurisdiction of the international criminal court with respect to a specific crime, that State should still enjoy the option of choosing whether or not to: (a) allow the competent authorities of that State to initiate prosecution; (b) transfer court documents and the accused to the international criminal court for adjudication; and (c) extradite the accused to the requesting country. However, the relevant article of the draft statute omits any mention of such options on the part of States parties. Furthermore, paragraph 4 of the same article would appear to contradict paragraph 2 (a). The Government of China therefore suggests that this article should be reformulated.

16. Considering the importance of rules of evidence and procedure, the Government of China agrees that the elaboration of such rules should be completed prior to the establishment of the court, so that they may be submitted to the States for consideration and approval as an integral part of the draft statute. Under this condition, it would be possible to simplify some of the draft statute’s content regarding evidence and procedure.

17. With regard to the matter of financial provisions, the Government of China endorses the request contained in General Assembly resolution 49/53 for the Secretary-General to submit a feasibility study to the Ad Hoc Committee. In this regard, the Government of China would like to point out that in view of the nature of the court, it should, in principle, be financially independent and should not be included as part of the regular budget of the United Nations. Rather, it should rely on contributions by Member States and funds raised through other channels for its support.

18. The foregoing are the principal comments of the Government of China with regard to the draft statute for an international criminal court. Absence of comment on other parts of the draft statute does not imply the approval or disapproval of them by the Government of China. The Government of China reserves the right to comment further on the draft statute at a later time.

SINGAPORE

[Original: English]

[10 March 1995]

Article 3 (3)

1. It is not clear whether "by special agreement" refers to an agreement with the third State or an agreement of the States which are party to the statute. The former seems to be the correct interpretation (otherwise the court could exercise powers on the territory of a non-State party without its consent). If this is the case, then article 3 (3) should read "by special agreement with any other State, on the territory of that other State".

Article 6 (1)

2. The criteria for the appointment of judges is either criminal trial experience or recognized competence in international law (see later provisions). This is not entirely clear from a reading of article 6 (1).

Article 6 (4)

3. There needs to be some provision to cover a situation where the citizenship of a judge changes during the course of the appointment, resulting in there being more than one judge from a single State. For example, the statute could stipulate that the second judge be deemed to have resigned from his appointment.

Article 8 (2)

4. It is not clear whether it is in fact the first or second Vice-President who will act in place of the President in the event of his unavailability of disqualification. Nor is it clear which of the two alternate Vice-Presidents will act in place of the Vice-President. It is desirable that there should be a clearer line of succession or a mechanism put in place (e.g., election by the judges) to make the decision.

Article 9 (6)

5. If "alternate judges" refers to alternate judges of the court and not unelected judges, then this has to be reflected in the statute.

Article 12 (5)

6. A prosecutor should not act in cases where either the complainant or the victim is a national of their State. This would help underline the neutrality of the proceedings and the principle that the prosecutor's primary duty is to the court. Article 12 (5) should consequently be amended to read:

> "The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint by their State or involving a person of their own nationality."

Article 21 (1)

7. Article 21 (1) (b), which makes the jurisdiction of the court contingent on its jurisdiction being accepted by both (i) the State having custody of the suspect and (ii) the State on whose territory the crime was committed, requires a clearer statement that condition (ii) is inapplicable in cases where the act in question is committed outside the territory of any State. This is possible because the crimes covered by subparagraph (b) include those of hijacking under the 1970 Hague Convention, etc.

Article 26 (6)

8. This provision sets out the accused's right to silence on being questioned and his right not to be compelled to give evidence. In Singapore, where there are no jury trials, the court may draw the appropriate inferences from the accused's silence or failure to testify. The right to silence is therefore not a universal or an immutable concept.

Article 38 (3)

9. This provides for the trial of more than one accused. There is however no provision for the joinder of charges against a single accused person. It is desirable that this should be explicitly allowed if the offences are part of the same transaction or it is uncertain which of several offences the acts constitute.

Article 46

10. The court should be given the power to convict an accused for an attempt to commit or an abetment of the crime for which he is charged. The court should also be given the power to convict an accused of a lesser crime if the elements of this lesser crime are also elements of the offence for which he is charged.

Article 47 (1)

11. It is necessary for the statute to set out the maximum fine which can be imposed.

Article 48

12. A time-limit should be fixed for appeals to be lodged, subject to the court having the discretion to extend time.

Articles 53 and 54

13. The "extradite or prosecute" provisions may affect existing extradition regimes created by the various treaties. As far as the treaties to which Singapore is a party are concerned, the Hague and Montreal Conventions already have in place an "extradite or prosecute" regime. In the case of the Geneva Conventions, parties are obliged to prosecute but may extradite the accused. The draft statute changes the discretion to extradite to an obligation to do so if a State party to the Conventions were to decide not to proceed with

prosecution although it seems implicit that if a prima facie case were not made out against the accused, these would be good grounds for refusing a request to extradite.

14. A further difficulty arises because it is not apparent whether "requesting State" in articles 53 and 54 refers only to a State which is a party to the statute or any State. If it is the latter, then a fundamental objection arises, viz., that obligations existing between two States to an existing treaty cannot be changed by a subsequent treaty (i.e., the statute) if only one of them is a party to the latter treaty.

Other matters

15. There are presently no provisions for the funding of the court's work. As the work of investigation, prosecution, adjudication, etc., will require funds, it is essential to establish a framework for financial contributions and budgets.

SWEDEN

[Original: English]

[14 March 1995]

1. Over the years, Sweden has repeatedly stated the importance it attaches to the issue of an international criminal court. It is now a task for an ad hoc committee, in accordance with the mandate given by the General Assembly in its resolution 49/53 of 9 December 1994, to bring forward the work of the establishment of such a court.

