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## Observations Concerning the 1997-98 Preparatory Committee's Work

### Keywords

Humanitarian Law, Criminal Law, Ethics, Professional Ethics, Genocide, Judgments

# Observations Concerning the 1997-98 Preparatory Committee's Work

M. CHERIF BASSIOUNI\*

## I. INTRODUCTION<sup>1</sup>

1. In 1989, Trinidad and Tobago proposed the creation of an International Criminal Court (ICC) to the General Assembly of the United Nations (UN) to aid in the fight against narcotics trafficking. This proposal revived the UN's work in connection with the establishment of an International Criminal Court. Previously, two special committees of the General Assembly had painstakingly developed in 1951<sup>2</sup> and 1953<sup>3</sup> draft statutes for a permanent International Criminal Court, but it had been tabled as a result of the "cold war." The only other UN initiative was in 1980 when a draft statute for the establishment of an international criminal jurisdiction to enforce the *Apartheid* Convention<sup>4</sup> was proposed, but it too was left without follow-up.

2. While there was little hope for the prospects of an ICC between 1989 and 1992, a chain of events was set in motion when the UN Se-

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\* All rights reserved to the author. Printed from ASSOCIATION INTERNATIONALE DE DROIT PENALE, 13 NOUVELLES ETUDES PENALES 1997. Professor of Law, President, International Human Rights Law Institute, DePaul University; President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences; Vice-Chairman, UN Preparatory Committee on the Establishment of a Permanent International Criminal Court; Former Chairman and Rapporteur on the Gathering and Analysis of the Facts, Commission of Experts established pursuant to Security Council Resolution 780 (1992) to investigate violations of international humanitarian law in the Former Yugoslavia. The views expressed herein are solely the author's. The research assistance of Daniel Mac Sweeney is acknowledged.

1. See Report of the Preparatory Committee for the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996)[hereinafter Report of the Preparatory Committee].

2. *Report of the Committee on International Criminal Jurisdiction, 1 - 31 Aug. 1951*, U.N. GAOR, 7th Sess., Supp. No. 11, annex I, UN Doc. A/2136 (1952) [hereinafter *1951 ICC Draft Statute*]. For a history of international efforts to establish an International Criminal Court, see BENJAMIN FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE* (1980).

3. *Report of the 1953 Committee on International Criminal Jurisdiction, 27 July - 20 Aug. 1953*, U.N. GAOR, 9th Sess., Supp. No. 12, annex, UN Doc. A/2645 (1954) [hereinafter *1953 Revised ICC Draft Statute*].

4. DRAFT STATUTE FOR THE CREATION OF AN INTERNATIONAL CRIMINAL JURISDICTION TO IMPLEMENT THE INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF *Apartheid*, Jan. 19, 1980, UN Doc. E/CN.4/1416 [hereinafter *APARTHEID STATUTE*]. The text, developed by this writer, is commented on in M. Cherif Bassiouni and Daniel H. Derby, *Final Report on the establishment of an international criminal court for the implementation of the Apartheid Convention and other relevant international instruments*, 9 HOFSTRA L. REV. 523.

curity Council in Resolution 780<sup>5</sup> established a Commission of Experts to investigate violations of international humanitarian law in the Former Yugoslavia.<sup>6</sup> This was the first time since World War II that the international community provided for the investigation of violators of international humanitarian law. In its first Interim Report, the Commission of Experts stated that the establishment of an *ad hoc* international criminal tribunal would be "consistent with the direction of its work."<sup>7</sup> Recalling that report, the Security Council in Resolution 808 proceeded to establish the International Criminal Tribunal for the Former Yugoslavia (ICTFY).<sup>8</sup> The Resolution stated that the Security Council: "[d]ecide[d] that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991[.]"<sup>9</sup>

The Security Council followed the same procedure in 1994 in connection with the events in Rwanda, and established the International Criminal Tribunal for Rwanda (ICTR).<sup>10</sup> The events in Yugoslavia and Rwanda shocked the world out of its complacency and the idea of pros-

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5. S.C. Res. 780, UN SCOR, 47th Year, 1992 S.C. Res. & Dec. at 36, para. 2, UN Doc. S/INF/48 (1992).

