XII. International Organisations

Reform of the Security Council

An article on Security Council reform, by MacAlistair Darrow "Directions in Security Council Reform" begins in this volume of the *Aust YBIL* at p 285. During the course of his speech in the General Debate at the 49th Session of the United Nations General Assembly on 3 October 1994, the Australian Foreign Minister, Senator Gareth Evans, gave further attention to the reform of the Security Council, as follows:

> If the United Nations decision-making bodies are to have legitimacy and guaranteed international support in responding to the range of new and difficult situations with which the international community is now being confronted—particularly deadly conflicts and massive human rights violations occurring within states—they must be representative of the broad range of interests and perspectives of UN member states. This is a key reason why enlargement of the Security Council's membership is a pressing concern for this General Assembly. It should be said, at the same time, that the Security Council's legitimacy will ultimately depend not just on its representativeness, but upon the quality of its performance, and in that context it will be very important that this Assembly applies very rigorously the criteria and qualifications for Security Council membership elaborated in Article 23 of the Charter.
>
> The model that would most simply meet the legitimate aspirations of the largest states presently excluded from permanent membership of the Security Council—including Japan and Germany, whose claims we support—would involve the creation of 5 new permanent membership seats. Assuming the continuation of the existing regional groups, 3 new Permanent Members would come from Africa and Asia, 1 from the Western European and Other States group (WEOG) and 1 from Latin America and the Caribbean. Australia would prefer not to extend the veto to any new permanent member; at the same time, we believe it would be appropriate to slightly dilute the veto power of the existing 5 Permanent Members by requiring 2 from their number to concur in its exercise.
>
> If, as seems not impossible, agreement on a simple model of this kind proves not easily reachable, it may be worth giving consideration to a more complex alternative model. We have in mind one which would no doubt in practice guarantee effective permanency for the largest states presently excluded from the Council (including Japan and Germany). But it would at the same time give a greater degree of flexibility to the Council's structure, and greater opportunities for recognition of several other countries which have made a major contribution to the organisation. It might, for those reasons, be a model capable of commanding more widespread support.
>
> This alternative model would involve, in addition to the 5 existing Permanent Members (whose veto power would again be slightly diluted, as already outlined), the creation of 8 Quasi-Permanent seats (allocated among regional groups) for which consecutive re-election would be possible, together

with 10 rotating Non-Permanent seats. It would make abundant sense, in our view, for the existing regional groups to be at the same time modified to reflect post-Cold War realities. A suggested way in which these 23 seats might be distributed among such a new set of regional groups is set out in the table attached to the circulated text of this speech; that table also sets out how they might be distributed among the existing groups. On this model, the question of which states became Quasi-Permanent Members, and how long they remained on the Council in that capacity, would be a matter for determination by the regional group in question.

Consequential amendments would be required to Articles 23 and 108 of the Charter, and the opportunity should be taken at the same time to remove the anachronistic enemy states clauses. An accompanying General Assembly Resolution could elaborate any new regional group arrangements.

It is of course the case that any change to Security Council membership is fraught with complexity and difficulty. But if we are ever to move from the stage of generalised discussion to concrete negotiations it is necessary to put some quite specific and comprehensive proposals on the table. I certainly do not suggest that the models I have advanced are the only possible approaches, but I do strongly suggest that the time is now ripe for us to commence such negotiation. I believe that others share our determination to move in a spirit of good will and conscientiousness to see that the United Nations for the next 50 years is soundly built, and an expanded, newly legitimised Security Council is a crucial foundation in this respect.

APPENDIX

Possible Models for Enlarging the Security Council

Existing Arrangement

	WEOG	Eastern Europe	Africa & Asia	Latin America & Caribbean	Total
	(26)	(19)	(99)	(34)	
PM	3	1	1	-	5
NPM	2	1	5	2	10
Total	5	2	6	2	15

Simple Model

	WEOG	Eastern Europe	Africa & Asia	Latin America & Caribbean	Total
	(26)	(19)	(99)	(34)	
PM	4	1	4	1	10
NPM	2	1	5	2	10
Total	6	2	9	3	20

Alternative Model

A. Existing Groups

	WEOG	Eastern Europe	Africa & Asia	Latin America & Caribbean	Total
	(26)	(19)	(99)	(34)	
PM	3	1	1	-	5
QPM	1	-	5	2	8
NPM	2	1	5	2	10
Total	6	2	11	4	23

B. New Groups

	Western Europe	Central & East Europe	Middle East & Maghreb	Africa	Central Asia & Indian Ocean	East Asia & Oceania	Americas	Total
	(24)	(22)	(19)	(43)	(17)	(24)	(35)	
PM	2	1	-	-	-	1	1	5
QPM	1	-	1	1	1	2	2	8
NPM	1	1	1	3	1	1	2	10
Total	4	2	2	4	2	4	5	23

Key:

PM = Permanent Member
QPM = Quasi-Permanent Member
NPM = Non-Permanent Member

Security Council—Sanctions—Australian Implementation

Details of Regulations adopted by the Australian authorities to implement Security Council sanctions against a number of countries in 1994 are set out under the section "Australian Legislation Concerning Matters of International Law 1994" in this volume of the *Aust YBIL*, pp 393–404 above, see Items B.3, B.6, and B.12. The following is the text of a question on notice and answer by the Foreign Minister, Senator Gareth Evans, on UN sanctions against Croatia (House of Representatives, *Debates*, 31 May 1994, p 1117):

> Mr Filing asked the Minister representing the Minister for Foreign Affairs, upon notice on 3 February 1994:
>
> Are sanctions in place between Australia and Croatia and, if so, (a) what is the extent of the sanctions, (b) what goods (i) exported to or (ii) imported from Croatia are affected, (c) under what basis have the sanctions been enforced and (d) when will the government lift the sanctions.
>
> Mr Bilney—The Minister for Foreign Affairs has provided the following answer to the honourable member's question:

United Nations Security Council Resolution (UNSCR) 713 of 25 September 1991 imposed an arms embargo, which remains in place, on all republics of the former Yugoslavia, including Croatia. UNSCR 820 of 17 April 1993 imposed sanctions against the United Nations Protected Areas (UNPAs) in Croatia, as well as against areas in Bosnia-Herzegovina under Bosnian Serb control. Australia has fully implemented those mandatory sanctions.

(a) and (b) Export of arms is prohibited under UNSCR 713. UNSCR 820 stated that "import to, export from and transhipment through the UNPAs in the Republic of Croatia and those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces with the exception of essential humanitarian supplies including medical supplies and foodstuffs distributed by international humanitarian agencies, shall be permitted only with proper authorization from the Government of the Republic of Croatia or the Government of the Republic of Bosnia and Herzegovina respectively".

(c) The sanctions regime is mandatory for all member states of the United Nations. In Australia the Customs Regulations have been amended to give full effect to the UN sanctions.

(d) Lifting the sanctions will require a UN Security Council resolution.