2. Sweden is pleased to note that the International Law Commission, in its draft statute for an international criminal court, adopted in 1994, has to an important extent paid attention to the extensive comments submitted by the Nordic countries in their note dated 14 February 1994 (see A/CN.4/458). For the future work of the Ad Hoc Committee, Sweden reiterates the remarks made in that note and would furthermore like to highlight a few aspects that ought to be given careful and special consideration.

3. The core of the future statute will indeed be the rules concerning jurisdiction. Sweden welcomes the general approach in the draft statute of the International Law Commission, but notes that the complexity of the system may need further consideration. In this regard, "the crime of aggression" illustrates the difficulty in balancing between aspects of law and politics. The concept as such may require further discussion. Sweden is, moreover, most hesitant to accept the possibility of a jurisdiction comprising crimes relating to drugs.

4. The draft statute does not state whether or not the court shall have jurisdiction over crimes committed prior to the establishment of the court. In this regard there seems to be a need for clarification.

5. The draft statute is also silent as regards periods of limitation. On comparison, national legal systems provide widely differing solutions concerning limitation of jurisdiction with regard to crimes of a serious character. As international law does not affect rules on periods of limitation of such crimes, the differing national views could complicate the cooperation between States and the court.

6. As to the internal organization of the court, the draft statute of the International Law Commission assigns important functions to the presidency, also with regard to substantive issues in ongoing criminal cases. It could therefore be questioned whether it would be advisable that the president of the court be both a member of the presidency and the chairman of the appeals chamber, the body which would have the final say in cases. The position and the role of the presidency seem to need further consideration.

7. Article 3 of the draft statute prescribes that the court may exercise its powers and functions on the territory of any State party to the statute and, by special agreement, on the territory of any other State. There seems to be a need to clarify the contents of this article in relation to part 7 of the draft statute regarding international cooperation and judicial assistance.

8. As to the trial, the draft statute does not comprise a great number of procedural rules. According to article 19, it is for the judges to make rules regulating, inter alia, the procedure to be followed and the rules of evidence to be applied. Preferably, the statute itself should contain more detailed rules in this regard.

SWITZERLAND

[Original: French]

[15 March 1995]

1. Introduction

1. The Swiss Government wishes to thank the International Law Commission for having worked swiftly to complete the preparation of a draft general multilateral convention to establish an international criminal court of a permanent nature. Recent events demonstrate how urgent and appropriate it is to establish such a court which will help ensure respect for international humanitarian law.

2. The Swiss Government has already had occasion to state its views concerning the draft articles which the Commission adopted in 1993, then finalized in 1994, both in the statements made by the Swiss representative in the Sixth Committee of the General Assembly on 1 November 1993 and 26 October 1994, and in its written comments of 8 February 1994 (see A/CN.4/458). It noted, in particular, that the Commission's draft was an excellent basis for the conclusion of a multilateral convention establishing a permanent international criminal court and, at the same time, it put forward suggestions for improving the text.

3. In the present comments the Swiss Government will refer to and expand upon some of these suggestions and formulate others. In the interest of brevity, it will try to avoid needless repetition and will refrain from highlighting the numerous positive elements of the draft.

4. The comments that follow will be grouped under five headings: legal basis for the international criminal court; jurisdiction; penalties; organization of the court; procedure.

2. Legal basis for the international criminal court

5. The establishment of a permanent court calls for the conclusion of a general multilateral convention; it is not enough simply to have the Security Council adopt a resolution under Chapter VII of the Charter of the United Nations on the pretence that the possibility of international crimes being committed is tantamount to a threat of or a permanent use of force. The disadvantage of this approach is that it takes time: negotiations may drag on and on and years will go by before a sufficient number of States have ratified or acceded to the convention. This means that, in the meantime, it might be necessary to establish other ad hoc international criminal tribunals. In order to limit this eventuality it is necessary to act fast. That can only be done if those in favour of establishing a permanent court give up extreme claims in order to reassure those States that are still hesitating.

3. Jurisdiction

(a) Punishable conduct

6. The crimes within the jurisdiction of the future international criminal court are listed in article 20 of the Commission’s draft: genocide, aggression, serious violations of the laws and customs applicable in armed conflict (the Hague Conventions of 1899 and 1907), crimes against humanity. These are four types of conduct which are punishable under customary international law, as demonstrated by the implicit references to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and to the Hague Conventions. A fifth category of crimes is constituted by "crimes established under or pursuant to the treaty provisions listed in the annex" (article 20, paragraph (e)), including, in particular, the Geneva Conventions of 12 August 1949 and Protocol I additional thereto of 8 June 1977 (perhaps also Protocol II?).

7. While it is in itself perfectly legitimate to make a distinction thus between customary law and treaty law, it is first necessary to correctly define the elements that fall into each category. In that connection, the Swiss Government, based on the Statute of the International Tribunal for the Former Yugoslavia (article 2) and, to some extent, on that of the International Tribunal for Rwanda (article 4), wonders whether the serious violations of the Geneva Conventions do not come under customary law rather than treaty law. Moreover, distinguishing between customary law and treaty law only makes sense if there is a practical consequence, which point will be tackled under the next heading.

