## (iii) Secretariat Brief
## Establishment of International Criminal Court

### I. Background

The issues relating to the creation of an international criminal jurisdiction have assumed enormous significance in recent times with the adoption of the draft statute of the International Criminal Court (ICC) by the International Law Commission (ILC) at its 46th session held during 1994.[1] The efforts, however, to evolve a legal mechanism for the exercise of international criminal jurisdiction in respect of a category of crimes which came to be regarded as "international crimes" began soon after the Second World War. Accordingly, the ILC had to deal with the question of the establishment of an International Criminal Court in the context of its work on the preparation of a draft Code of Offences against the Peace and Security of Mankind.

The General Assembly of the United Nations (UN) directed the ILC in 1947 to[2]

(a) formulate the principles of international law recognized in the Charter of the Nurnberg Tribunal and in the judgement of the Tribunal; and

(b) prepare a draft Code of Offences against the Peace and Security of Mankind.

The ILC at its Second Session in 1950, adopted a formulation of the Principles of International Law recognized in the Charter and the judgement of the Tribunal.[3] And at its Sixth Session in 1954, the ILC also finalized

1. The draft adopted by the ILC consists of 60 articles. For the text of the draft Statute see Annex-A.
2. GA Resolution 177(II) of 21 November 1947.
3. *Year Book of the International Law Commission*, 1950, Vol. II pp. 374-378.

a draft Code of Offences against the Peace and Security of Mankind and submitted it to the UN General Assembly.[4] The UN General Assembly, however, decided to postpone consideration of the draft Code as it raised issues and problems closely related to the question of the definition of "aggression" which was being considered by a Special Committee of the UN.[5] It was only in 1981 that the UN General Assembly invited the ILC to resume its work on the elaboration of the draft Code of Offences. After a decade long deliberations, the ILC adopted provisionally the draft Articles on the Code of Crimes in 1991.

This part of the work of the ILC could be considered as the first phase in the evolution of international criminal jurisdiction. The second phase, the primary concern of this paper, is closely connected with the evolution of international criminal jurisdiction *vis-a-vis* its effective enforcement. In 1991, the UN General Assembly invited ILC "to further consider and analyse within the formulation of the draft Code, the issues relating to an international criminal jurisdiction, paying particular attention to the proposals made in the General Assembly for the establishment of an ICC or other international trial mechanism.[6]

**Towards the Establishment of an ICC:**

At its 47th Session in 1992, the UN General Assembly requested the ILC to accord high priority to its work on the establishment of an international criminal jurisdiction and to finalize the draft Statute of the Court. Meanwhile, the creation of an *ad hoc* tribunal for Yugoslavia had generated debate on the possibility of establishing an ICC of a permanent character. On the contrary, the approach recommended by the Working Group constituted by the ILC in 1992 was flexible in that it had envisaged a Court which would not be a full-time body but an established structure to be called into operation as and when required, according to a procedure determined by its Statute. Some of the preliminary recommendations of the Working

4. *Year Book of the International Law Commission*, 1954, Vol. II pp. 150-152.
5. In 1947 the UN General Assembly finally adopted the "Definition of Aggression" by consensus, on the basis of the recommendation of the Special Committee; see, GA Resolution 3314 (XXIX) of 14 December 1947.
6. GA Resolution 46/54 of 9 December 1991. This was the outcome of an intiative taken in the General Assembly by Trinidad and Tobago on the question of an international criminal jurisdiction in the context of transnational crimes such as international drug trafficking.
7. GA Resolution 47/33 of 25 November 1992. According to some scholars certain developments in the international scene acted as a catalyst to give an impetus to the work of the ILC. Foremost among them was the creation of an *ad hoc* tribunal for the trial of war crimes in the territory of former Yugoslavia; see A. Rohan Perera, "Towards the Establishment of an International Criminal Court" *Commonwealth Law Bulletin*, Vol. 20 (1994) no. 1, pp. 298-309 at page 299; Also see Theodor Meron, "War Crimes in Yugoslavia and the Development of International Law", *American Journal of International Law*, Vol. 87 (1993), p. 639.