International Court of Justice—Australian National Group

In answer to a question on notice the Foreign Minister, Senator Gareth Evans, gave details of the composition of the Australian National Group for the purpose of nominations for the elections to the International Court of Justice in 1993, and of the candidates whom the Group nominated for election as Judges in that year, as follows (House of Representatives, *Debates*, 19 October 1994, p 2432):

The members of the Australian National Group were:

Sir Anthony Mason, K.B.E., Chief Justice of the High Court of Australia;

The Right Honourable Sir Ninian Stephen, A.K, G.C.M.G., G.C.V.O., K.B.E.;

Dr Gavan Griffith, A.O., Q.C., Solicitor-General of Australia;

Professor Ivan Shearer, Challis Professor of International Law, Faculty of Law, University of Sydney.

The Australian National Group nominated Carl-August Fleischhauer (Germany), Shigeru Oda (Japan) and Jiuyong Shi (China).

International War Crimes Tribunal for Yugoslavia

On 10 February 1994, legislation was introduced into the Senate to allow Australia to fulfil its obligations towards the work of the International Tribunal set up to examine crimes against international humanitarian law in the former Yugoslavia. The following is the second reading speech explaining the legislation, the International War Crimes Tribunal Act (Senate, *Debates*, 10 February 1994, p 668):

The purpose of this bill is to enable Australia to comply with binding international obligations which were imposed by the United Nations Security Council on 25 May 1993, when it adopted resolution 827. That resolution established 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 adopted the Statute of the International Tribunal.

The decision to establish the Tribunal as an enforcement measure under Chapter Vll of the United Nations Charter created, from 25 May 1993, an immediately binding obligation on UN Member States, including Australia, to take whatever action is necessary to implement the Security Council's decision and to meet the obligations imposed under the Statute of the International Tribunal. It is obviously desirable that Australia should be in a position to comply with requests for co-operation with the Tribunal as soon as they are received, and it is therefore important to have the legislation enacted as soon as possible.

The Statute imposes obligations on Member States "to co-operate with the International Tribunal in the investigation and prosecution" of accused persons and to comply "with any request for assistance or an order issued by a Trial Chamber". Such requests may involve, among other things, the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest and detention of persons, and the surrender of accused persons to the Tribunal.

The bill contains provisions enabling Australia to comply with these international obligations. It specifically provides for the handing over of accused persons to the Tribunal for trial; other forms of assistance to enable co-operation with the Tribunal in the investigation and prosecution of alleged offenders; the recovery and return of property and proceeds of crimes located within Australia; and the Tribunal to sit in Australia if it so desires. The aim was to keep the legislation as simple as possible, while still enabling us to meet our international obligations. The bill adopts a minimalist approach, providing only for the mandatory obligations imposed by the Statute.

It was originally intended that the bill would also provide for imprisonment in Australia of persons convicted by the Tribunal. We have been consulting with the States and Territories on this issue, as any persons will need to be imprisoned in State and Territory prisons. The matter has not been included in this bill because not all States and Territories have responded on this issue, and imprisonment within Australia is not a mandatory obligation under the Statute. However, I recognise that it may be desirable to amend the legislation at an appropriate time, for example, when all the States and Territories have responded, and if the Tribunal commences proceedings against Australian citizens.

I now mention some important features of the bill.

Part 3 of the bill covers the surrender aspect of our obligations. The Statute requires countries to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including...the surrender or the transfer of the accused to the International Tribunal".

Although the Extradition Act 1988 was used as a general model for Part 3 of the bill, the bill departs from that Act in a number of ways because of the different circumstances and purposes of the legislation. In this case, Australia has binding international obligations to comply with requests for assistance by the Tribunal, and as a result the mechanism for handing over of persons to the Tribunal is more streamlined and has less grounds of refusal than under the

Extradition Act. The reason for this different approach stems from the unique nature of our international obligations.

One way in which this case differs from usual extradition situations is that the obligation to transfer accused persons to the Tribunal is derived not from a treaty-based obligation but from the duty of UN Member States to implement the decisions of the Security Council.

In addition, persons would be surrendered to an international body, rather than to another country . In any event, persons surrendered to the Tribunal will have the benefit of internationally recognised procedural and legal safeguards.

Furthermore, the bill provides for the Attorney-General to have a residual discretion to refuse the surrender of a person in exceptional circumstances.

Although exercise of this discretion may cause some embarrassment internationally, it does provide discretionary protection for Australian residents that may not be available under the Tribunal's safeguards.

Parts 4 and 6 of the bill provide for other types of assistance to enable Australia to co-operate with the Tribunal in the investigation and prosecution of alleged offenders, as required by the Statute.

Part 4 covers the taking of testimony and the production of evidence, the service of documents, search and seizure assistance, and assistance in relation to the giving of evidence at hearings, and assisting in investigations, in foreign countries.

It also appears that the Tribunal may make forfeiture or confiscation orders under the Statute and then seek to have those orders enforced in Australia. However, it will not be totally clear until the Tribunal develops its own rules of evidence and procedure exactly what kinds of orders, if any, the Tribunal may make in relation to the proceeds of crime. It is only envisaged at this stage that the Tribunal is likely to make forfeiture orders and therefore the bill, in Part 6, includes provisions whereby such orders may be enforced in Australia. If the Tribunal determines at a later date that it will make restraining orders or pecuniary penalty orders which it might seek to have enforced in a particular country, or that it will issue information gathering orders, then it will be necessary at that time to amend the legislation.

Parts 4 and 6 are based upon corresponding provisions in the Mutual Assistance in Criminal Matters Act 1987. However, one major difference is the grounds on which a request may be refused. While the Mutual Assistance Act contains a number of such grounds, the bill has only very limited grounds, namely that complying with the request would prejudice Australia's sovereignty, security or national interest, or that there are exceptional circumstances justifying the non-compliance. This is a direct result of the binding international obligations in this situation. Apart from this matter, the procedures in Parts 4 and 6 of the bill are almost identical to those employed in similar situations under the Mutual Assistance in Criminal Matters Act.

Part 5 of the bill covers the possibility of the Tribunal sitting in Australia. Although this is considered to be a remote possibility, the provisions are necessary because the Security Council Resolution provides that, while the Tribunal is to have its seat at the Hague, it may sit elsewhere when it considers it necessary for the efficient exercise of its functions.

While sitting in Australia, the Tribunal would be exercising the judicial power of the international community, not the judicial power of the Commonwealth. However, Commonwealth legislation is required to authorise the Tribunal to exercise coercive powers within Australia (such as to compel attendance, and to require production of evidence). The Security Council resolution does not compel Australia to automatically authorise the exercise of such powers. As a matter of comity countries would expect agreements to be reached about the exercise of power in their territory by a foreign tribunal.

Part 5 of the bill therefore enables the Tribunal to sit in Australia for the purpose of performing its functions, and provides that the Tribunal's powers while sitting in Australia will be such powers as are prescribed by regulations. Those regulations will implement agreements between the Commonwealth and the Tribunal about the powers that the Tribunal may exercise while sitting in Australia.

The bill is expected to have little impact on Commonwealth expenditure or revenue in the short term. However, there are possible implications for Commonwealth agencies which may be affected by the legislation. For example, there may be resource implications for the Australian Federal Police, and cost and resource implications might arise if the Tribunal decides to sit in Australia.