(b) Submission of a matter to the court

8. According to article 21, paragraph 1 (b), of the Commission's draft statute, when read together with article 22, in order for a matter to be submitted to the international criminal court, aside from matters referred by the Security Council (article 23, paragraph 1 of the draft statute), a complaint must be brought by a State party to the future convention. Contrary to what was accepted in the case of the Tribunals for the Former Yugoslavia and Rwanda, the prosecutor of the international criminal court cannot act on his own. This means that whoever is chosen to represent the interests of the international community will be deprived of any right of initiative, although that same right will be granted to the Security Council, an eminently political organ. That is a clumsy solution which the Swiss Government has difficulty in endorsing.

(c) Acceptance of the jurisdiction of the court

9. In order to be able to bring a complaint, a State must have accepted the jurisdiction of the international criminal court for the type of crime in question by means of an optional declaration (article 25, paragraph 2 of the Commission's draft statute, read in conjunction with article 22) unless the crime is genocide (article 23, paragraph 1). A declaration of acceptance, following the technique borrowed from article 36, paragraph 2, of the Statute of the International Court of Justice, must also have been made for the category of crimes in question by the State which has custody of the suspect and by the State in whose territory the crime was committed (article 21, paragraph 1 (b)).

10. Given this string of conditions, it will be difficult to establish the court's jurisdiction: in many cases its jurisdiction will have to have been accepted by three States, and none of them can have formulated any reservation regarding the type of crime involved (the rule of reciprocity will also, no doubt, be applicable and will be applicable among three States). As the representative of Switzerland pointed out in his statement on 26 October 1994, the Swiss Government would have preferred a system conferring inherent jurisdiction on the international criminal court as long as the States concerned were parties to the future convention. But, since such a system would come up against numerous objections which might cause the negotiations to fail or at least prevent the Convention from being widely accepted, we will have to resign ourselves to accepting the proposed solution. However, it could be eased somewhat, for example, by requiring only the consent of the State making the complaint and that of the custodial State.

11. The declarations of acceptance of the court's jurisdiction may relate to conduct that is punishable under customary law or under the treaties listed in the annex to the draft statute, even though the latter does not require the States concerned to be parties to the conventions in question. We may then wonder whether there is any point in keeping the distinction in article 20 between crimes under customary law and crimes under treaty law, since it does not have any practical consequence.

12. The draft statute also envisages the possibility of a treaty instrument deploying its effects even against States that are not parties thereto, namely, when the Security Council, acting under Chapter VII of the Charter, refers a

matter to the international criminal court (article 23, paragraph 1 of the draft statute). This possibility, which results from a reading of article 21 together with article 23, disregards the principle of the relativity of treaties and should be ruled out; we should insist, at the very least, that the custodial State must be a party to the convention in question.

13. A comparable situation arises in the case of the crime of genocide over which the international criminal court has inherent jurisdiction that is to say, independent of any declaration of acceptance. This is perfectly consistent with the customary nature of the prohibition of acts of genocide. On the other hand, the requirement, spelled out in article 25, paragraph 1, that the State making the complaint must be a party to the Convention of 1948, whereas the other State concerned (the custodial State or the State in whose territory the crime occurred) does not (nor does it have to have accepted the jurisdiction of the court), is not customary.

(d) Concurrent jurisdiction and the principle non bis in idem

14. Unlike the statutes governing the Tribunals for the Former Yugoslavia and for Rwanda, the draft statute of the international criminal court remains silent on the question of which court has priority as regards jurisdiction, the international criminal court or the national courts. From this silence we can infer that whichever court is first seized of a complaint has jurisdiction. In principle, therefore, the court would exercise its jurisdiction only if a State party to the future convention brought a complaint to it, or if the Security Council referred a matter to it and this, as a rule, would happen only if the national organs themselves failed to act. This solution is to be criticized, in as much as it does not give primacy to the international criminal court. At the same time, the absence of primacy could, ultimately, prove beneficial, since States might be more inclined to accept the convention if it safeguarded the jurisdiction of their national courts.

15. By contrast, where an individual has already been tried by a national body or by the court, the predominance of the international criminal court is assured. According to article 42, paragraph 1 of the draft statute, a domestic court cannot under any circumstances review cases dealt with by the International Criminal Court. By contrast, the latter can review a case that has already been tried, but only if the proceedings in the national court were not entirely proper, in other words, if the offence was wrongly characterized as an offence under the ordinary law, or if the national court did not act diligently or sought to shield the accused from international criminal responsibility (article 42, paragraph 2). In such cases, the penalty imposed by the international criminal court must be served and whatever penalty has already been served at the national level must be deducted therefrom. Applying the above-mentioned criteria will no doubt be difficult; however, the fact that the responsibility lies with the international criminal court guarantees a measure of impartiality which allows one to affirm that respect for the principle ne bis in idem is not in question.

4. Penalties

16. What about respect for the principle nulla poena sine lege? This principle states that at the time of the offence, the perpetrator must not only have known or been in a position to know that the offence was punishable but also that he must have known or at least have had a fairly clear idea of the penalty involved. Article 47, paragraph 1, of the Commission's draft statute authorizes the international criminal court to impose "one or more of the following penalties: (a) a term of life imprisonment or of imprisonment for a specified number of years; (b) a fine". Paragraph 2 of that same article goes on to say that in determining the length of a term of imprisonment or the amount of a fine to be imposed, the court "may have regard to the penalties provided for by the law" of the State of which the convicted person is a national, or the State where the crime was committed or lastly, "the State which had custody of and jurisdiction over the accused." These provisions are to be criticized on two counts.

17. First, they provide that the penalty may consist of just a fine, which seems inappropriate given the fact that the international criminal court will be dealing only with major offences. The Swiss Government therefore feels that a fine can only be envisaged as a secondary penalty.

