the Presidency, acting on behalf of and with the prior approval of States parties, and the UN, and it would provide, *inter alia*, for the exercise by the UN of the powers and functions referred to in the Statute.

Some members of the Commission had strongly put forward the view that the Court could only fulfil its proper role if it was made an organ of the UN by amendment of the Charter. This, it has been pointed out, had substantial implications for the operation and financing of the Court. Despite some of these problems, it was agreed that the Court could only operate effectively if brought into a close relationship with the UN, for administrative purposes, in order to enhance its universality, authority and permanence, and because in part the Court's jurisdiction could depend upon decisions by the Security Council. The Working Group, however, did not consider budgetary arrangements as it should be worked out satisfactorily in the context of an overall willingness of States to proceed to the establishment of the Court.

As regards the "Seat of the Court", the Working Group, *inter alia* referred in its Commentaries to some of the crucial issues such as provision of the prison facilities for the detention of persons convicted under the Statute, in the absence of other arrangements. There were also some crucial questions as regards the "status and legal capacity" of the Court. The Working Group sought to bring in Article 4 the goals of flexibility and cost reduction set out in its earlier report in 1992 which had laid down the basic parameters for the draft Statute. Although there was a substantial agreement in the Working Group as regards the permanent nature of the Court and that it would sit only when required to consider a case submitted to it, some Members continued to feel that this was incompatible with the necessary permanence, stability and independence of a true international criminal court.

C. Composition and Administration of the Court

Article 5 specifies the structure of the international judicial system to be created and its component parts. The Working Group briefly noted the functions to be performed by each component, namely, (a) strictly judicial functions are to be performed by the Presidency of the Court and its various chambers; (b) the crucial function of the investigation and prosecution of offenders is to be performed by an independent organ, the Procuracy, and (c) the principal administrative organ of the Court is the Registry. In the view of the Working Group, for conceptual, logistical and other reasons, the three organs are to be considered 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 and the prosecutorial branch.

The Working Group notes carefully the problems in the way of electing qualified judges with criminal law and criminal trial experience and expertise in the field of international law. Further, the relatively long period of 12 years for the term of office of the judges was also dealt with by the Working Group. This was criticized by some States as too long, and has been reduced to nine years, the same term as judges of the ICJ. The Working Group favoured the principle that judges should not be eligible for re-election considering the special nature of an international criminal jurisdiction. However, it found necessary to provide limited exceptions to this principle to cope with transitional cases and casual vacancies.

While commenting on Article 8 concerning the Presidency, the Working Group noted that the President and the two Vice-Presidents (with two alternates) will have to perform important functions in the administration of the Court, in particular as members of the Presidency. In addition to its overall responsibility for administration, the Presidency has pre-and post-trial functions of judicial character under the Statute. Further, it is clarified by the Working Group that the manner in which these functions are exercised would be subject to more detailed regulation in the rules. The Working Group discusses briefly the possible involvement of any one judge in pre-trial functions. This, according to the Working Group, raises the question whether such an involvement might prevent the judge sitting as a member of a Trial or Appeals Chamber, on the basis of an appearance of lack of impartiality. In this regard, it refers briefly to the practice and case law of the European Court of Human Rights. In the specific view of the Working Group the functions actually conferred by the Statute in the pre-trial phase are consistent with the involvement of members of the Presidency in Chambers subsequently dealing with that case.

In order to allow for specialization, an Appeals Chamber is envisaged, consisting of the President and six judges, at least three of whom are to be drawn from judges nominated as having recognized competence in international law. This, the Working Group points out, ensures that a majority of judges with criminal trial experience would be available to serve on Trial Chambers. Some members of the Working Group had 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, however, 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. The Working Group although dealt with these matters fairly briefly, thought that this was a matter which could be left to the Rules to be framed.