These costs cannot be quantified at all at this stage, as they will depend upon the extent to which the legislation is used in Australia. However, the legislation will be reviewed after it has been in place for a period of 12 months to determine the extent to which it has been utilised and to assess the resource implications.

Establishment of an International Criminal Court—Australian Support

The Foreign Minister, Senator Gareth Evans, restated Australian support for the establishment of an International Criminal Court in answer to a question on notice as follows (Senate, *Debates*, 23 August 1994, p 154):

> The Australian Government fully supports the establishment of an International Criminal Court to try those accused of international crimes, including war crimes. The Court is not yet established but the International Law Commission has prepared a draft statue for the Court, which is currently under consideration. In the current draft statue, the Court's jurisdiction is consensual. That is, the Court could only try a case when there was consent by the country in which the crime was committed and, if the accused is in the country of his or her nationality, by that particular country also...

In response to press comment on the subject, the Foreign Minister, Senator Gareth Evans, had earlier written a letter to the Editor of the *Canberra Times* on 17 May 1994 as follows:

> Your editorial of 15 May, entitled "War Crimes tribunal for a perfect world", implies that my support—not proposal—for the establishment of an international criminal court, while laudable, is "idealistic" and possibly impractical.
>
> The prospects for creation of a permanent international criminal court are rather less remote than your editorial would suggest. We are hopeful that a draft statue for an international criminal court will be finalised by the UN's International Law Commission (ILC) during its current session and discussed

further at the UN General Assembly's 49th Session later this year. Australia's ILC member, Professor James Crawford, has been particularly active in this task. Creation of the International Criminal Tribunal on Former Yugoslavia last year gave impetus to this work.

While there are, as you point out, substantial practical difficulties in bringing individuals responsible for international crimes to justice, such difficulties are not insurmountable in all cases. First, the court would try only the gravest war crimes, as well as other international crimes defined in various conventions (eg genocide, hijacking, crimes against internationally protected persons, hostage-taking, and exceptionally serious cases of international drug trafficking). Second, states accepting the jurisdiction of the court would be obliged either to hand over a suspect for trial by the court or try the suspect in their own courts. A refusal to do so could be viewed as an admission of complicity. Third, initiation of a case would not necessarily be left to the states most directly affected by the crime, but could be by any other state which accepts the jurisdiction of the court, or by the Security Council. Fourth, the court's statute and established international law would be the principal sources of the law applicable to trials, with relevant national legislation only being a subsidiary source. Fifth, creation of an Appeals Chamber would provide protection to the accused. And finally, the complexities of setting up an international prison system would be overcome by use of national jails.

The bottom line is that a start must be made somewhere. Certainly no progress on seemingly intractable issues such as Cambodia would have occurred if we had listened exclusively to all the doom-sayers in the media and elsewhere.

The following are the detailed comments which were submitted by Australia to the United Nations Secretariat on the Preliminary Draft of the Statute for the Court prepared by the International Law Commission at its 45th Session in 1993:

The Working Group of the International Law Commission (ILC) should be commended for its work at the 45th Session of the ILC in producing a preliminary version of a draft Statute for an International Criminal Tribunal.

Australia has made comments on several issues arising from the draft Statute in its Statement to the Sixth Committee at UNGA 48. We assume that the ILC will have received these comments. This document will elaborate on some of the issues raised in that Statement and will cover a range of other matters. Australia reserves its position on the draft Statute that is ultimately prepared by the ILC.

The Working Group draft is divided into seven parts and the following comments will deal with each Part in turn.

PART 1: ESTABLISHMENT AND COMPOSITION OF THE TRIBUNAL

A number of articles in this Part raise issues of particular importance.

Draft Article 2: Relationship of the Tribunal to United Nations

DA 2 contains two alternative texts in square brackets. The first states that the Tribunal is to be "a judicial organ of the United Nations". The second provides that the Tribunal is to be "linked with the United Nations as provided for in the present Statute".

The Working Group's commentary on DA 2 notes that there was disagreement among its members on what type of relationship the Tribunal should have with the UN. Australia believes that the International Criminal Tribunal should be part of the United Nations system, preferably as a subsidiary judicial organ. Australia believes this could be achieved pursuant to Art. 7(2) of the UN Charter. At the very least, Australia believes that the Tribunal should be linked with the United Nations by an agreement analogous to those concluded with specialised agencies.

Draft Article 4: Status of the Tribunal

DA 4.1 provides that the Tribunal is to be "a permanent institution...which will sit when required to consider a case submitted to it". This approach accords with the view Australia expressed in its interventions on this issue in the Sixth Committee in 1992 and 1993 and in its written comments on the 1992 Working Group Report.

Draft Article 5: Organs of the Tribunal

DA 5 establishes the three organs of the Tribunal:

(a) the Court;

(b) the Registry; and

(c) the Procuracy.

This structure is appropriate and identical to that employed for the international tribunal for crimes in the former Yugoslavia (ITCFY).

Draft Article 9: Independence of Judges

Adherence to this principle is vital to the proper functioning of the Tribunal. The Working Group may wish to list in DA 9 examples of activities which would interfere with the "judicial functions" of judges or "affect confidence in their independence". For example, the commentary on DA 9 notes that "it was clearly understood that a judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government".

Draft Article 11: Disqualification of Judges

The Working Group's commentary on this article notes that it would welcome comments from the General Assembly on "whether a limit should be placed on the number of judges whose disqualification an accused could request". Setting a limit should not be necessary as it is unlikely that an accused could make out the grounds necessary for disqualifying more than one or two judges. Establishing a limit may also be seen as prejudicing the right of an accused to a fair trial before an impartial Court.

The Working Group also requested comments as to the quorum required in the event that a judge be disqualified. Australia believes that, whether this disqualification occurs pursuant to Art. 11.2 or 3, a replacement should be provided so that the original quorum is maintained.

Draft Article 13: Composition, functions and powers of the Procuracy

DA 13.2 provides for States parties to nominate candidates for election as Prosecutor and Deputy Prosecutor. Unlike DA 7.2 which limits States parties to nominating one candidate for election as a judge of the Court, DA 13.2 places no such limitation on States parties in relation to nominating candidates for the Prosecutor and the Deputy Prosecutor. It would be best also to limit States

parties to nominating one candidate each for Prosecutor and Deputy Prosecutor with the requirement that the candidates put forward would have to be of different nationality.

DA 13.4 states that the Procuracy is to act independently. Australia's written comments on the 1992 Working Group Report expressed support (at para. 59) for an independent prosecutorial system rather than the complainant State conducting prosecutions.

Draft Article 15: Loss of Office

DA 15 establishes the mechanism by which judges, the Prosecutor, Deputy Prosecutor and Registrar can be removed from office for misconduct or serious breach of the Statute. In particular DA 15.2 provides that the Prosecutor and Deputy Prosecutor can be removed by decision of two thirds of the Court. Australia believes that empowering the Court to dismiss the Prosecutor or Deputy Prosecutor threatens the independence of the Procuracy and might lead to accusations of bias. A more suitable mechanism would be for the States parties to decide the question of whether the Prosecutor or Deputy Prosecutor should be removed in any particular case.