18. Next, and this is most disturbing, the court is completely free to determine the length of the prison sentence, which may therefore range from one day to forever. It may, of course, base itself on the national legislation but is not required to do so; moreover, it can choose from any of four different legislations.

19. The double uncertainty resulting from article 47 prompts the Swiss Government to point out that the Commission's draft statute departs from the fundamental principle of nulla poena sine lege. Article 47 in fact suggests that the international criminal court may impose just about any penalty save the death penalty. The fact that the court is free to base itself on any one of four national legislations does not inspire confidence in anyone reading the draft statute. Thus article 47 as it stands seems unacceptable. One can only hope that it will be revised in the light of the aforementioned considerations.

5. Organization of the court

(a) Composition

20. The international criminal court will be composed of 18 judges elected, in principle, for a single term of nine years by the assembly of State parties (article 6, paragraphs 3 and 6), whereas the Tribunals for the Former Yugoslavia and for Rwanda have had to content themselves with 11 members (two trial chambers of three members and one appeals chamber of five members). It is true that the range of crimes covered is wider in the case of the permanent court than in the case of the two ad hoc tribunals, but that element may be offset by the fact that the jurisdiction of the international criminal court depends on its being accepted by all States concerned. Moreover, given that the establishment of a permanent criminal court would be an innovation at the international level, it would be best to start on a modest scale, particularly

since most members of the community of States are having serious financial difficulties. The Swiss Government would therefore like, at least in the initial stage, to follow the example of the two ad hoc tribunals by reducing the number of members of the international criminal court to 11 and having it form two trial chambers of three judges and one appeals chamber of five members. In order to prevent the possibility of deadlocks, we might add two alternates, who would be called on only in the event that the regular members were unavailable.

(b) Qualification of judges

21. One particular characteristic of the Commission's draft statute is the rule which provides for the election, first, of 10 experts in criminal law and, then, of eight judges of "recognized competence in international law" (article 6, paragraphs 1 and 3). While seemingly appealing, this formula poses serious difficulties as regards application. How is one to determine whether a candidate falls into one category rather than the other? What if, for example, some people feel that a candidate falls into both categories or into neither one? Moreover, the very substance of the rule in question lends itself to controversy. It is debatable whether a court of this kind should be dominated by experts in criminal law who have no experience in international relations or in international law and international jurisdiction. How could a trial chamber of the international criminal court that is dominated by criminal law experts (article 9, paragraph 5) be in a position to evaluate properly conduct which the submitting State characterizes as constituting aggression?

22. For all these reasons, the Swiss Government is in favour of a more flexible solution. One way would be to require that candidates have criminal trial experience and/or recognized competence in international law, without establishing any difference between the former and the latter in the elections to the court or when setting up the chambers.

6. Procedure

23. The many provisions of the Commission's draft statute on the procedure to be followed in the international criminal court merit detailed analysis; however, that is beyond the scope of these comments. Accordingly, the Swiss Government will confine itself to one question, namely trial in absentia. The statutes of the International Tribunals for the Former Yugoslavia and for Rwanda rule out this possibility entirely in order not to have a situation where a sentence is pronounced but is not carried out, which would only serve to undermine the prestige of the two institutions. Similar reasoning applies to the international criminal court. Whereas article 37 of the draft statute confirms the prohibition of trial in absentia, it allows three exceptions to that rule: (a) when, for reasons of security or ill-health, it is undesirable for the accused to be present; (b) when the accused is continuing to disrupt the trial; and (c) when the accused has escaped from lawful custody or has broken bail. Whereas the exception under (b) is entirely justified, the two other grounds seem neither necessary nor desirable. In other words, the prohibition of trial in absentia should be complete, the only exception being where the accused continuously disrupts the trial.

7. Conclusion

24. The Swiss Government hopes that the multilateral convention prepared by the Commission can be swiftly negotiated. One should take advantage of the impetus generated by the establishment of the tribunals for the former Yugoslavia and for Rwanda.

25. The Convention should be generally applicable. It should therefore be adopted by consensus; this presupposes that it should satisfy those States which are in favour of an international court with broad jurisdiction and also those which maintain a more cautious or critical attitude with regard to the establishment of such a court. However, compromise should not be built around a solution that would render the convention practically inoperative. In order to avoid this, acceptance of the international criminal court's jurisdiction might be confined to the State which has custody of the accused.

26. What about the proposed mechanism for submitting complaints which required that the State making the complaint must have accepted the court's jurisdiction? This system at any rate reveals a fundamental contradiction. On the one hand, there is the requirement that a complaint must be lodged by a State, save in those cases where the matter is referred by the Security Council. On the other hand, the Prosecutor is responsible for investigating the matter and for the subsequent prosecution. Thus the Prosecutor - who is supposed to represent the international community as a whole - assumes a secondary role vis-à-vis individual States, but has no autonomous function. There is something incongruous or even startling in the idea that, as a rule, only a State complaint can trigger proceedings against an individual who is accused of having committed a crime that is of concern to the international community as a whole. It would therefore be desirable to re-examine the mechanism for submitting complaints and in that context, the functions of the Prosecutor.

27. There is one final point. Although it is intended to be part of a multilateral treaty, the draft statute contains no final clauses; of course preparation of such clauses is not a matter for the Commission. The Swiss Government would nevertheless like to point out that the future Convention must rule out the possibility of formulating reservations other than those expressly provided for in the Convention. It would also like to recall how important it will be, during the forthcoming negotiations, to seek not only consensus for adopting the Convention but also and above all, ratification by as many States as possible for without that the Convention will be of minimal usefulness. With this in mind, the Swiss Government believes that the number of ratifications or accessions required must be set relatively high (50 or 60 ratifications and accessions, for example). It would be unfortunate if an instrument that only 20 States, for instance, had accepted were to be used as a pretext for not establishing ad hoc tribunals in cases where it might be necessary to do so.