Group of 1992 could be noted. First, as regards the composition of the Court and the appointment of its members, its suggestion was that each State party to the Statute would nominate, for a prescribed term, one qualified person to act as a judge of the Court. Second, on the question of the nature and modalities of acceptance of the jurisdiction of the envisaged Court, its recommendation was that the envisaged Court, should not have compulsory jurisdiction in the sense of a general jurisdiction which a State party to the Statute would be obliged to accept *ipso facto* and without further agreement, nor exclusive jurisdiction in the sense of a jurisdiction excluding the concurrent jurisdiction of States in criminal cases. Third, the jurisdiction of the envisaged Court should be based on specified existing international treaties in force creating crimes of an international character, including the Code of Crimes after its adoption and entry into force.[8]

Reference may now be made to the eleventh report of the Special Rapporteur which dealt with the draft Statute of the ICC and to written comments received from Member States submitted with reference to General Assembly resolution.[9] He noted, both in the introduction of his eleventh report and in his presentation of the report to the ILC, that he had already studied the question of the possible establishment of an international criminal jurisdiction.[10] He also pointed out that at that stage, the aim was not to submit a draft Statute of an ICC on very important aspects relevant to the establishment of such a court, so that the debate could provide him with the guidelines necessary for the elaboration of a draft Statute.[11] The framework of the ICC, as envisaged by the Special Rapporteur, was not intended to offer definitive solutions to a problem of great complexity. On the other hand, it was a work plan presenting the various subjects of the Statute of a Court that mostly respected the spirit and the approach of the Commission, which had hoped for an organ with structures that were adaptable, not permanent and of modest cost.[12]

8. As far as the relationship between the Statute of the envisaged Court and the Code of Crimes, the Working Group's recommendation was that, while drafting the Statute of the envisaged Court, the possibility should be left open that a State could become a party to the Statute without thereby becoming a party to the Code of Crimes; see *Year Book of the International Law Commission*, 1992, Vol. II, pp. 58-77.
9. In this report, the Special Rapporteur had also referred to the fact that he had already studied the question of the possible establishment of the ICC in his three previous reports; see Eighth Report; *Year Book of the International Law Commission*, 1990, Vol. II (Part one), p.27; Ninth Report; *Year Book of the International Law Commission* 1991, Vol. II (Part one), p. 37; Tenth Report; *Year Book of the International Law Commission*, 1992, Vol. II (Part one); Eleventh Report; *Yeary Book of the International Law Commission*, 1993, Vol. II (Part two), p. 14.
10. Year Book, 1993, n.9, p.14.
11. *Ibid.*
12. *Ibid.*

In order to focus its area of discussion, the 1993 Working Group constituted by the ILC decided to create three subgroups dealing primarily with the following topics, namely, (a) Jurisdiction and Applicable Law; (b) Investigation and Prosecution; and (c) Cooperation and Judicial Assistance. Subsequently, the preliminary consolidated text elaborated by the 1993 Working Group was divided into seven main parts. These were: Part 1-Establishment and Composition of the Court; Part 2-Jurisdiction and Applicable Law; Part 3-Investigation and Commencement of Prosecution; Part 4-The Trial; Part 5-Appeal and Review; Part 6-International Cooperation and Judicial Assistance; and Part 7-Enforcement of Sentences.[13]

**An Overview of the Draft Statute**

In 1994, the Working Group before finally adopting the draft Statute noted that it "did not purport to adjust itself to any specific criminal legal system, but rather to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an international court or tribunals and releveant provisions in national criminal justice systems within the different legal tradition.[14] It also took note of the various provisions regulating the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991. Furthermore, its objective in conceiving the Statute for an ICC was to be "as an attachment to a future international convention on the matter."[15]

**A. Preamble**

The preamble to the Statute primarily sets out the main purpose intended to be achieved. Accordingly, the draft Statute intends further cooperation in international criminal matters.[16] It also seeks to provide a forum for trial and, in the event of conviction attempts to provide for an appropriate punishment of certain persons accused of crimes of significant international concern. More importantly, the envisaged Court does not purport to run parallel to the national criminal justice systems. Instead, it intends to be complementary to the national systems, particularly in cases where such trial procedures may not be available or may be ineffective. It is also clarified in the Commentaries to the draft Statute that it does not affect the right

13. *Revised Report of the Working Group on the Draft Statute for an ICC*, A/CN/4L/490, 19 July 1993; The Working Group of 1994, however, included one more item i.e. Composition and Administration of the Court.
14. Report of the Working Group, A/CN/4/L.491, 17 June 1994.
15. *Ibid.*
16. For the text of the draft Statute see Annex-A at the end of this study.