Draft Articles 19 and 20: Rules of the Tribunal

These provisions are akin to Art. 15 of the Statute of the ITCFY which calls for the judges of that Tribunal to adopt rules of evidence and procedure. Security Council resolution 827 which adopted the Statute of the ITCFY also called on States to provide comments on the rules of procedure and evidence of that Tribunal which would be submitted to the judges for their consideration. It would be appropriate to consider whether a similar mechanism could be created to allow States parties the opportunity to have an input into the making of the rules of procedure and evidence for the International Criminal Tribunal.

Draft Article 21: Review of the Statute

Such a provision would be best placed with the final clauses of the Statute. It provides for a review after five years at the request of an unspecified number of States parties. It will be difficult to set the number of States parties necessary to request a review, as the total number of States parties after five years will be hard to predict. Perhaps a better approach would be to set a fraction of States parties as the required number eg. one-third or one-quarter. It may also be appropriate to allow for subsequent reviews of the Statute.

PART 2: JURISDICTION AND APPLICABLE LAW

These provisions lie at the heart of the Statute.

These draft articles represent an expanded view of what should constitute the subject-matter jurisdiction of the Court. In its 1992 Report, the Working Group (at para. 449) argued that "the Court's jurisdiction should extend to specified existing international treaties creating crimes of an international character". It expressed the view (at para. 451) that "at the first stage of the establishment of the Court, its jurisdiction should be limited to crimes defined by treaties in force". In its intervention during debate on this issue in the Sixth Committee at UNGA 47, Australia noted its general support for this approach of the Working Group in dealing with the subject-matter jurisdiction of a Court.

The present draft articles now propose that the subject-matter jurisdiction of the Court reach beyond treaties in force to crimes under general international law, certain crimes under national law which give effect to crime suppression conventions (eg. the 1988 UN Drugs Convention) and crimes referred to the Court by the Security Council in certain cases. This represents a considerable change of attitude.

Draft Article 22: List of crimes defined by treaties

DA 22 lists those crimes defined by certain treaties which are intended to form the basis of the Court's jurisdiction. The following criteria for inclusion in the list are given in the Working Group's commentary on DA 22:

"(a) the fact that the crimes are themselves defined by the treaty concerned in such a way that an international criminal Court could apply a basic treaty law in relation to the crime dealt with in the treaty"; and

"(b) the fact that the treaty created, with regard to the crime therein defined, either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility that an international criminal Tribunal try the crime, or both".

These criteria represent a filter for determining which crimes and treaties should be included in DA 22. Because they adequately describe the elements of the crime and establish the principle of *aut dedere aut judicare* or universal jurisdiction, they largely meet the concerns expressed by Australia at para. 37 of its written comments on the 1992 Working Group Report that:

> "Consideration will need to be given as to how specific offences which constitute a serious crime of an international character are to be deduced from the wide range of penal norms created by existing conventions. The elements of the criteria by which certain conduct defined in existing conventions would come within the jurisdiction of a Court will need to be identified."

As noted in its Statement to the Sixth Committee at UNGA 48, Australia believes that Article 22 should not constitute an exhaustive list, and should allow for future expansion. We note that, at present, no general procedure has been established in any other part of the draft which would allow for future treaties to be included. This possibility should be explored. There seems no reason in principle to limit the Court's jurisdiction in this regard to only those treaties currently included in the list.

One point remains unclear in relation to this draft article. This is whether it is intended that the Court can have jurisdiction over the list of offences contained in the draft article on the basis that these are "international crimes" as defined by the various conventions (in which case the Court's jurisdiction would not depend on a State being a party to the relevant treaty), or whether it is intended that the Court will only have jurisdiction in the event that jurisdiction is conferred upon it by a State which is a party to a particular convention. DA 23 suggests that the former is the proper interpretation, but DA 24 suggests that the latter is the proper interpretation.

Moreover, the inter-relationship between DA 22, 23 and 24 is crucial but not clear, as currently drafted. Unless clarified, the precise jurisdiction of the Court will remain difficult to ascertain and may well lead to challenges to the jurisdictional competence of the Court in individual cases.

Draft Article 23: Acceptance by States of jurisdiction over crimes listed in Article 22

DA 23 is intended to provide the mechanism by which States can accept the jurisdiction of the Court over crimes listed in DA 22. It lists three alternative approaches; "Alternative A" providing for States parties to opt in to the jurisdiction of the Court; "Alternative B" requiring States parties to opt out of the Court's jurisdiction; and "Alternative C" providing for a modified version of opting in to the jurisdiction. In its commentary, the Working Group has sought guidance from the General Assembly as to the system to be adopted.

In its comments on the 1992 Working Group Report, Australia noted the importance of the Court having a voluntary jurisdiction whereby a State could become party to the Statute and by separate act accept the jurisdiction of the Court. An opting in mechanism would encourage greater participation in the Statute. Alternatives A and C would facilitate this opting in approach.

Draft Article 24: Jurisdiction of the Court in relation to Article 22

Australia agrees with the underlying principle of the present draft article insofar as it takes account of the competing jurisdictional claims of States parties. In considering the Court's jurisdiction, Australia agrees that, for practical reasons, the emphasis should be placed on the State in whose territory the accused is found or which otherwise can establish jurisdiction under the relevant treaty.

Australia is unclear as to the proposed scope of DA 24.2. Is it intended to give the Court jurisdiction in situations where the suspect is located in a State which is not a party to the relevant treaty? As noted above in our comments on DA 22, it is unclear whether the Court can have jurisdiction only in those cases in which such jurisdiction has been conferred by a State which is a party to the relevant treaty.

Draft Article 25: Cases referred to the Court by the Security Council

Australia has no objection in principle to the idea of the Security Council being able to refer complaints to the Court. However, as currently drafted, the Security Council would have far greater powers in this regard than any individual State. On its face DA 25 seemingly allows the Court to hear cases submitted to it by the Security Council regardless of whether the requirements in DA 24 have been met. If this is intended to be the case, it should be made clear in the text of the draft article.

Draft Article 26: Special acceptance of jurisdiction by States in cases not covered by Article 22

Australia supports the principle expressed in this draft article, as noted in Australia's Statement to the Sixth Committee at UNGA 48.

PART 3: INVESTIGATION AND COMMENCEMENT OF PROSECUTION

Draft Article 29: Complaint

This draft article accords with the view put by Australia in its written comments on para. 514 of the 1992 Working Group Report that the power of complaint to the Tribunal should extend to any State party which has accepted the jurisdiction of the Court with respect to the offence in question.

Australia is uncertain, however, as to which States are covered by inclusion in the present draft of the sentence "or other State with such jurisdiction and

which has accepted the jurisdiction of the Court pursuant to article 23". Some clarification is requested. The commentary at para. 1 refers to States initiating complaints in respect of offences at customary international law or municipal law. It may be that this is intended to pick up the provisions of DA 26. However, DA 26 confers jurisdiction only in very limited circumstances and does not in general confer jurisdiction over offences at customary international law or municipal law where these are not also treaty offences.