6. United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia. For the Commission's Final Report, see Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992) U.N. SCOR, Annex, U.N. Doc. S/1994/674 (May 27, 1994) and the Annexes to the Final Report, U.N. Doc S/1994/674/Add.2 (1994). For a description of the Commission's work, see M. CHERIF BASSIOUNI, THE COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780: INVESTIGATING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE FORMER YUGOSLAVIA, Occasional Paper No. 2, International Human Rights Law Institute, DePaul University College of Law (1996).

7. Letter from the Secretary-General to the President of the Security Council, Feb. 9, 1993, U.N. SCOR, 48th Sess., para. 74, UN Doc S/25274 (1993), transmitting *Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992).

8. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 1, UN Doc. S/RES/808 (1993) [hereinafter ICTFY]. For a Commentary on the International Criminal Tribunal for the Former Yugoslavia, see M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS), THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996); VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

9. S.C. Res. 808, *supra* note 8, para.1.

10. On the basis of the precedent of the Former Yugoslavia, the Security Council established a similar Commission of Experts in S.C. Res. 935, UN SCOR, 49th Year, 3400th mtg., at 1, UN Doc. S/RES/935 (1994). That Commission did not, however, engage in investigations and lasted only three months. The Security Council subsequently set up a judicial mechanism for Rwanda with ties to the International Criminal Tribunal for the Former Yugoslavia in S.C. Res. 955, UN SCOR, 49th Sess., 3453rd mtg., at 1, UN Doc. S/RES/955 (1994) [hereinafter ICTR Statute]. For a Commentary on the International Criminal Tribunal for Rwanda, see Larry D. Johnson, *The International Tribunal for Rwanda*, 67 REVUE INTERNATIONALE DE DROIT PENAL 211.

ecuting those who committed international crimes acquired a broad based support in world public opinion and in many governments.

3. Largely out of the 1989 initiative of Trinidad and Tobago, and the International Law Commission's (ILC) work on the draft Code of Crimes Against the Peace and Security of Mankind,<sup>11</sup> the General Assembly in resolution 47/33 of November 25, 1992, requested that the (ILC) undertake the elaboration of a draft statute for a permanent International Criminal Court. By the time that this draft was produced in 1994, the climate in which it was viewed had changed significantly due in large part to the tragic victimization in the Yugoslav and Rwandan conflicts, and the fact that the Security Council had established in 1993 the International Criminal Tribunal for the Former Yugoslavia<sup>12</sup> and in 1994, the International Criminal Tribunal for Rwanda.<sup>13</sup> In order to guide its work in drafting a statute for the ICC, the ILC looked to international precedents. They are: the Nuremberg<sup>14</sup> and Tokyo<sup>15</sup> tribunal statutes, the 1951<sup>16</sup> and 1953<sup>17</sup> ICC draft statutes, the 1980 draft statute for the creation of an international criminal jurisdiction to enforce the *Apartheid* convention,<sup>18</sup> the 1993 ICTFY Statute,<sup>19</sup> and the 1994 ICTR Statute.<sup>20</sup>

4. In 1994, the ILC completed a draft statute for an ICC and recommended to the General Assembly to call a conference of plenipotentiaries "to study the draft statute and to conclude a convention on the establishment of an international criminal court."<sup>21</sup> However, the Sixth Committee of the General Assembly, at the instigation of States reluctant to see the court come into being so rapidly, declined to call a diplomatic conference as the ILC had requested. Instead, the General Assembly established an *Ad Hoc* Committee to review the ILC's 1994

11. Concerning the 1991 draft Code against the Peace and Security of Mankind, see *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, 11 *Nouvelles Études Pénales* (1993).

12. See generally BASSIOUNI, *supra* note 8.

13. See generally Larry Johnson, *THE INTERNATIONAL TRIBUNAL FOR RWANDA*, *supra* note 10.

14. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Charter), signed at London, August 1945, 82 U.N.T.S. 279, 59 Stat.1544, E.A.S. No.472 (entered into force, Aug. 8, 1945), annex, Charter of the International Military Tribunal (Nuremberg).

15. INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST PROCLAIMED AT TOKYO, Jan. 19, 1946, and amended Apr. 26, 1946, T.I.A.S. No. 1589 (entered into force Jan. 19, 1946), ANNEX, CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (Tokyo).

16. 1951 ICC Draft Statute, *supra* note 2.

17. 1953 Revised ICC Draft Statute, *supra* note 3.

18. See M. Cherif Bassiouni, *Draft Statute for an International Criminal Tribunal*, 9 *NOUVELLES ÉTUDES PÉNALES* (1993).

19. ICTFY Statute, *supra* note 8.

20. ICTR Statute, *supra* note 10.

21. See Report of the International Law Commission on the work of its 46th session, Official Records of the General Assembly, 49th Session, Suppl. No. 10, para. 90, A/49/10.

draft statute.<sup>22</sup> According to GA resolution 49/53 of 9 December 1994, the mandate of the *Ad Hoc* Committee was: "to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries."<sup>23</sup>

The General Assembly hoped that the *Ad Hoc* Committee would resolve the differences between States favoring the establishment of an ICC and those who were opposed or reluctant to see this result in the short term. The *Ad Hoc* Committee met for two sessions in 1995, but failed to come to sufficient agreement to call a conference of plenipotentiaries. However, these meetings had the positive effect of allowing States to familiarize themselves with the issues involved in the creation of an International Criminal Court. The educational value produced by the work of the *Ad Hoc* Committee served a beneficial purpose and led to the establishment of a Preparatory Committee in 1996 (PrepCom). The mandate of the 1996 PrepCom<sup>24</sup> was explicitly goal-oriented. The 1995 *Ad Hoc* Committee discussed the principal ideas that made the work of the 1996 PrepCom more specific. Consideration of the benefits of the meetings of the 1995 *Ad Hoc* Committee must be tempered, however, with an acknowledgment of the difficulties that still hinder elaboration of the draft statute. Proponents of the ICC have had to face something of a constant effort to keep the process moving forward. Due to the unfamiliarity of many with the important topics involved, and the related desire of all parties to cast a court which would be most useful, in their eyes, the process has sometimes seemed to delay meaningful progress. Regarding the number of proposals that have been made by States and the fact that the PrepCom has at times found it difficult to deal with them efficiently, it would probably be unfair to say that a purposeful war of attrition was being waged by opponents of the court, nevertheless the costs that governments had to bear in sending experts from capitals to long meetings in New York was felt by many delegations.

5. Building the work of the *Ad Hoc* Committee, the 1996 PrepCom was mandated by the General Assembly:

to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a con-

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22. See G.A. Res. 49/53, U.N. GAOR, 49th Sess., agenda item 137, UN Doc. A/RES/49/53 (1994).

23. G.A. Res. 50/46, U.N. GAOR, 50th Sess. agenda item 142, UN Doc. A/RES/50/46 (1995).

24. See *infra*.

ference of plenipotentiaries, and [it was] also decide[ed] that the work of the Preparatory Committee should be based on the draft statute prepared by the International Law Commission and should take into account the report of the Ad Hoc Committee and written comments submitted by States . . . and, as appropriate, contributions of relevant organizations.<sup>25</sup>

As stated above, this mandate had a more specific, goal oriented character and was therefore due progression from the earlier mandate of the *Ad Hoc* Committee. The 1996 PrepCom did not, however, produce a "consolidated" text of a draft statute, and only succeeded in creating a report which compiled various proposals. On the basis on this work, the 1996 PrepCom proposed to the General Assembly to continue its work with an enhanced mandate and meet for another nine weeks in 1997-98 before a diplomatic conference could be held. With all of this in mind, the 1996 PrepCom, in its report to the Sixth Committee stated: "recognizing that this is a matter for the General Assembly, . . . on the basis of its scheme of work, considers that it is realistic to regard the holding of a diplomatic conference of plenipotentiaries in 1998 as feasible."<sup>26</sup>

The weakness of the language in this recommendation is, however troubling. The insistence by some delegations on the inclusion of a footnote in the recommendations of the 1996 PrepCom reserving their positions on its findings and its decision to move towards a diplomatic conference in 1998 necessitates caution. The footnote states that: "[s]ome delegations expressed reservations on the conclusions of the Preparatory Committee and felt that these conclusions do not prejudice the position of the States in the General Assembly."<sup>27</sup>