While dealing with the question of independence of the judges, some members of the Working Group strongly preferred a permanent court, believing that only permanence would give full assurance of independence and impartiality. Considering the non-permanent nature of judges, the Working Group sought to outline the nature of activities which might compromise the independence of the judges. For instance, it was clearly understood that a judge could not be, at the same time, a member of the legislative or executive branch of a national government. Similarly, a judge should not at the same time be engaged in the investigation or prosecution of crimes at the national level. On the other hand, the Working Group noted, national judges with experience in presiding over criminal trials would be most appropriate persons to act as judges.

The provision of "exercising and disqualification of judges" is unique. Although judges have a general obligation to be available to sit on the Court, at his request, the Presidency may excuse that judge from the exercise of a function under this Stature and may do so without giving any reason. This, in the view of Working Group, would be necessary for good reason to excuse a judge from sitting and where the interests of justice would not be served by disclosing the reason. For instance, this might be so in the case of grave security risks to the person or family of a judge.

The Procuracy, dealt in Article 12, is an independent organ composed of the Prosecutor, one or more Deputy Prosecutors and such other qualified staff as may be required. The importance of the independence of the Procuracy is underlined by the provision that the election of the Prosecutor and Deputy Prosecutors be carried out not by the Court but by an absolute majority of the States Parties. The Prosecutor must not seek or receive instructions from any Government or any other source, but act as a representative of the international community as a whole. 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. The Working Group had no difficulty in formulating a unanimous opinion on these aspects.

Article 16 refers to the privileges, immunities and facilities to be extended to judges. Officers and staff of the Court as well as counsel, experts and witnesses appearing before it. A composition made by the

Working Group to the similar provisions of the Statute of ICJ in Article 19 and Article 30 of the Statute of the International Tribunal for the Former Yugoslavia. The provision relating to "allowances and expenses" reflects the fact that the Court is not a full-time body. The English and French are to be the working languages of the Court. But this is, it is noted, without prejudice to the possibility that a particular trial be conducted concurrently in the languages of the accused and of the witnesses, together with the working languages. Article 19 refers to rules of the Court relating to pre-trial investigations as well as the conduct of the trial itself. It extends to matters concerning the respect of the rights of the accused, procedure, evidence etc. In these matters the Working Group had difficulty in formulating a substantial agreement as most of these were procedural in nature. The major and crucial questions arose in the substantive aspects such as jurisdictional issues.

D. Jurisdiction of the Court

One of the central elements in the draft Statute concerns the question of "jurisdiction". Part 3 deals with this aspect and limits the range of cases which the Court may deal with, so as to restrict the operation of the Statute to the situations and purposes referred to in the Preamble. The basic ideas regarding the jurisdictional strategy as expressed in the 1992 Working Group Report should be recounted briefly. It had two strands, namely, (a) the Court to exercise jurisdiction over crimes of an international character defined by existing treaties; and (b) acceptance of substantive jurisdiction in a particular case. However, there were a few difficulties of identifying the exact limits of application of these strands of jurisdiction. For instance, the distinction between treaty crimes and crimes under general international law could be difficult to draw. To cite an example, it cannot be doubted that genocide as defined in the Genocide Convention could be regarded as a crime under general international law. The majority of the Working Group in 1993 concluded that crimes under general international law could not be entirely excluded from the draft Statute. However, this formulation was met with considerable criticism in the Sixth Committee and in the comments of States, on the gronds that a mere reference to crimes under general international law was highly uncertain and that it would give excessive power to the proposed Court to deal with conduct on the basis that it constituted a crime under general international law. With a view to minimizing these possibilities the Working Group sought to limit the Court's jurisdiction over crimes under general international law to a number of specified cases, without prejudice to the definition and content of such crimes for other purposes.