DA 29 could also perhaps be more specific in relation to the types of supporting documents required to accompany a complaint.

Draft Article 30: Investigation and preparation of the indictment

Importantly, DA 30.1 provides for the review by the Bureau of the Court of the prosecutor's decision not to proceed with a complaint. This reflects Australia's view expressed at para. 64 of its written comments on the 1992 Working Group Report that there should be scope for review of a prosecutor's decision not to prosecute.

Draft Article 31: Commencement of prosecution

DA 31.1 provides that "upon a determination that there is a sufficient basis to proceed" the Prosecutor shall prepare an indictment. There is no mention of the Prosecutor being satisfied that a *"prima facie* case" exists before preparing an indictment, although this is the standard mentioned in DA 32 in relation to the Court affirming an indictment. The meaning of "sufficient basis" should therefore be explored and, if different from "*prima facie* case", reasons should be supplied.

Draft Article 33: Notification of the indictment

DA 33 sets down the requirements for notification of an indictment to States Parties and States which are not party to the Statute. It permits the Court to seek the co-operation of the latter in the arrest and detention of accused persons within their jurisdiction. Given the consensual nature of the Court's jurisdiction, no greater obligation can be placed on States which are not parties to the Statute.

Draft Article 35: Pre-trial detention or release on bail

DA 35 allows the Court to detain an accused in custody or to release him or her on bail. The provision, however, does not set out the criteria the Court is to use in making this decision. This should be further explored.

PART 4: THE TRIAL

Unlike the Statute of the ITCFY, the draft Statute makes general provision for rules of procedure and evidence.

Draft Article 36: Place of trial

DA 36.1 provides for trials to be carried out at the seat of the Tribunal, unless the Court decides otherwise. DA 36.2 provides for the Court and a State, which need not have accepted the jurisdiction of the Court or even be a party to the Statute, to reach an arrangement for the exercise by the Court of its jurisdiction in the territory of the State. A State party, therefore, is not obliged to permit the Court to exercise jurisdiction in its territory. This approach is preferable to that taken in relation to the ITCFY which apparently allows the Tribunal to sit in

States without having to secure the agreement of the State concerned (see operative paragraph 6 of SCR 827).

Draft Article 38: Disputes as to Jurisdiction

The commentary to this draft article states two questions on which the Working Group has invited comments. The first relates to whether all States parties or only those with a direct interest in a case should have the right to challenge the Court's jurisdiction. Australia believes that only those States with a direct interest in a case should be able to challenge the Court's jurisdiction. There is no benefit in a policy sense to be gained from allowing a challenge by all States parties.

The second question is whether pre-trial challenges by the accused as to jurisdiction and/or the sufficiency of the indictment should be included in the Statute. Australia considers that challenges of this nature should be part of the trial process and should take place at the outset of the trial. In this regard, Australia does not agree with the provisions of DA 38.2(b).

The meaning of the second sentence in DA 38.3 is unclear. Once a decision has been made as to jurisdiction it should not be subject to further challenge during the hearing, irrespective of the identity of the party challenging the jurisdiction. Accordingly, the accused person should not be able to reopen the question of jurisdiction later in the trial once it has been adjudicated upon. Of course, jurisdiction may be challenged on appeal.

Draft Article 41: Principle of legality *(nullum crimen sine lege)*

DA 41 embodies the principle of *nullum crimen sine lege.* This meets the requirement of Art. 15 of the ICCPR which states, *inter alia*, that:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

The words contained in square brackets in paragraph (a) should be retained without the brackets to make it clear that a given treaty provision must have been made applicable to the accused by whatever mechanisms different States may adopt.

Draft Article 44: Rights of the accused

DA 44.1(h) appears to allow for the trial of a person *in absentia.* The Working Group has sought comment on this point. Australia is, as a general principle, opposed to trials *in absentia* and would prefer that the Statute not allow for them. On this matter we refer to Art 14.3(d) of the ICCPR which provides that an accused person is entitled to be tried in his or her presence.

We note further that the present draft does not contain any procedural safeguards in the event that trials may be held *in absentia.* These issues need to be canvassed.

Draft Article 45: Double jeopardy *(non bis in idem)*

DA 45.2(a) would allow the Court to try a person who has been convicted by another Court where the act in question "was characterised as an ordinary crime". The issue arises as to whether the principle of *non bis in idem* is being adhered to when the Court can try a person again who has been properly tried by

a national Court, solely on the ground that the offence concerned was characterised as an ordinary crime.

Draft Article 47: Powers of the Court

DA 47.1(a) empowers the Court to "require the attendance and testimony of witnesses." As drafted, the attendance of witnesses from any State party may be required, even if that State party is not otherwise involved in the action. The point should be made that, if adopted, this procedure would differ substantially from that usually followed where States may request assistance from other States in seeking the presence of witnesses, but where such presence is not compulsory.

The Statute does not at present address the more mundane issues connected with this power, such as who is responsible for expenses of witnesses. Presumably these will be addressed, perhaps in the rules of Court that will no doubt be developed.

Draft Article 51: Judgment

DA 51.2 provides that only a single judgment or opinion is to be issued. The prohibition on dissenting judgments is easier to accept in the context of a trial than it is in the determination of appeals (see comment on DA 56 below).

Draft Article 53: Applicable penalties

As currently drafted, DA 53.3 provides for the Court to make orders relating to the proceeds of a crime but does not provide a mechanism for enforceability. That mechanism seems to be provided by DA 65 which requires States parties to recognise and give effect to judgments of the Court. These two provisions thus need to be read together.

PART 5: APPEAL AND REVIEW

Draft Article 55: Appeal against judgment or sentence

As currently drafted, this article provides for the accused to have the right of appeal, with the right of the Prosecutor to appeal inserted in square brackets. Provision should be made for the Prosecutor to appeal the decision of a trial chamber to ensure that the acquittal of an accused is not legally flawed or based on errors of fact. This accords with national procedures the world over.

Draft Article 56: Proceedings on appeal

DA 56 dealing with proceedings on appeal does not expressly provide for dissenting or separate opinions to the decision of the Appeals Chamber. Although views on this point will vary according to the legal traditions of the commentator, Australia's common law heritage would dispose it to support provision for dissenting opinions.

The commentary on DA 56 also reveals a difference of views in the Working Group as to whether there should be a separate and distinct Appeals Chamber akin to the one established by Art. 11 of the Statute of the ITCFY. A separate Appeals Chamber may be preferable, but the final position will no doubt be determined by the number of judges constituting the Court and the expected case load.

PART 6: INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Draft Article 58: International cooperation and judicial assistance

DA 58.1 places a general obligation on all States parties, whether or not they have accepted the Court's jurisdiction, to cooperate with the Tribunal "in connection with criminal investigations relating to, and proceedings brought in respect of, crimes within the Court's jurisdiction."