VENEZUELA

[Original: Spanish]

[14 March 1995]

1. General considerations

1. The creation of an international system of criminal justice must respond to the present state of international relations and the need to punish crimes against the peace and security of mankind.

2. Generally speaking, the draft statute reflects a balanced approach, establishing the form to be taken by the court, its jurisdiction, procedures, independence, permanent nature and prosecutorial role, and the applicable law, among other fundamental elements. However, the Government of Venezuela believes that a number of provisions which it considers particularly important should be incorporated into the draft.

3. First of all, the proposed court must be a permanent, independent organ but also an integral part of the United Nations system. Its relationship to the United Nations is closely bound up with the way in which it is to be created. Accordingly, the Government of Venezuela believes that the draft statute can be equated with the draft of a constituent instrument of an international organization, as provided for in article 20 of the Vienna Convention on the Law of Treaties.

4. With regard to the operational aspects of the court, even though article 2 of the draft establishes that the president of the court may conclude an agreement with the United Nations, the Government believes that an article must be included allowing the State parties to meet and review the court's administrative functioning.

5. Likewise, reference must be made to the financing of the court, an aspect which the Government of Venezuela considers to be especially important but which is not covered in the draft statute. Accordingly, it is essential that a set of provisions should be adopted concerning the budget and the manner in which the proposed organ is to be financed.

6. With regard to the election of judges, the Government of Venezuela believes that a provision must be included expressly enunciating the principle of equitable geographical distribution.

7. The Government of Venezuela believes that vague, imprecise expressions must be avoided, since they may create difficulties when the time comes to put the provisions of the statute into practice.

2. Comments on individual articles

8. Article 20. This article, which establishes the crimes falling within the jurisdiction of the court, will have to state clearly and expressly whether the

list of crimes it contains is illustrative or restrictive, so that the court can exercise its jurisdiction with the necessary clarity.

9. Article 23. The Government of Venezuela believes that only persons or individuals can be tried by the proposed court and therefore that the jurisdiction defined in article 23 of the draft, linked to the action of States and the intervention of the Security Council, is inappropriate and would undermine the court's necessary independence of action. The Government therefore proposes that article 23 should be deleted.

10. Article 26. It follows from the preceding comment that the reference in paragraph 1 of article 26 to a decision of the Security Council must be deleted. Subparagraph (a) of paragraph 2 of this article should specify what kind of measures the prosecutor can take to ensure the confidentiality of the investigation.

11. Article 27. The Government of Venezuela believes that the use of the term "prima facie" in referring to the evidence which may serve as the basis for the commencement of prosecution seems imprecise and even subjective.

12. It therefore proposes that the term should be replaced, in this article and throughout the text, by the word "substantiated", in order to give it the appropriate legal significance. This would, moreover, be in keeping with the terminology used by most legal systems. In paragraph 3 of the article, the reference to the participation of the Security Council should be deleted.

13. Article 28. In paragraph 2, the Government of Venezuela considers the period of 90 days set for provisional arrest to be excessive, since it conflicts with the actual nature of such arrest and, moreover, contradicts the principle, recognized by States, that the period of provisional arrest must be as short as possible, a situation dealt with in some legal systems, including Venezuela's, under the heading of habeas corpus.

14. Article 30. In paragraph 1, the words "language understood by", referring to the accused, should be replaced by "language of origin of" or "mother tongue of", since it is this that really gives a person a full understanding of what has been said or written and that enables him to exercise fully his right to defend himself.

15. Furthermore, since article 18 establishes the official languages of the court, the court will not be able to certify copies in languages other than these. The Government of Venezuela therefore suggests that the second part of the first sentence of paragraph 1 should be replaced by the following: "a certified copy, duly translated into the mother tongue of that person, of the following documents". The drafting of paragraph 3 of the article will have to be improved because the Spanish is unclear.

16. Article 31. Paragraph 1 will have to establish what kind of persons a State party may make available.

17. Article 33. With respect to the reference in subparagraph (c) to national law, it must be specified what national law the court may apply in taking its

decisions. The Government of Venezuela believes that preference should be given to the law of the country of which the suspect is a national.

18. Article 35. With regard to issues of admissibility, subparagraph (c) of this article should clarify how it will be determined whether the situation is or is not of such gravity as to justify action by the court.

19. Article 37. It is suggested that the words "As a general rule" in paragraph 1 should be deleted.

20. Article 41. The comment made about article 30 concerning language also applies to paragraph 1 (a) of this article. The Government therefore suggests that it should be redrafted along the lines of the suggestion made in connection with article 30.

21. Article 42. The Government of Venezuela believes that in this article, which sets forth the principle that no one can be tried twice for the same offence, paragraph 2 (b) dealing with one of the exceptions to this principle will have to specify that it is duly established that the court which first tried the case acted in a manner that was not impartial or independent.

22. Article 45. Paragraph 3 should establish precisely how much time the chamber must take to deliberate, instead of using such a vague expression as "sufficient time" which could jeopardize the rights of the accused.

23. Article 47. With regard to the term of imprisonment, it should be noted that article 60 (7) of the Constitution of the Republic of Venezuela prohibits the imposition of life imprisonment. The Government of Venezuela cannot therefore accept the wording of paragraph 1 (a) of article 47, since it conflicts with a national constitutional norm. Moreover, it is inappropriate in an instrument of this nature to establish a system of fines, unless the purpose is to compensate the victims of crime, as indicated in paragraph 3 of the article. In any case, if such a system is to be adopted, the type of fine, its amount and other details governed by the kind of crime that is being punished must be determined precisely.