The 1993 draft distinguished between two "strands" jurisdiction in relation to treaty crimes: (a) jurisdiction over crimes of an international character; and (b) crimes under what were referred to as suppression conventions (e.g. the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988). As pointed out by the Report of the Working Group the draft Statute adopted a course which has jurisdiction limited provisions so as to eliminate such crimes which may not exhibit international concerns. The Annex to the Statute lists multilateral treaties in force clearly defining as criminal specified conduct of international concern and extending the jurisdiction of States over such conduct. The Court's jurisdiction extends to certain crimes defined by those treaties, whether or not they are "suppression conventions" as mentioned earlier. By the combination of a defined jurisdiction in Article 20 the draft Statute seeks to ensure, in the words of the preamble, that the Court will be "complementary to national criminal justice system in cases where such trial procedures or may not be available or may be ineffective".

Some members of the Working Group had expressed their dissatisfaction at the restrictive approach taken to the jurisdiction of the Court (other than in cases of genocide). In their view the various restrictions imposed on the Court, and in particular the restrictive requirements of acceptance contained in Article 21, were likely to frustrate its operation in many cases, and even to make the quest for an international criminal jurisdiction negatory. On the contrary, there were other members of the Working Group who thought that the State went too far in granting "inherent" jurisdiction even over genocide, and that in the present state of the international community, the Courts jurisdiction should be entirely consensual. Suggestions were also made that the Court should also have an advisory jurisdiction in matters of international criminal law, either on reference from UN organs or from individual States. However, the Working Group has not made any provision for such a jurisdiction.

The Working Group, for the reasons stated above, concluded that it should not confer jurisdiction by reference to the general category of crimes under international law, but should refer only to the specific crimes warranting inclusion under that category. It has included four such: genocide, aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity. Of these, the Working Group finds that "genocide" was clearly and authentically defined in the 1948 Convention and it had envisaged that cases of genocide could be referred to an international criminal court. Further, in the view of the

crime of genocide. On the other hand, it had difficulty in accommodating the crime of "agression" in the same category as there was no treaty definition comparable to genocide. It should be noted that the General Assembly resolution 3314 (XXIX) dealt with aggression by States, not with the crimes of individuals, and was designed as a guide for the Security Council, not as a definition for judicial use. References were also made to Article 2(4) of the Charter of the UN and the Nuremberg Tribunal in 1946. It was, *inter alia*, felt that it would seem retrogressive to exclude individual criminal responsibility for aggression 50 years after Nuremberg. Considering the number of principles incorporated in the Charter of the International Military Tribunal of 1945 (the Nuremberg Charter), some members of the Working Group took the view that not every single act of aggression was a crime under international law giving rise to the criminal responsibility of individuals. With respect to the crimes against humanity the Working Group noted that there were unresolved issues about the definition of the crime. Nevertheless, in the understanding of the Working Group the definition of crimes against humanity encompassed inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or part. As regards the listing of crimes under general international law, in the view of the Working Group, raised questions as to why other international crimes, such as apartheid and terrorism were not also included.

Article 21 spells out the States which have to accept the Court's jurisdiction in a given case under Article 20 for the Court to have jurisdiction. The modes of acceptance are spelt out in Article 22. The Working Group, *inter alia*, referred to the aspects of Article 21 and how it differed from the equivalent provision of the 1993 draft Statute. It noted: first, the focus was specifically on the custodial State in respect of the accused, as distinct from any State having jurisdiction under the relevant treaty. Second, it required the acceptance by the State on whose territory the crime was committed, thus adopting the acceptance requirement in the 1993 Statute for crimes under general international law. Third, it also required the acceptance of a State which had already established, or eventually established its right to the extradition of the accused pursuant to an extradition request. Article 22, it should be noted, is concerned with the modalities of that acceptance, and is drafted so as to facilitate acceptance both of the Statute as a whole and of the Court's jurisdiction in individual cases. Article 23 refers to the "action by the Security Council". In other words, it allows the Security Council, in circumstances where it might have authority to establish an *ad hoc* tribunal under Chapter VII of the Charter of the UN, instead to trigger the Court's jurisdiction

by dispensing with the requirement of the acceptance by a State of the jurisdiction of the Court under Article 21.