of States to seek extradition and other forms of international judicial assistance under existing arrangements.[17]

**B. Mode of Establishment**

The crucial issue concerning this subject relates to the "relationship of the Court to the UN." Some countries had favoured the Court becoming a subsidiary organ of the UN by way of resolutions of the Security Council (SC) and the GA, without the need for any treaty. Others had strongly preferred that it be created as an organ of the UN by amendment to the Charter. Those who did not agree with these two arrangements advocated another kind of link such as, for instance, a relationship agreement along the lines of that concluded between the UN and the International Atomic Energy Agency (IAEA).[18]

**C. Composition and Administration**

Article 5 of the draft Statute outlines the structure of the international criminal jurisdiction proposed to be created. These structures include the following: (a) judicial functions to be performed by the Presidency of the Court and its various chambers; (b) investigation and prosecution of offenders to be performed by an independent organ, the Procuracy; and (c) the principal administrative organ of the Court is to be the Registry. In the view of the ILC Working Group, for conceptual, logistical and other reasons, the three organs are to be considered as constituting an international criminal 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.[19]

**D. Jurisdiction**

Part 3 of the draft Statute deals with the aspects relating to the jurisdiction of the Court.[20] It seeks to restrict the operation of the Statute to the situations and purposes referred to in the Preamble. It has two main 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. 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, however, stated in Article

17. For the viewpoints of ILC Members and the AALCC Secretariat's views on these issues see *Report on the Work of the International Law Commission at its Forty-Sixth Session*, Doc. No. AALCC/XXXIV/Doha/95/1, at page 13.
18. *Ibid* page 16; However, the Working Group of the ILC had concluded that it would be extremely difficult to establish the Court by resolution of a UN body, without the support of a treaty.
19. Report of the Working Group, A/CN.4/L.491, 17 June 1994.
20. See Annex-A at end of this study.

22. It should be noted that the modalities of acceptance are 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." It authorises the SC to trigger in circumstances where it might have authority to establish an *ad hoc* tribunal under Chapter VII of the Charter of the UN, 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**

Part 4 of the draft Statute provides for the procedures concerning "investigation and prosecution."[21] It specifies the procedure concerning the mode of investigating alleged crimes by taking into account the norms of natural justice. 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 investigation. The procedures relating to the "commencement of prosecution" and "arrest", commence, if after investigation the Procuracy 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".

**F. The Trial**

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 principle of legality (*nullum crimen sine lege*), the fundamental principle of criminal law, is incorporated in Article 39. It specifies that an accused shall not be held guilty in the case of a prosecution....(a) unless the act or omission in question constituted a crime under international law; (b) 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. And Article 41 specifically provides for the "rights of the accused". In other words, it incorporates the minimum guarantees to which an accused is entitled in relation to the trial.

21. *Ibid.*



**G. Appeal and Review**

Appeals may be, as enunciated in Article 48, brought either against judgement or sentence. 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.

**H. International Cooperation and Judicial Assistance**

Article 51 imposes a general obligation of cooperation on States parties to the Statute, independently or whether they are parties to relevant treaties or have accepted the Court's jurisdiction with respect to the crime in question. Article 52, allows the Court to request States to take provisional measures to prevent 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 Article 28. As to States not parties to the Statute, no obligation of transfer can be imposed, but cooperation can be sought in accordance with Article 56.

**I. Enforcement**

Article 58 provides that States parties to the Statute must recognize the judgements of the Court. Further, it is also provided that the prison sentences imposed by the Court are to be served in the prison facilities of the State designated by the Court or, in the absence of such a designation, in the State where the prison facilities are provided.

## IV. REPORT OF THE AD HOC COMMITTEE : CONTENTIOUS ISSUES

The draft Statute for the establishment of an ICC prepared by the ILC was considered by the Sixth Committee during the 49th Session of the GA. During this Session, it was pointed out by many delegations that there were certain gaps in the draft Statute which needed further consideration. Accordingly, the Sixth Commitee constituted an *Ad Hoc* Committee with a specific mandate to discuss the major areas of contention. The *Ad hoc* Committee on the Establishment of an ICC met at UN Headquarters from 3 to 13 April and from 14 to 25 August 1995, in accordance with GA resolution 49/53 of 9 December 1994. It was open to all States Members of the UN or members of the specialized agencies.[22] The *Ad Hoc* Committee primarily considered the following six issues : (a) Establishment and

22. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* A/50/22.