The lack of imperative to complete its work by April 1998 in the language of the recommendation to the 1996 PrepCom raises concerns. It raises the prospect that the 1997-98 PrepCom work could delay the convening of the conference in June 1998. The wording of the General Assembly resolution is not sufficiently peremptory to concentrate the minds of delegates to bring the process to end by April 1998. This prospect may offer opponents of the court a method by which to delay the outcome. Nevertheless, the General Assembly's resolution is quite specific.<sup>28</sup> It mandates the 1997-98 PrepCom:

(a) to meet three or four times up to a total of 9 weeks before the diplomatic conference. To organize its work so that it will finalize its work in April of 1998 and so as to allow the widest possible participation of States. The work should be done in the form of open-ended working

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25. G.A. Res. 50/46, *supra* note 23, at para. 2.

26. Report of the Preparatory Committee, *supra* note 1, vol. I, at para. 370.

27. *Id.* vol. I, at 77, n.12.

28. *Report of the Sixth Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., agenda item 147, UN Doc. A/51/627 (1996). This resolution was adopted by the UN General Assembly on December 17, 1996.

groups, concentrating on the negotiation of proposals with a view of producing a widely acceptable draft consolidated text of a convention, to be submitted to the diplomatic conference. No simultaneous meetings of the Working Groups shall be held. The working groups should be fully transparent and should be by general agreement to secure the universality of the convention. Submission of reports of its debates will not be required. Interpretation and translation services will be available to the working groups.

(b) The subjects to be dealt with by the Preparatory Committee are:

1. List and definition and elements of crimes
2. Principles of criminal law and penalties
3. Organization of the court
4. Procedures
5. Complementarity and trigger mechanism
6. Cooperation with States
7. Establishment of the ICC and relationship with the UN
8. Final clauses and financial matters
9. Other matters

The renewed mandate of the 1997-98 PrepCom is a more positive, goal oriented statement than that of the 1996 PrepCom, and it enhances the prospects for successful progression to the negotiation stage of the process.<sup>29</sup>

6. It must be emphasized that all the language necessary for the creation of an acceptable consolidated statute has been adopted in the 1996 General Assembly resolution. At this stage, a genuine and disciplined drafting effort is necessary in 1997-98 in order to fully exploit the opportunities offered by the General Assembly's positive mandate to the PrepCom. As explained below, limited member drafting groups would be a positive way to allow focussing on creation of an acceptable text. However, the fact that the General Assembly resolution refers to the use of open-ended working groups means that a more diversified effort must be made to avoid the shortcomings that have been in evidence in the 1996 PrepCom. To this end, the role of the chairs of the working groups is vital, as is the role of the Bureau. A positive and genuine drafting effort to consolidate the various proposals is, therefore, required.

## II. GENERAL OBSERVATIONS

7. A successful drafting undertaking of this nature is not easily achieved with open-ended multiple working groups. Problems have hindered this process in the past, such as: lack of broader participation due to under-representation of Member-States; the fact that some delegations have only one representative who has responsibilities broader than the ICC alone, and therefore cannot be adequately prepared to

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29. *Id.*



deal with all the technical issues that must be addressed by the working groups; and the fact that some delegations lack sufficient expertise in the complexities of the subject matter.

8. While a limited and fixed membership for each working group would be the most efficient method to produce within a relatively short period of time, a satisfactory text, equivalent results must be achieved using the broader system envisaged by the 1996 resolution. So far, the work of the 1996 PrepCom has been on the basis of open participation to all member States, and all decisions have been made by consensus. That process has been important as a method of exchanging views and clarifying issues. But it has not been effective as a drafting process. The forthcoming 1997-1998 PrepCom must therefore change focus, method, and speed of work. This will depend on the dynamics of each working group and on the choice and expertise, as to subject matter, of the working groups' chairs.