E. Investigation and Prosecution

The procedure regarding the "investigations and prosecution" begins with the complaint. In the view of the Working Group the Court is envisaged as a facility available to States Parties to its Statute, and in certain cases to the Security Council. These aspects could be seen in the various provisions relating to this procedural aspect. In the case of genocide, where the Court has jurisdiction without any additional requirement of acceptance, the complainant must be a Contracting Party to the Genocide Convention and thus entitled to rely on Article VI of the Convention. The Working Group while supporting the idea of keeping the Court open for only States had stated two main reasons namely: (a) this may encourage States to accept the rights and obligations provided for in the Statute; and (b) to share in the financial burden relating to the operating costs of the Court. The members of the Working Group were not in agreement with the suggestion that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint if it appeared that a crime apparently within the jurisdiction of the Court would otherwise not be duly investigated.

The Draft Statute specifies the procedure concerning the mode of investigating alleged crimes by taking into account the norms of natural justice and equity. Nevertheless, while conducting the investigation, the Procuracy has the power to question suspects, victims and witnesses, to collect evidence, to conduct on-site investigations, etc. In this regard, the Prosecutor may seek the cooperation of any State and request the Court to issue orders to facilitate the investigation. At the investigation phase, a person who is suspected of having committed crime may be questioned, subject however, to following rights, namely the right not to be compelled to testify or to confess guilt; the right to remain silent without reflecting guilt or innocence; the right to have the assistance of counsel of the suspect's choice; the right to free legal assistance if the suspect cannot afford a lawyer, and the right to interpretation during questioning, if necessary. The Working Group had also felt that it was important to include a separate provision to guarantee the rights of a person during the investigation phase, before the person has actually been charged with a crime. It also found the necessity to distinguish between the rights of the suspect and the rights of the accused since the former were not as extensive as the latter. For instance, the suspect does not have the right to examine

witnesses or to be provided with all incriminating evidence, rights which are guaranteed to the accused.

The procedures relating to the "commencement of prosecution", and "Arrest", commence, if after investigation the Prosecutor concludes that there was a *prima facie* case against the suspect in respect of a crime within the Court's jurisdiction. There is an elaborate provision concerning pre-trial detention or release", which *inter alia* provides for the judicial determination of proceedings concerning "prosecution" and "arrest". The Working Group has generally taken the view to minimize any unnecessary and disproportional harm to the alleged offenders. Even it sought to provide for compensation in cases where there was an unlawful detainment. Considering the principles of natural justice, as soon as an accused is arrested on a warrant, the Prosecutor is obligated to take all necessary steps to notify the accused of the charge by serving the necessary documents, such as, statement of the ground for the arrest etc.

F. The Trial

It is provided that trials will generally take place at the seat of the Court. In the view of Working Group, the Court may decide. In the light of the circumstances of a particular case, that it would be more practical to conduct the trial closer to the scene of the alleged crime, for example, so as to facilitate the attendance of witnesses and the production of evidence. The provision relating to "applicable law" mentions two sources which are the Statute itself and applicable treaties. The third source which refers to national law acquires special importance in the light of the inclusion in the Annex of treaties which explicitly envisage that the crimes to which the treaty refers are nonetheless crimes under national law. As pointed out by the Working Group the dictates of the *nullum crimen* (i.e. principle of legality as enunciated in Article 39) requires that the Court be able to apply national law to the extent consistent with the Statute, applicable treaties and general international law. This, the Working Group notes, would be essential as international law does not yet contain a complete statement of substantive criminal law and the Court would need to develop criteria for the application of rules of national criminal law, to the extent to which they were properly applicable to a given situation. At the trial stage, the questions of jurisdiction and admissibility are addressed in the Draft Statute in order to ensure that the Court only deals with cases in the circumstances outlined in the Preamble i.e. where it is really desirable to do so. Further, the question whether trial *in absentia* should be permissible under the Statute had been discussed extensively. One view, according to the Working Group, was that trial in