Composition of the Court; (b) The Principle of Complementarity; (c) Issues pertaining to Jurisdiction and Applicable Law; (d) Methods of proceedings: Due process; (e) Relationship between States parties, non-States parties and the ICC; (f) Budget and Administration.

### A. Establishment and Composition of the ICC

The widely shared view was that the proposed Court should be established as an independent judicial organ by means of a multilateral treaty. Further, such an approach based on the express consent of States was considered consistent with the principle of State sovereignty and with the goal of ensuring the legal authority of the Court. Many delegations recognized the difficulties that would be involved in establishing the Court as an organ of the UN through an amendment to the Charter of the UN. On the other hand, some delegations suggested that a relatively high number of ratifications and accessions, for instance 60, should be required for the entry into force of the treaty, by way of ensuring general acceptance of the regime.

Some delegations, it should be noted, supported the establishment of the proposed Court as a principal organ of the UN, in order to ensure its universality, moral authority and financial viability. They felt that the difficulties involved in the required amendment to the Charter were overemphasised.

There was no unanimity among delegations as regards the mode of appointment of judges and the qualifications required for their appointment. According to some delegations too rigid a distinction between judges with criminal trial experience and those with competence in international law might result in an unjustifiable quota system and complicate the selection of candidates. A more flexible approach was preferred by many delegates. There was also a proposal that the procedure for the nomination and election of judges applicable in the context of the ICJ and the International Tribunal for the former Yugoslavia afforded better guarantees of independence and unversality. There was a suggestion that paragraph 5 of Article 6 should be amended to provide for an equitable geographical representation as well as the representation of the principal legal systems of the world.

### B. The Principle of Complementarity

The principle of complementarity deals with the relationship between the proposed ICC and national criminal and investigative procedures.[23] There was a unanimity among the delegations that the principle of complementarity

23. China, India, Japan, Malaysia and Thailand favour the supremacy of the national jurisdiction over the ICC.



constituted one of the essential elements in the establishment of the ICC. However, several delegations pointed out that an abstract definition of the principle would serve no useful purpose and found it preferable to have a common understanding of the practical implications of the principle for the operation of the ICC. Some delegations sought to ascertain those provisions of the draft Statute on which the principle of complementarity had a direct bearing.

According to several delegations a strong presumption in favour of national jurisdiction was necessitated for the following reasons : (a) all those involved would be working within the context of an established legal system, including existing bilateral and multilateral arrangements; (b) the applicable law would be more certain and developed; (c) the prosecution would be less complicated, because it would be based on familiar precedents and rules; (d) both prosecution and defence were likely to be less expensive; (e) evidence and witnesses would normally be more readily available; (f) language problem would be minimized; (g) local courts would apply established means for obtaining evidence and testimony, including application of rules relating to perjury; and (h) penalties would be clearly defined and readily enforceable.

On the other hand, some delegations sought the application of "concurrent jurisdiction", allowing the proposed ICC the primacy of jurisdiction. Although there was a greater emphasis on the balanced approach, an examination was felt necessary in the following areas, such as, international judicial cooperation and various issues involving surrender, extradition, detention, incarceration, recognition of decisions and applicable law.

According to several delegations, the meaning and scope of the "national jurisdiction" needed clarification. "National Jurisdiction", it was pointed out, was not limited to territorial jurisdiction but also included the exercise of jurisdiction by the States competent to exercise jurisdiction in accordance with established principles and arrangements. Considering this clarification, some delegations sought to outline the "nature of the exceptions to the exercise of national jurisdiction." A reference was made to the preambular paragraph which mentioned this exception as "where such trial procedures may not be available or may be ineffective". However, there was a measure of agreement that it would be inappropriate to term any national jurisdiction as "ineffective". On the other hand, there was no unanimity as regards the question whether the duty of the ICC to respect the decisions of national courts extended only to manifestly well-founded decisions or not. In this regard, it was stressed that the standards set by the ILC were not intended to establish a hierarchy between the ICC and national courts, or to allow the ICC to pass judgment on the operation of national courts in general.