24. Based on the above, the Government proposes that paragraph 3 of this article should be adopted as a separate provision, since its purpose differs from that of the rest of the article, which is to establish penalties. In any case, subparagraph (a) of paragraph 3 should be deleted.

25. Article 49. Paragraph 2 talks about situations where it is found that the proceedings appealed from "were unfair", but this is not consistent with paragraph 1 of article 48, which refers to "procedural error". Paragraph 2 of article 49 should therefore be amended to bring it into line with article 48 (1).

26. Furthermore, paragraph 2 (b) should clarify what happens concerning the accused's release if the prosecutor appeals against his acquittal. It is suggested that in paragraph 5 of the Spanish version, the words "será firme", referring to the decision of the appeals chamber, should be replaced by the words "será definitiva".

27. Article 50. It should be indicated at the end of the article that the chamber may, after reviewing the new evidence, determine whether that evidence should lead to a revision of the conviction or "to the holding of a new trial", in order to maintain a proper balance in the text.

28. Article 52. The period of 28 days mentioned in paragraph 2 is incomprehensible.

29. Article 57. Paragraph 3 (a) of the Spanish text should use the word "fundamentos" rather than "motivos".

30. Article 58. The Government of Venezuela believes that recognition of the court's judgements will have to be subject to the procedures provided for that purpose in the national legislation of each of the parties. It therefore proposes that mention should be made of this point in article 58.

31. Article 60. In a criminal proceeding, decision-making cannot be based on appearances. As a result, the use of the word "apparently" in paragraph 3 is inappropriate for determining whether or not an application is well-founded. Since the necessary requisites for such a determination have been established, the word should be deleted.

32. Moreover, paragraph 4 mentions the possibility that the chamber may stipulate that the sentence is to be served in accordance with "specific" laws as to pardon, parole or commutation of sentence of the State of imprisonment. This may give rise to confused situations and problems when the time comes to put the provision into practice.

33. On this point, the Government of Venezuela reiterates the view expressed concerning article 33, on applicable law, to the effect that preference should be given to the law of the country of which the suspect is a national. It therefore proposes that this point should be mentioned in paragraph 4 of article 60.

34. The above are the preliminary observations of the Government of Venezuela on the draft statute for an international criminal court. The Government reserves the right to make additional comments during the working meetings convened to study and consider the aforesaid draft.

III. COMMENTS FROM RELEVANT INTERNATIONAL ORGANS

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

[Original: English]

[15 February 1995]

1. Introduction

1. Pursuant to [paragraph 4 of resolution 49/53] the International Tribunal for the former Yugoslavia ("the Tribunal") was invited, on 13 December 1994, to provide its comments on the International Law Commission's draft statute for an international criminal court. The draft statute was accordingly discussed by the Tribunal in plenary session, and the following comments are now submitted.

2. First, the judges of the Tribunal wish to congratulate the Commission on its pioneering draft. A permanent international criminal court has been eagerly awaited by human rights advocates and Governments alike for more than half a century, and the document prepared by the Commission is a milestone in this direction. The judges fervently hope that the General Assembly will be expeditious in taking all necessary steps for establishing such a court. The United Nations is uniquely suited to making the court an effective institution for prosecuting serious international crimes, one of its main purposes being "to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (Article 1, paragraph 3, of the Charter of the United Nations).

3. The comments submitted by the Tribunal will fall into three categories: first, some general comments on the draft statute, then comments relating to specific provisions, and finally, some minor drafting suggestions.

2. General comments

(a) A permanent court

4. The judges of the Tribunal, first, unanimously support the concept of administering international criminal law through the establishment of a permanent institution, as opposed to a succession of ad hoc tribunals. Undoubtedly the establishment by the Security Council of ad hoc tribunals such as those for the former Yugoslavia and for Rwanda marks a momentous progress in the fight against human rights abuses and fleshes out the basic demand for international justice as a means of contributing to real and lasting peace in countries torn by armed conflict and beset by large-scale disregard of human dignity. Nevertheless, these institutions, being ad hoc, are bound to be limited both as regards the range of their jurisdiction and their duration in time. The ad hoc tribunals should therefore serve as useful stepping-stones to

the creation of a permanent court. This court would have the advantage of being both stable and not geared to specific regions or situations, and of possessing a broad international criminal jurisdiction covering several classes of crimes. The practical experience, as well as the case-law, that the ad hoc tribunals will have built up meanwhile will no doubt prove exceedingly useful to the future permanent court.

(b) Method of establishing the court

5. Most of the judges of the Tribunal concur with the Commission that an international criminal court should be established by a treaty, to be worked out and adopted by a diplomatic conference convened by the United Nations. A treaty-based court is, in general, a more solid institution, since it is firmly grounded in the consent of the States parties and not, as United Nations ad hoc tribunals are, dependent for its continued existence on the Security Council or the General Assembly.

6. Some judges of the Tribunal are, however, of the opinion that the court should be established by the United Nations, either by amending the Charter - the court thereby becoming a United Nations organ - or by a resolution of the General Assembly. Since in any case the basic requirement for the establishment and functioning of the court lies in the consent of States willing to submit to its jurisdiction, such consent might be expressed by each relevant State with regard to a resolution by the General Assembly instead of a treaty. Furthermore, a General Assembly resolution would have the advantage that it could, first, be adopted more expeditiously than a treaty, and, second, become operative, with regard to those States accepting the court's jurisdiction, in a shorter period of time.