DA 58.2 places more onerous obligations on those States parties which have accepted the jurisdiction of the Court, including the surrender of an accused to the Tribunal in accordance with DA 63. The Working Group might consider a more detailed list of the types of assistance a State party can be called on to provide under DA 58.2 At the same time some guidance might be given as to what constitutes cooperation under DA 58.1.

Draft Article 61: Communications and contents of documentation

DA 61 deals with communications and contents of documentation and is based on Art. 5 of the UN Model Treaty on Mutual Assistance in Criminal Matters. The Working Group's use of articles from the UN Model Mutual Assistance and Extradition Treaties as precedents for provisions in the draft Statute is supported.

Draft Article 63: Surrender of an accused person to the Tribunal

DA 63.3 obliges States parties which have accepted the Court's jurisdiction to surrender the accused person to the Tribunal. This may be seen as cutting across generally accepted rules of extradition law where States retain the discretion not to extradite the person subject to the request. However, as regards the Tribunal it may be argued that, by specifically consenting to jurisdiction, States have already agreed to the Tribunal hearing the case and have given up the right not to hand over the accused person. The situation may therefore be distinguished from mere requests for extradition where no prior consent has been given to the exercise of jurisdiction by the Courts of a foreign country and where, accordingly, it is entirely appropriate that the requested State retains the discretion not to extradite.

Draft Article 64: Rule of speciality

DA 64 establishes the rule of speciality. This rule is a key provision in extradition treaties and its inclusion in the draft Statute is essential.

PART 7: ENFORCEMENT OF SENTENCES

Draft Article 66: Enforcement of sentences

DA 66.1 requests States parties to offer facilities for imprisonment. This approach is acceptable. States should not be forced to accept prisoners. The housing of prisoners can present particular difficulties for countries, such as Australia, which have a federal system in which each of the individual State governments run prisons and there are no federal prisons.

The following are extracts from the statement made by the Australian Delegation during discussion of an International Criminal Court in the Sixth Committee of the UN General Assembly during its 49th Session on 25 October 1994:

Mr Chairman,

My delegation welcomes the completion of the draft statute for an International Criminal Court....We believe that the draft statute, while not in its final form, represents a balanced effort which offers solutions to many of the difficulties that would need to be overcome in establishing a court and provides a suitable basis for negotiation by governments. The ILC has thoroughly explored the conceptual and practical issues involved and the draft statute has benefited from the views of governments expressed in the Sixth Committee and in comments on the reports of the working groups in 1993 and earlier this year. The statute establishing the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia adopted by the Security Council has also clearly provided a useful precedent.

Mr Chairman, my delegation would not propose to make detailed comments on the draft statue at this time. As I indicated earlier, we believe that the draft statute is at a stage suitable for detailed consideration by governments. We would, however, like to make some general observations about the approach to several issues adopted by the Commission.

We endorse the approach of the draft statute whereby the court will be a permanent institution, but will only sit when cases are submitted to it. So far as the method of creation of the court is concerned, we welcome the Commission's detailed consideration of this issue. In the past, we have stressed our belief that the court must be given a clear place within the United Nations system to assure its universality, authority and effectiveness. We have indicated that this could be achieved either through the creation of the court as a subsidiary organ of the United Nations or by the establishment of some formal relationship with the United Nations. As the report notes, the difference of views is essentially about "technique" since no one doubts the need for the court to have a place in the United Nations system. The draft statute adopts the approach of establishing the court under a multilateral treaty and provides a mechanism for the creation of a relationship with the United Nations. Having regard to the Commission's analysis, Australia believes that this is an acceptable approach and that countries will need in the future negotiation of the statute to focus on the detail of the relationship and practical matters such as financing of the court's activities, particularly having regard to the proposed ability of the Security Council to refer matters to the court under Chapter VII of the Charter.

Mr Chairman, the proposed jurisdiction of the court and the approach of the statute with respect to the modalities of how matters would come before the court are central to the statute. We believe that it is important that the court have a jurisdictional basis which allows it to consider the most serious crimes of concern to the international community, whether these crimes are provided for under treaties specified in the statute or general international law. Jurisdiction over crimes under customary international law is essential to avoid possible gaps which might leave the perpetrators of terrible acts of the kind that we have seen most recently in the former Yugoslavia and Rwanda outside the jurisdiction of the court because no relevant treaty obligation is involved. We consider that the approach in the draft of identifying particular crimes is an improvement over a more general reference to general international law.

We note that the commission has substantially simplified the jurisdictional provisions contained in the 1993 draft statute. We believe that this is a

significant improvement and that it allows the concept of the court to be more easily explained to non-specialists. We welcome the further work done by the commission on this aspects of the statute.

We also endorse the basic approach in draft Articles 21 and 22 that the court should exercise jurisdiction on an essentially consensual basis, except in cases of a complaint alleging a breach of the Genocide Convention or where the Security Council has referred a matter under Chapter VII of the Charter. Last year, my delegation spoke in favour of the so-called "option-in" approach under which relevant states would declare their acceptance of the court's jurisdiction with respect to specified crimes. While we are conscious that some fear that this approach could potentially limit the court's effectiveness, we believe that it is more likely to secure wide-spread acceptance of the statute. We are conscious that a number of countries have concerns about a possible loss of "sovereignty" or duplication of existing domestic court systems. We believe that the commission has responded to these concerns in the current draft. We note that the underlying premise of the statute is that the court should be complementary to national criminal justice systems and should be used when such trial procedures may not be available or may be ineffective. We note also that the commission has been guided by the need to ensure the rights of the accused and that the statute contains provisions which restate the relevant fundamental human rights standards and the generally accepted standards drawn from national criminal law systems.

Mr Chairman, in conclusion my delegation wishes to reiterate that we consider that the draft statute represents a balanced effort which offers solutions to many of the difficulties that would need to be overcome in establishing a court. Accordingly, we believe that we should now be looking to putting in place definite steps for early consideration by states of the draft statute. An appropriate next step would be for governments to come together in 1995 to consider the statute in a preparatory conference in order to convene a diplomatic conference in 1996.

Work of the International Law Commission—Australian Comment

The Australian Delegation commented on the work of the International Law Commission at its 1994 session (other than its work on an International Criminal Court, referred to above) in a statement in the Sixth Committee of the UN General Assembly on 3 November 1994. The statement dealt with the subjects of state responsibility; strict liability (that is, "international liability for injurious consequences arising out of acts not prohibited by international law"); international watercourses; and the future work of the Commission:

Australia notes with considerable interest the progress that has been made by the ILC on the subject of State responsibility. In particular, the debate about the notion of criminal behaviour within the context of State responsibility, and the distinction between an international delict and an international crime, clearly raise basic questions about how relations between States should be regulated. Moreover, difficult questions also arise in the context of considering the consequences that would attach to an international crime—an issue which has not yet been fully addressed in the Commission's debate. These issues may well go beyond the task which the Commission has focused on to date—the conclusion of a text dealing with essentially procedural aspects of State

responsibility. The Australian delegation is of the view that the development of a concept of international crime needs to be given substantial consideration by States before further work is done in this area by the Commission.