absentia should be excluded entirely, on the ground, *inter alia*, that the Court should only be called into action in circumstances where any judgement and sentence could be enforced, and that the imposition of judgements and sentences *in absentia* with no prospect of enforcement would bring the Court into disrepute. On the other hand, another view would allow such trial only in very limited circumstances. The Working Group deals extensively with the formulations of the 1993 draft Statute which, *inter alia*, had provided that an accused should have the right "to be present at the trial, unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate". The discussion in the Working Group brings in various decisions incorporated in the Selected Decisions of the Human Rights Committee under the Optional Protocol and the European Court of Human Rights. However, the Working Group was attracted to the solution adopted in the Rules of the International Tribunal for the Former Yugoslavia which contemplates that the accused will be present at the trial. However, it provides for a form of public confirmation of the indictment in cases where the accused could not be brought before it.

Article 38 deals with the general powers of the Trial Chambers with respect to the conduct of the trial. The Trial Chamber has a full range of powers in respect of the proceedings. The Working Group has given elaborate comments on the applicability of these procedures. In its view the overriding obligation of the Trial Chamber is to ensure that every trial is fair and expeditious and is conducted in accordance with the Statute, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The principle of legality (*nullum crimes sine lege*), the fundamental principal of criminal law, is incorporated in Article 39. It specifies that an accused shall not be held guilty: (a) in the case of a prosecution... unless the act or omission in question constituted a crime under international law; (b) in the case of a prosecution... unless the treaty in question was applicable to the conduct of the accused at the time the act or omission occurred. Further, Article 40 recognizes that in a criminal proceeding the accused is entitled to a presumption of innocence and that the burden of proof rests with the Prosecution. The Working Group stresses the fact that the Prosecutor should have the burden of proving every element of the crime beyond reasonable doubt. In furtherance of this, Article 41 specifically provides for the "rights of the accused". In other words, it states the minimum guarantees to which an accused is entitled in relation to the trial, namely (a) to be informed promptly and in detail of the nature and cause of the charge; (b) to have adequate time and facilities for the preparation of the defence, and to communicate with

counsel of the accused's choosing; (c) to be tried without undue delay; (d) to examine and have examined in the Court proceedings; (e) necessary language interpretations; and (f) not to be compelled to testify or to confess guilt; Accordingly, Article 42 recognizes the important principle of criminal law, *non bis in idem* which *inter alia*, means that no person shall be tried for the same crime twice.

Considering the international importance of the Court's proceedings there is a provision for the "protection of the accused, victims and witnesses". The draft Statute in other articles attempts to take care of all the procedural aspects of criminal justice, such as evidence, sentencing and applicable penalties. As regards the determination of the appropriate punishment in a particular case, there is a term of imprisonment up to and including life imprisonment and a fine of a specified amount. The Court is not authorized to impose the death penalty. While determining these, the Working Group notes, the Court may consider the relevant provisions of the national law of the States which have a particular connection to the person or the crime committed, namely the State of which the convicted person is a national, the State where the crime was committed and the State which had custody of and jurisdiction over the accused.

G. Appeal and Review

Appeals may be, as enunciated in Article 48, brought either against judgement or sentence. In view of the Working Group the right to appeal should exist equally for the Prosecutor and the convicted person. The grounds for appeal may relate to one or more of the following: procedural unfairness, errors of fact or law, or disproportion between the crime and the sentence, proceedings on appeal are regulated by Article 49. Further, a person convicted of a crime may, in accordance with the Rules, apply for revision of a judgment on the ground that a new evidence has been discovered, which was not known to the accused at the time of the trial or appeal and which would have been a decisive factor in the conviction. This provision for "revision" is provided in Article 50.

H. International Cooperation and Judicial Assistance

For an effective functioning of the Court, States Parties to the Statute should cooperate wih the criminal investigations conducted by the Prosecutor and respond without undue delay to any request from the Court regarding, for example, the location of persons, the taking of testimony, the production of evidence, the service of documents etc. Some members of the Working Group, it is pointed out, thought that Article 51 went too far in imposing

a general obligation of cooperation on States Parties to the Statute, independently of whether they are parties to relevant treaties or have accepted the Court's jurisdiction with respect to the crime in question. They would therefore prefer Article 51 to state that parties would use their best efforts to cooperate. Provisional measures, specified in Article 52 allow the Court to request States to take provisional measures to present an accused from leaving its territory or the destruction of evidence located there.