7. The majority of the judges of the Tribunal, however, favour establishing the court by treaty.

(c) State sovereignty versus international justice

8. The draft statute presents an underlying tension between State sovereignty and the demands of international justice ("nationalism" versus "internationalism"), in which State sovereignty seems in several instances, to have prevailed. This tension may also be described as a contrast between consensualism and community interests. the Draft statute, it appears, is trying to advance community interests, i.e., international criminal justice, by the method of consensualism, i.e., trying to obtain as much consent to the machinery of criminal justice as possible. In this respect, there is an inherent, albeit necessary, contradiction in its logic.

9. The prevalence of State sovereignty or consensualism over community interests or international justice is readily apparent in three areas: (i) initiation of prosecutions; (ii) approval of the court's rules; and (iii) the powers of the presidency, as described below.

(i) Initiation of prosecutions

10. Under the draft statute, the power to set criminal proceedings in motion lies only with States, either acting directly as contracting parties or through the Security Council. The Tribunal perceives this to be a major defect, since States may often be motivated by considerations other than those of international justice, and tend to be reluctant to initiate legal proceedings against each other, particularly in the field of alleged international crimes, for reasons of diplomacy. To give an example, the Genocide Convention of 1948, which explicitly provides for State responsibility to prevent and punish genocide, has been in force since 1951, and on 30 June 1994 had been ratified by 113 countries; it was only last year, however, that the Convention was for the first time relied upon in the International Court of Justice by one State party against another, despite numerous instances of the crime of genocide having occurred since 1951. It would therefore be fair to assume that most States will be reluctant to set the machinery of the international criminal court in motion, or that they might do so primarily from political motives. In the opinion of the judges, the prosecutor, as well as States parties, should be able to institute criminal proceedings against persons responsible for gross, large-scale violations of human rights or humanitarian norms. The prosecutor would obviously have to be totally independent of influence of any description.

(ii) Approval of the court's rules

11. Article 19 (2) of the draft statute provides that the court's rules have to be approved by a conference of States parties. The judges find this provision very striking. In the Tribunal's view, it is vital to the administration of justice that the judges control their own rules of procedure, provided of course that these rules are consistent with and fully respect the court's statute. Obviously, in case of possible inconsistencies, the strict terms of the statute will prevail over any inconsistent rule. The Tribunal's judges, however, strongly disavow giving the power of approval of the rules to States.

(iii) Powers of the presidency

12. The judges observe that, under the draft statute, several, not inconsiderable powers have been bestowed upon the presidency, for example, the powers set out in articles 26 (3) (power to issue subpoenas and warrants) and (5) (review of prosecutorial action); 27 (2) (examination of the indictment) and (3) (non-confirmation of the indictment); 28 (arrest) and 29 (pre-trial detention or release), although certainly some of these powers are delegable to one or more judges under article 8 (5). The Tribunal recognizes that there may well be practical reasons for this arrangement, for example, to permit the evolution of a full-time presidency which could exercise these functions in the absence of those judges serving on a part-time basis. If this be the case, however, the Tribunal respectfully suggests that a system of rotation of judges might be adopted providing for the presence of a single judge at the court at any given time, whose task it would be to exercise the functions now allocated to the presidency.

13. In the absence of any such practical justification for the powers designated to the presidency, the position adopted might be seen as reflecting

an emphasis on considerations extraneous to the proper administration of justice. Inasmuch as the president and vice-presidents would in all likelihood be nationals from different countries, the perception might arise that the powers of the presidency will be exercised in a non-judicial manner designed to achieve consensus or compromise.

14. Although there are similarities, the concept of the presidency under the draft statute should be distinguished from that of the Tribunal's Bureau (Rule 23). The Bureau's powers are premised on the idea of democratic and collegiate, judicial administration, rather than regional compromise or consensus-building, and do not concern judicial functions such as reviewing indictments.

(d) "Opting-in" approach

15. Fourth, the Tribunal has serious reservations about the "opting-in" approach to the court's competence which has been adopted under article 22 of the draft statute (i.e., when a State party ratifies the treaty it does not thereby automatically accept the competence of the court; it must do this by a further declaration), subject to the court's "inherent jurisdiction" as regards genocide under article 20 (a). This approach, which is also to be found in the Statute of the International Court of Justice and other treaties, has no doubt been included as an incentive for States to join the treaty. Arguably, this incentive was necessary when the ICJ's predecessor, the Permanent Court of International Justice, was established in 1920, since it was the first permanent court and a cautious approach to its establishment was advisable. This incentive is perhaps no longer necessary, particularly where, as here, all the crimes enumerated are already recognized crimes under general international law.

16. The Tribunal's judges would prefer to see the "opting-out" system established in the draft statute, where States would have publicly to declare on ratifying the treaty that they do not accept the jurisdiction of the court, either generally or over specified crimes. This would have the effect of putting the onus on States of justifying their non-acceptance of the court's jurisdiction.

(e) Flexibility

17. The judges note the flexibility of the instrument drafted by the International Law Commission. In some respects this is a desirable feature. An appropriately flexible provision is that judges can be part-time or full-time. This provision appears to be a healthy compromise between the full-time ICJ judiciary and the Permanent Court of Arbitration's panel of arbitrators, and is particularly suitable where, as here, the institution's evolution, in particular the judges' workload, is not foreseeable. In this context, it is also judicious to provide that the pool of judges shall comprise both criminal lawyers and international lawyers, since both elements clearly need to be represented in an international criminal court. These terms are, however, in need of further clarification (see sect. 3 (a) below).