By contrast, the Australian delegation believes that the Commission's work on the procedures which should apply to the taking of counter-measures ultimately has real potential to assist the peaceful resolution of disputes. Accordingly, my delegation believes that it would be more fruitful for the Commission to focus on the objective of setting out the procedures relating to counter-measures which could attract wide support, and could lead to finalisation of the text of a Convention within the Commission's current term—a target which my delegation would support. We look forward to further work by the Commission in this area.

Australia welcomes the progress made towards conclusion of the ILC's work on international liability for injurious consequences arising out of acts not prohibited by international law. The Commission has now adopted provisionally a considerable number of articles, particularly on the subject of prevention. Australia generally welcomes these provisions. However, as my delegation has said in previous Sixth Committee debates, the most important part of this topic remains the question of liability. It, therefore, welcomes the fact that the 10th Report of the Special Rapporteur deals with this issue and makes concrete proposals in this regard. That Report was not discussed by the ILC this year but will be considered next year. To assist that consideration Australia considers it appropriate to make some brief remarks, principally in relation to the liability of States. Obviously, this will be an issue to which we will return next year.

This issue of liability is closely linked to the substantive obligations imposed on States, including particularly Article 14 of the draft Articles. Nor, in considering this issue, should one ignore the draft Articles on international watercourses adopted by the ILC at this session, particularly Article 7.

Australia has consistently argued in this Committee and in other forums that Principle 21 of the Stockholm Declaration reflects a customary law obligation on States to take action to ensure activities do not cause environmental damage beyond their territory. This obligation is not qualified by words such as "take appropriate measures" or "take practical measures".

Yet the ILC argues that the obligation to prevent transboundary harm is not in fact an obligation of result—that is, an obligation actually to prevent harm. It is only an obligation to attempt to prevent harm, in relation to which a standard of due diligence operates (see commentary on Article 14). While one might accept that this may generally be the case in relation to measures of prevention, it may not always be the relevant standard. In the case of treaty regimes one must always examine the content of the actual obligations assumed by States—some times they are obligations of result, i.e. to do something specific even if designed for preventive purposes. Thus, where there is an obligation in terms that States "*shall ensure* an assessment is undertaken of the risk of such activity", the failure to in fact ensure such an assessment is undertaken gives rise to a breach of an obligation by the relevant State, whether there was a lack of due diligence or not. There should be some recognition in Article 14 that it is subject to contrary indications.

Article 14 deals with the need to take appropriate measures to prevent the risk of transboundary harm. But what is the situation when harm actually occurs? That is the issue dealt with in the Special Rapporteur's report.

In view of Australia it is not sufficient to say that you can sue the private operator but the State of that operator is only liable if there was a breach of some due diligence preventive obligation. That is a situation of a wrongful act by the State contrary to an explicit obligation for which the consequences of a breach are those clearly established by international law. This is reflected in draft Article A proposed by the Special Rapporteur.

But what of damage from a lawful act by a private operator that causes transboundary harm? In the view of Australia it is not sufficient to leave this to private law remedies against the private operator. This is the issue that the ILC will need to consider next year. The Special Rapporteur has provided alternative drafts on State liability in this situation—versions A and B for Article 21.

Australia does not accept the conclusion of the Special Rapporteur in his report that "it would be simplest not to impose any form of strict liability on the State". Simplicity is not the relevant criterion. Justice for those injured is the proper object of a liability regime.

The Special Rapporteur offers four options to deal with State liability. As a minimum, Australia considers there should be strict liability imposed on the State subsidiary, either directly or as a residual liability to the liability of an operator. It is not acceptable to Australia that in the case of an activity that causes transboundary damage the innocent injured victims in one State can be left without compensation because a private operator in another State from which the harm originated did not have adequate financial resources to meet the costs of compensation for the harm. It is for this reason that Australia considers residual State liability to be essential. It therefore strongly supports Alternative A to Article 21.

In this regard, Australia views with disappointment and concern the significant weakening of Article 7 in the Articles on International Watercourses adopted on a second reading by the ILC. Apart from emphasising the limited due diligence nature of the obligation to utilise watercourses so as not to cause significant harm, the articles provide that if harm occurs there is no more than an obligation to consult.

Whatever the justification for this limited obligation in the case of the use of watercourses, the same standard is certainly not applicable to activities that have a known risk of causing significant transboundary harm through their physical consequences. This needs to be remembered by the ILC in its future work on "injurious consequences" and in particular in determining the legal consequences for States when prevention does not work and harm actually occurs.

Turning to the draft Articles provisionally adopted by the Commission this year, my delegation wishes to make the following brief comments. We welcome the definition in Article 2 of the expression "risk of causing significant transboundary harm". We believe that it is important that the qualification that the harm be "significant" is read in the way indicated by the accompanying commentary. That is, "significant" is to be understood as something more than detectable but need not be substantial or serious. We also welcome the inclusion of Articles 12, 13, 15, 18, 19 and 20. We note that Article 18.3 provides that, if

consultations fail, a State has an obligation nonetheless to take into account the interests of States likely to be affected and may proceed with the activity but "at its own risk". This confirms that a State cannot ignore known concerns and possible consequences and say when damage occurs that it did all that "due diligence" required.

Australia congratulates the Commission on the finalisation of its draft Articles on the Non-Navigational Uses of International Watercourses. This work is finely tuned to meet most of the varied interests concerned in watercourse management.

Australia wishes to see the many years of labour dedicated to the draft Articles flow into a common legal instrument where they will be optimally utilised and therefore endorses the Commission's recommendation that the draft Articles be elaborated as a convention. A legal instrument will set an institutional framework and clear minimum standards for determining when it is necessary to cooperate at an international level and what regional watercourse management regimes should do

We note that the Commission's report on the meaning of the threshold term "significant harm" in Article 7 is elaborated in the commentary of its Report to mean objectively evident but less than substantial. Australia considers this to be a satisfactory formulation in the context of evolving international environmental norms, which should not require that harm be substantial before cooperative action is required but need not be triggered by events which are not international.

As indicated earlier, Australia would, however, like to see clearer and stronger provisions for imposition of liability as a consequence of significant transboundary harm where the watercourse use in question is not equitable or reasonable. This would require some reconsideration of draft Article 7.

The principles adopted in the draft Articles are generally applicable to the varied range of watercourses which might be affected and also to confined transboundary groundwaters. However, keeping the draft Articles focused on international watercourses as defined will avoid confusion and it is therefore appropriate that confined transboundary groundwaters be treated separately.

Australia extends its gratitude to the Special Rapporteur, Mr Robert Rosenstock, and to his predecessors, and warmly welcomes the results of their work. We believe that the text provides a sound basis for an early diplomatic conference to elaborate the draft Articles, and support the convening of such a conference in preference to submission of the text directly to the General Assembly for adoption. Australia endorses the Commission's recommendation that the proposed Resolution on Transboundary Groundwaters be adopted.