Article 53 deals with the crucial question of "transfer of an accused to the Court". As provided in this provision, the Registrar may request any State to cooperate in the arrest and transfer of an accused pursuant to a warrant issued under Articlec 28. As to States not parties to the Statute, no obligation of transfer can be imposed, but cooperation can be sought in accordance with Article 55. The Working Group in its comments points out that the term "transfer" has been used to cover any case where an accused is made available to the Court for the purpose of trial, in order to avoid any confusion with the notion of extradition or other forms of surrender of persons (e.g. under status of forces agreements) between two States. The Working Group briefly dealt with the question of relationship between extradition and transfer. In its view, these provisions provide adequate guarantees that the Statute will not undermine existing and functional extradition arrangements. Accordingly, Article 55 recognizes that all States as members of the international community have an interest in the prosecution, punishment and deterrence of the crimes covered by the Statute.

I. Enforcement

It is provided that the States Parties to the Statute must recognize the judgments of the Court. As regards the prison sentences imposed by the Court these are to be served in the prison facilities of a State designated by the Court or, in the absence of such a designation, in the State where the Court has its seat. It is also provided that since the limited institutional structure of the Court, in initial stages at least, would not include a prison facility, States Parties would be requested to offer the use of such facilities to the Court. With the suggestion coming from the Working Group, a provision was incorporated to provide for the possibility of pardon, parole and commutation of sentence. The Annex to the Draft Statute includes crimes which are found in the treaties in force of universal character. Treaties which merely regulate conduct, or which prohibit conduct but only on an inter-State basis are included.

IV. Comments:

It should be recalled that at its forty-third session in 1991, the Commission provisionally adopted on first reading the Draft Code of Crimes against the Peace and Security of Mankind. At the same session, the Commission decided to transmit the Draft Code to Governments for their comments and observations with a request that such comments and observations be submitted by 1 January 1993. The Commission noted that the draft it had completed on first reading constituted the first part of the Commission's work on the topic of the Draft Code of Crimes Against the Peace and Security of Mankind; and that the Commission would continue at forthcoming sessions to fulfil the mandate the General Assembly had assigned to it in paragraph 3 of resolution 45/41 of 28 November 1990, which invited the Commission in its work on the Draft Code of Crimes Against the Peace and Security of Mankind to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. Similar ideas were reiterated by the General Assembly in its resolution 46/54 of 9 December 1991. Accordingly, at its forty-fourth session in 1992, the Commission had before it the Special Rapporteur's tenth report on the topic which was entirely devoted to the question of the possible establishment of an international criminal jurisdiction. In furtherance of this mandate, a Working Group was also set up to consider the issues concerning international criminal jurisdiction.

Remarkable progress could be seen in the work of the Working Group to establish an acceptable international criminal jurisdiction. In fact, priority was accorded to the "draft Statute for an International Criminal Court". However, there were various comments concerning the need to reconcile the expeditious completion of the draft Statute, given its priority, with the care required to draft an instrument that would be generally acceptable to States and provide for the establishment of a viable and effective institution. In AALCC Secretariat's view the work on the completion of the Draft Code and the International Criminal Court should progress simultaneously. The Draft Code, in AALCC Secretariat's view, provides the broad substantive criminal normative structure to operate an international criminal jurisdiction. For the reasons expressed by many of the members the main question always remains jurisdictional. Even there were various comments regarding the general approach to be taken by the Commission as it continued its work on the draft Statute. The AALCC Secretariat concurs with the view that the relationship between the substantive law to be applied by the Court and the procedural law represented by the

Statute had received insufficient attention. The AALCC Secretariat also seeks to consider the view that the functions of the Court should be precisely defined so that the States can accept a transfer of its sovereignty to the Court more easily.