(f) Crime of aggression

18. The Tribunal commends the Commission for including the crime of aggression among its substantive offences, and for recognizing its paramountcy by placing the crime next after genocide in article 20. Plainly, the crime of aggression is the wellspring of most other international crimes. In the respectful submission of the judges, the provision that the court cannot proceed against an individual for a crime of aggression unless the Security Council has first determined that a State has committed the act of aggression should, however, be omitted. Unlike the ad hoc Tribunals for the former Yugoslavia and Rwanda, which were of course set up by the Security Council, acting under Chapter VII of the Charter of the United Nations, and which are to that extent bound by resolutions of the Security Council, the proposed international criminal court is premised on a multilateral treaty, and not on any United Nations institution. Accordingly, it does not seem necessary to provide that the court defer to the Security Council on the subject of aggression, the effect of which would be to give the Security Council, and in particular the permanent members, exclusive rights of definition over the term "aggression", making it the "mouth of the oracle" for this category of crimes. The Tribunal's judges respectfully suggest that this would be an undesirable outcome.

3. Specific comments

19. On a more specific level, the Tribunal submits the following brief comments relating to particular articles of the draft statute.

(a) Article 6. Qualifications and election of judges

20. Regarding article 6, the rule that 10 judges are to have "criminal trial experience" and 8 judges "recognized competence in international law", while a good rule in principle, as stated above, might be too rigid in its application of a strict ratio. Additionally, States must specify into which category their nominee falls; there may well be circumstances, however, where a prospective judge has experience and competence in both criminal and international law, and where, consequently, it would be difficult precisely to categorize the candidate's credentials.

(b) Article 33. Applicable law

21. Some judges of the Tribunal find this article troubling inasmuch as subparagraph (c) provides for the application of "any rule of national law". In national criminal law there is usually a general part, consisting of broad principles of criminality, for example the rule "actus non facit reum nisi mens sit rea", and a special part which defines specific offences. The general part of international criminal law seems to be entirely absent from the draft statute. Consequently, when article 33 provides for the application of national law, it is unclear which general principles to apply. In some civil-law countries, for example, the definition of "intention" differs markedly from its definition in common-law countries, where it has a relatively precise meaning as a species of mens rea; it is moot, in this context, which rule of national law the court should apply.

(c) Article 37. Trial in the presence of the accused

22. The judges express approval of article 37, allowing trials in absentia under specified circumstances.

(d) Article 45 (5). Quorum and judgement

23. The judges of the Tribunal are concerned with this provision prohibiting separate and dissenting opinions, which represents a departure from the practice of the International Court of Justice, the Inter-American Court of Human Rights (article 66 (2)), the European Court of Human Rights (article 51 (2)), and the statutes of the ad hoc Tribunals for the former Yugoslavia (article 23 (2)) and for Rwanda (article 22 (2)). The first concern is that the judges of the international criminal court will have made a public and solemn undertaking under article 14 to exercise their functions under the statute "impartially and conscientiously" and in fairness to this judicial oath a dissenting judge should perhaps be allowed to make his dissent known where the judgement does not express the unanimous opinion of the judges. Second, as stated, the International Court of Justice, the European Court of Human Rights and the ad hoc Tribunals all provide for separate and dissenting opinions without fear of undermining the authority of those institutions or their judgements. In fact, most judgments of the International Court of Justice are accompanied by separate or dissenting opinions. We respectfully suggest that these models are worthy of being followed.

(e) Article 47. Restitution of property

24. Article 47 of the draft statute is silent on the subject of restitution of property, in contrast to the statute of the Tribunal, article 24 (3) of which allows the Tribunal to order restitution. The commentary to article 47 of the draft statute mentions the deliberate suppression of the power of restitution of property from the 1993 draft, because the Commission regarded it as primarily a civil remedy. While acknowledging that this remedy has civil-law elements, the Tribunal's judges respectfully suggest that the draft statute should nevertheless have provision for restitution.

(f) Article 49. Proceedings on appeal

25. Paragraph (5) of the commentary to article 49 states: "Like article 45, article 49 does not allow for dissenting or separate opinions." Article 49 does not, however, expressly so provide and it is arguably not even open to that construction. The judges submit, therefore, that article 49 should be re-drafted so as to clarify the position. In so far as the position is as stated in the commentary, the judges would repeat their contention, above, that separate and dissenting opinions should be allowed.

4. Drafting suggestions

26. The following suggestions concern the drafting of the statute, rather than commentary on its substantive provisions.

Article 27 (5)

27. Under this article, vital provisions on disclosure are left to the discretion of the presidency by the use of "may".

28. Furthermore, it is not apparent how the protection of confidential information in article 27 (5) (d) and the provisions of (b) are reconcilable; it is presumably left to the presidency's discretion.

Article 38 (4)

29. The reference to confidential information in this article conflicts with the reference to public hearing in the chapeau of article 41 (1), which is made subject to article 43 but not article 38 (4).

Article 45 (1)

30. The wording of this provision is infelicitous. It suggests that a judge could come and go during a trail and still give judgement.

Appendix II

31. There is a typographical error regarding the First Geneva Convention of 1949. It is referred to in the heading of section 1 as the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the field, 12 August 1989, rather than 1949.

5. Conclusion

32. The judges of the Tribunal commend the International Law Commission for its completion of a draft statute for an international criminal court and express the hope that the above comments will prove useful to the Ad Hoc Committee which has been set up to examine the draft statute. It perhaps bears repeating that, despite any reservations or suggestions expressed herein regarding the draft statute of the Commission, the judges have no hesitation in declaring that an international crimina court is urgently required. It is truly the "missing link" of international law.