Some delegations were, however, concerned with Article 42 on *non bis in idem*, (the rule of double jeopardy) which according to them conferred upon the ICC a kind of supervisory role *vis-a-vis* national courts, notwithstanding the fact that the jurisdiction of the ICC was concurrent with that of national courts. Another provision that was viewed as departing from the concept of complementarity was paragraph 4 of Article 53, which required a State party to give priority, as far as possible, to requests for arrest and transfer emanating from the Court over extradition requests from other States.

### C. Issues Pertaining to Jurisdiction and Applicable Law

There was a great deal of concurrence among the delegations on the importance of limiting the scope of the subject-matter jurisdiction of the ICC to the most serious crimes of concern to the international community.[24] The reasons for this were stated to be the following: to promote broad acceptance of the Court by States and thereby enhance its effectiveness; to enhance the credibility and moral authority of the Court; to avoid overloading the Court with cases that could be dealt with adequately by national courts; and to limit the financial burden imposed on the international community.

With regard to the selection of crimes under Article 20 there were divergent views, particularly concerning the inclusion of three or four crimes under general international law. According to one view the inclusion of three crimes i.e. the crime of genocide, serious violations of the laws and customs applicable in armed conflict and crimes against humanity, would be sufficient to obviate the need for the creation of additional *ad hoc* tribunals. The inclusion of treaty-based crimes was also supported. Delegations made particular reference to terrorist and drug-related offences. Torture and apartheid were also sought to be included as serious crimes of international concern. Some delegations were supportive of the inclusion of environmentally-related offences. Considering these various views a flexible approach was mooted. It initially sought to limit the Court's jurisdiction to the first three or four crimes, while providing for some type of mechanism to enable the States parties to the Statute to consider the addition of other crimes at a later stage. Some delegations sought to outline the implications arising out of the selection of crimes. According to this, nature and the

24. This concurrence was however, not uniform. Egypt, for instance, sought to concentrate on three crimes, namely, genocide, war crimes and crimes against humanity. Majority of the Western countries (USA, UK, Canada, Australia, Finland and Denmark) sought to include additional crimes, particularly relating to internal armed conflicts and the safety of UN personnel. However, this was not acceptable to China, India and Algeria.



selection of crimes had its effect on the principle of complementarity, the State consent requirements and the trigger mechanism for the exercise of jurisdiction, as well as the obligations of States parties with respect to the cooperation and judicial assistance to be provided to the Court.

The definition of crimes presented many difficulties. For instance, the principle of legality (*nullum crimen sine lege and nulla poena sine lege*) and the constituent elements of each crime needed elucidation to avoid any ambiguity and to ensure full respect for the rights of the accused. Some delegations suggested the following methods for defining the crimes listed in Article 20: referring to, or incorporating the provisions of relevant treaties; elaborating definitions by using the Nurnberg Charter and the Statutes of the International Tribunals for the former Yugoslavia and for Rawanda as a starting point; or finalizing the draft Code of Crimes against the Peace and Security of Mankind as a matter of priority to avoid delays in the establishment of the Court.

According to many delegations, the crime of genocide met the criteria for inclusion in the jurisdiction of the Court set forth in the preamble. The suggestion to expand the scope of the definition of the crime of genocide did not receive full support by all the delegations. The scope of present exercise, delegations pointed out was not to amend the existing binding conventions. Concern was also expressed that providing for different definitions could result in the ICJ and ICC rendering conflicting decisions with respect to the same situation under the two respective instruments. However, some delegations noted that it might be useful to elaborate on various aspects of the intent requirements without amending the Convention, including the intent required for the various categories of responsible individuals, and to clarify the meaning of the phrase "intent to destroy" as well as the threshold to be set in terms of the scale of the offence of the number of victims.

The proposal to include "aggression" as crime was opposed by many delegations. According to them the possibility of arriving at a definition of aggression for the purpose of the Statute within a reasonable time-frame was extremely difficult. It was also pointed out that 1974 Definition of Aggression was not intended for the establishment of individual criminal responsibility. The idea of allowing the Security Council to determine the existence of an act of aggression did not receive complete acceptance by the delegations. According to some of the delegations, it, in fact, may deprive the independence and objectivity of the functioning of the ICC. So, it was felt necessary to find a proper balance between the requirement of the independence of the Court and the need to respect the primary role of the SC in the maintenance of international peace and security.