The AALCC Secretariat notes that while stressing more on the draft Statute of the criminal court, the Commission should not attempt to create norms whose legal validity at the international level needed further clarification. This was, in fact, the initial mandate given by the General Assembly. Keeping some of these difficulties in view, several members had expressed the opinion that it would be preferable to take more time, if necessary, to draft an instrument for a better, more useful and permanent institution bearing in mind the unlikelihood that the Court would be established by States upon receipt of the draft Statute by the General Assembly.

As regards the nature of the Court, the AALCC Secretariat would like to support a realistic and pragmatic approach. In its view, a balance should be struck between a non-standing permanent body and full-time organ. It is for consideration whether a Court remaining permanently in session would help in encouraging uniformity and further development of law. In this regard, it would be necessary to clearly outline the nature of its relationship with the national courts. It may be necessary to have more output to consider this aspect. The AALCC Secretariat, however, finds no great difficulty in harmonizing the pure procedural aspects of the Court. Nevertheless, this calls for a greater amount of flexibility in applying these norms. In the view of AALCC Secretariat resolution of any disagreement in this regard should be solely left to the Court itself.

The AALCC Secretariat notes that there were some unclear areas with regard to the issue of what laws should be applied by the Court. One dominant view suggested that the Statute should be drafted in such a way as not to foreclose the future application of the Code. Some members, it should be noted, attributed particular importance to the applicability of national law, not only in instances where a treaty did not define a crime with the necessary precision, but also with respect to rules of evidence and penalties. Although there is some kind of balance in the structure of the draft Statute, the AALCC Secretariat seeks to note with care the erosion of "sovereignty". It is not clear as to how far the State can go to limit themselves and it is here that the success of the Statute and Code depends. The three mainstreams of the criminal, judicial process i.e. the investigation, the trial and the punishment, need at one level or the other, to intrude into national sovereignty. These questions, in the view of AALCC Secretariat, are crucial for the countries of Asia and Africa.

THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

The topic "the Law of the Non-navigational Uses of International Watercourses" was taken up by the International Law Commission (ILC) in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970. The work on this topic progressed steadily through the contributions made by five Special Rapporteurs. At its forty-third Session the Commission adopted on first reading an entire set of draft articles on the topic which was transmitted through the Secretary-General to Governments for comments and observations, with a request that such comments and observations be submitted to the Secretary-General by 1 January 1993. Accordingly, at its forty-fifth session, the Commission considered the first report (A/CN.4/451) of the Special Rapporteur. The Commission also had before it the comments and observations on the draft articles received from Governments (A/CN. 4/447 and Add. 1-5). While concluding its debate, the Commission referred Articles 1 to 10 to the Drafting Committee established by the Commission. At its forty-sixth session, the Commission considered the second report of the Special Rapporteur and referred the draft articles covered in the second report to the Drafting Committee established by the Commission. It invited the Drafting Committee to proceed with the consideration of the draft articles without the amendments introduced by the Special Rapporteur on unrelated confined groundwater, and to submit suggestions to the Commission on how the Commission should proceed on the question of unrelated confined groundwater. Finally, on the basis of the Drafting Committee's report, the Commission adopted the final text of a set of 33 draft articles on the Law of the Non-Navigational Uses of International Watercourses and a resolution on confined transboundary groundwater. The present study, to the extent necessary, reflects these overall developments in the work of ILC concerning this topic.

In his second report, the Special Rapporteur was making suggestions for what could be regarded as substantive changes. The first was to delete the phrase "flowing into a common terminus", a concept that had not been present in the drafts submitted by the earlier Special Rapporteur. Reference has been made in this context to the Water Resource Committee of the International Law Association, which had stated in 1993 in response to the draft produced on first reading that the "notion that the waters of a watercourse must always flow into a common terminus cannot be justified in the light of today's knowledge of the behaviour of water". As noted in the report by way of an example, the waters of the Danube at certain