My delegation congratulates Mr Alain Pellet and Mr Vatchlav Mikulka on their appointments as Special Rapporteurs. The Australian delegation considers that the principles of international law relating to reservations require further clarification, and believes that it is useful that some of the less certain issues that arise in relation to reservations should be addressed. My delegation also believes that the future work of the ILC on the topic of State succession and its effects on nationality can be of real value to States. The experience of the last few years has demonstrated that States take different approaches to the diverse issues relating to State succession. It is our expectation that the ILC will be able to draw on

recent experience in developing principles relating to the effect of State succession on nationality which will be of practical value to States.

Australia has already commented on the work of the Commission relating to the Statute of the International Criminal Court. We would like to note that the short time within which the working group completed its consideration of that subject indicates the value of the more flexible working methods that are being adopted by the Commission. Australia congratulates the Commission on this increased flexibility, and believes that this approach to its work will mean that the Commission is able to play a truly relevant and practical role in facilitating the development of principles of international law.

United Nations Administrative Tribunal—Review

The Sixth Committee at UNGA49 again debated the work of the Committee on Review of the Judgements of the Administrative Tribunal, which makes final decisions in personnel questions which arise within the UN Secretariat. (See also *Aust YBIL* 1994, vol 15, p 613.) The following is the statement made by the Australian Charge d'Affaires, Mr Richard Rowe, during this debate on 18 November 1994:

It is clear from the comments submitted by a number of Member States...that there is a considerable degree of concern about the procedure for review of judgements of the Administrative Tribunal under Article 11 of the Statute of the Administrative Tribunal of the United Nations.

My delegation shares in those concerns.

It is our view that the procedure for review of judgements established under Article 11 is less than satisfactory. For many years the system has failed to demonstrate its efficiency or effectiveness as a mechanism for providing adequate protection to staff. Year after year staff members come before the Committee on Review of the Judgements of the Administrative Tribunal at great expense and trouble to themselves to appeal judgements of the Administrative Tribunal. The Committee is unable to satisfy them.

The Committee is not an appeal body. It is a political body, with all the potential for politicisation of cases that this provides. At the same time it is almost impossible for it, in terms of legal mandate, to be able to recommend an appeal to the ICJ. Nor would it be wise use of the time of the heavily pressed ICJ, whose real purpose is to decide on disputes between nations. The procedure under Article 11 has merely created delays, raised false expectations, and entailed inefficient expenditure of resources. It might be commented that the United Nations Administrative Tribunal by and large has done an excellent job. But it is always difficult to achieve an ideal system of justice for staff grievances.

It is the belief of my delegation that a better system is needed, and one that does not need to involve the already heavily pressed ICJ. Accordingly, my delegation believes the Statute should be amended by removing the procedure in Article 22 of the Statute.

Consideration is currently being given to reform of the internal system of administrative justice in the Secretariat. The abolition of the review procedure under Article 11 of the Statute would be an important first step in that process of reform.

While deletion of Article 11 and any consequential amendments is necessary, we must ensure that, by so amending the Statute, we put in its place a system which ensures the protection of the rights of the international civil servants of the UN. This is our responsibility to our UN staff.

One possible mechanism that would seem to have some attraction would be an Ombudsman, a position that exists in other international bodies such as the World Bank. This position could perhaps look into staff grievances even before they become a subject for the Administrative Tribunal. Also an Ombudsman might well be able to follow up decisions of the Administrative Tribunal. Other ways might exist for improving the system for addressing staff grievances. An internal appeal system might well be considered...

Safety of United Nations and Associated Personnel—Draft Convention

Further to the 1993 debate quoted in the *Aust YBIL* 1994, vol 15, p 611, the Australian Delegation made the following statement on 10 November 1994 in the Sixth Committee in support of the proposal for a Convention on the Safety of United Nations and Associated Personnel:

As is well recognised, the safety of the United Nations personnel is one of the most important questions facing the United Nations at this time, particularly now as the United Nations attempts to meet the increasing demand for involvement in the fields of preventive diplomacy, peacebuilding, peacekeeping and humanitarian operations.

My delegation therefore welcomes and strongly supports the completion of the work of the ad hoc committee on the elaboration of a draft convention on the safety of United Nations and associated personnel. We support the recommendations of the working group that the draft convention, in its present form, be considered by the Sixth Committee with a view to adoption. ...

This draft convention is an important achievement. The draft convention signals the international community's commitment to take action against deliberate acts of violence which strike against the personnel who are working to support the United Nations' efforts to promote a peaceful and secure world. In Australia's view, this draft convention constitutes a significant step forward in creating a more effective framework for deterring attacks against United Nations and associated personnel, thereby increasing the safety of such personnel as well as the effectiveness of United Nations operations.

The draft convention would create personal responsibility for individuals who attack United Nations and associated personnel by making such an attack a crime punishable under the national laws of States parties. It would commit States to prosecute or extradite where UN and associated personnel have been the subject to deliberate acts of violence.

Mr Chairman, we are not persuaded by arguments that the negotiations have moved precipitately. After all, many of the general provisions contained in the draft convention are not new to us: for example, the mechanisms reflected in the provisions relating to the establishment of jurisdiction and measures for prosecution or extradition have already found expression in the 1973 Convention on the Prevention and Punishment of Crimes against International Protected Persons, the 1979 International Convention against the Taking of

Hostages and the IMO Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

It is our strong conviction that the draft convention, in its present form, is capable of serving the interests of the international community as a whole. In our view, careful attention has been given to ensure that the draft convention preserves and protects the rights of all States parties in accordance with the UN Charter.

Throughout the negotiation of the draft convention, the most difficult issues have related to the scope of application of the convention. At the end of our deliberations, we arrive at a text which has a relatively broad scope of application in respect of the types of personnel and the types of operations and activities which will be covered. My delegation welcomes the wider scope of application reflected in the draft convention. We consider that the definitions of "UN personnel", "UN operation" and "associated personnel", contained in Article 1(a), (b) and (c), would cover the range of operations, activities and personnel which have been authorized by the Security Council and the General Assembly in recent years.

The definition of "associated personnel" is sufficiently broad to extend the application of the convention to personnel involved in a wide range of humanitarian and other peacebuilding activities in support of the achievement of the mandate of a UN operation. Under these provisions, those carrying much of the burden for humanitarian relief will be accorded protection under the convention, including non-governmental humanitarian organizations.

Mr Chairman, this draft convention leaves potential attackers in no doubt as to the fact that they would be internationally and individually accountable for their actions, even if they were perpetrated in areas where there was no host government or where the government was unable to exercise effective control. It is largely because of this point that it was important not to limit the convention to Chapter VI consent-based operations.

In relation to Article 1(c)(ii), it would be our expectation that the Security Council or the General Assembly should make early and pre-emptive declarations that there is an exceptional risk to personnel involved in operations with the aim of according maximum protection to personnel involved in such operations.

Mr Chairman, the urgency of our task cannot be questioned. Personnel who work to support the aims of the UN Charter and who act to secure peace and safety on behalf of the international community have been targets of violence and intimidation.

The international community is now in a position to respond constructively to this situation by adopting the draft convention at this General Assembly. We owe the men and women involved in UN operations at least this measure of protection.