The inclusion of the crime relating to the "serious violations of the Laws and Customs Applicable in Armed Conflict", in Article 20 received approval of the majority of delegations. However, a view was expressed that the concept of seriousness might require further clarification or possibly be accompanied by additional criteria to distinguish between violations of greater or lesser gravity, magnitude, scale or duration and to ensure that only the former would be included in the jurisdiction of the Court. Regarding the inclusion of the crime relating to the "Crimes Against Humanity", it was pointed out that there was no convention containing a generally recognized and sufficiently precise juridical definition of crimes against humanity. Accordingly, in the view of several delegations the definitions contained in the Nurnberg Charter, the Tokyo Tribunal Charter and the Statutes of the *ad hoc* Tribunals for the former Yugoslavia and for Rawanda could provide guidance in the elaboration of the definition relating to "Crimes against Humanity". Regarding the inclusion of treaty-based crimes, the view was expressed that the offences established in the treaties might be of lesser magnitude than the other offences provided for in Article 20 and that their inclusion within the jurisdiction of ICC entailed a risk of trivializing the role of the Court. On the other hand, it was felt that the ICC should focus on the most serious crimes of concern to the international community as a whole. Furthermore, it was also argued that the 'treaty-based crimes' were more effectively dealt with by national courts or through international cooperation. A suggestion was also made that a provision should be included in the Statute to allow for periodic reviews of the list of crimes as a way of keeping it attuned to the requirements of international community.

The issues relating to the exercise of jurisdiction were central to the effective application of the Statute. It had also close links with the major elements such as the principle of complementarity, consent, triggering mechanism and the role of the SC. The exercise of jurisdiction brings into focus the question of 'inherent jurisdiction' meant that any State that became a party to the Statute would *ipso facto* accept that the Court had the power to try an accused for that crime without additional consent being required from any State party. However, it was also pointed out that inherent jurisdiction did not mean exclusive jurisdiction and would not strip States parties of the power to exercise jurisdiction at the national level. According to some delegations, the inclusion of the concept of inherent jurisdiction in the Statute was incompatible with the principle of State sovereignty. This view, however, was not accepted by all the delegations. According to them, the crimes under consideration in the Statute were crimes of international concern, the prosecution of which would be of interest to a number of States. It was also pointed out that the subordination of the exercise of jurisdiction by the ICC to a declaration of acceptance would



leave the future fate of the ICC in the hands of States on whose discretion the ability of the Court to operate would depend. Several delegations were, nevertheless, concerned with the mechanism adopted by the ILC to the question of inherent jurisdiction in Article 21. However, several other delegations sought to extend the sphere of inherent jurisdiction to the crime of genocide only.

The conditions relating to the State consent for the exercise of jurisdiction were crucial. According to several delegations, to avoid subjecting the operation of the Court to undue restrictions, the consent requirement should be limited to the territorial State, which had a particular interest in the prosecution of the case, or to the custodial State, whose consent was necessary for the Court to obtain custody of the accused. The view was also expressed that the consent requirements should be extended to other States which could have a significant interest in a case, including the State of nationality of the victim, the State of nationality of the accused and the target State of the crime.

The filing of a complaint envisaged as a trigger mechanism under Articles 21 and 25 was considered by the delegations closely. According to some delegations any State party to the Statute should be entitled to lodge a complaint with the prosecutor with respect to the serious crimes under general international law that were of concern to the international community as a whole, referred in Article 20, sub-paragraphs (a) to (d). It was also suggested that the filing of such complaints should be limited to the States concerned that had a direct interest in the case and should be able to provide relevant documents or other evidence to avoid substantial costs involved in a lengthy investigation in response to frivolous, politically motivated or unsubstantiated complaints. At this stage of the discussion, the delegations also considered the role of the prosecutor. According to many of them, his role should be more fully elaborated and expanded to include the initiation of investigation or prosecution in the case of serious crimes under general international law that were of concern to international community. However, opinions differed as to whether in the absence of State complaint, would it be appropriate for the prosecutor to initiate an investigation or not. According to one view, the absence of such a complaint indicated that the crime was not of sufficient gravity or concern to the international community. According to another view, it showed that the States concerned were unable or unwilling to pursue the matter.

As regards authorizing the SC to refer matters to the ICC under Article 23 of the draft Statute, the views among the delegations were divided. Some felt that it was consistent with its primary responsibility for the maintenance of international peace and security and its existing powers