9. It should also be noted that some Member-States, particularly among the less developed countries, may not be represented at the 1997-98 PrepCom, due to their lack of sufficient personnel and due to the costs of attending the PrepCom. The absence of these governments' delegations at the PrepCom is deleterious to the objective of making this effort truly universal. It will also make it more difficult at a later time, to induce these governments to become parties to the Convention establishing the ICC. Thus, some efforts should be made to ensure the participation of these governments through contributions to the special fund which the 1996 resolution for the establishment of an ICC requests the Secretary-General to establish for that purpose.<sup>30</sup>

10. To avoid some of the difficulties that have affected the PrepCom and the *Ad Hoc* Committee, the chair's proposed plan is to have two working groups each day but alternating between morning and afternoon so that governments with small delegations can participate in all working groups and so that all working groups will have simultaneous interpretation.

11. The Chair's latest informally proposed schedule is as follows:<sup>31</sup>

SESSION 1 — FEBRUARY 10-21, 1997

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30. 1996 Sixth Committee Report, *supra* note 28, at para. 7.

31. This working programme for the first two sessions of the PrepCom was circulated by the Chairman to the Permanent Missions to the United Nations on November 15, 1996. As is customary, it is a draft, and will be proposed to the Plenary for its approval. The working program for the third session of 1997 is still under consideration.

## Week 1 Opening with a plenary meeting

<b>Working Group 1</b>	<b>Working Group 2</b>
Morning Sessions	Afternoon Sessions
-List and definitions and elements of crimes.	-Principles of criminal law and penalties.

## Week 2

<b>Working Group 1</b>	<b>Working Group 2</b>
Morning Session	Afternoon Session
-List and definitions and elements of crimes.	-Principles of criminal law and penalties. -Procedures (if time permits).

Closing session in a plenary meeting.

## SESSION 2 — AUGUST 4-15, 1997

## Week 1 Opening with a plenary meeting in Week 1

<b>Working Group 1</b>	<b>Working Group 2</b>
Morning Session	Afternoon Session
-Complementarity and trigger mechanisms.	-Procedures

## Week 2

<b>Working Group 1</b>	<b>Working Group 2</b>
Morning Session	Afternoon Session
-Complementarity and trigger mechanisms. -Organization of the Court.	-Procedures

## III. CATEGORIES OF DRAFTING ISSUES

12. The drafting issues facing the 1997-98 PrepCom fall into three categories. They are:

- (a) Parts of the Statute involving technical and substantially technical issues;
- (b) Parts of the Statute involving a mix of political judgments and technical issues; and
- (c) Parts of the Statute involving political judgments.

Each one of these parts presents a different set of problems and drafting progress. Each one of these parts will, therefore, have to be dealt with in such a way as to address those differences. Following is an assessment of the expected progress on the various parts of the statute, in light of the experiences of the 1996 PrepCom, and based on the above three categories of drafting issues.

## A. *Parts Involving Technical and Substantially Technical Issues*

### 1. Rules of Procedure and Evidence<sup>32</sup>

13. At the second session of the 1996 PrepCom an informal working group was established. It used a text presented by Australia and the Netherlands<sup>33</sup> as a basis for its work. The working group then received a significantly large number of additional proposals and amendments and this caused that part of the text to become unmanageable. A different approach is however needed in 1997-98 because the goal is not to produce a comprehensive code of criminal procedure and evidence with extensive details. Instead, the approach should be to develop in the statute, general principles of procedure and evidence, while an annex could contain more detailed provisions. The annex would expressly have the character of guidelines, and hence not be deemed of the same order as the rest of the Statute. Equally, the Statute could provide that this annex could be amended by the Committee of States Parties on the recommendation of the ICC. This approach would also open the way for the ICC to develop rules of court to supplement the rules of procedure and evidence on the basis of the ICC's future experience. Since Rules of Court would be subject to the approval of the Committee of States Parties, there should be no apprehension that the ICC would act with total independence on such a quasi-legislative undertaking. This approach would make the 1997-98 PrepCom's work on this part of the Statute more fruitful.

14. In 1997-98 this working group would benefit from the participation of delegates with specific expertise in comparative criminal procedure, and with an understanding of the particularities of international criminal investigations and prosecution of international criminal cases.

### 2. Organization of the Court<sup>34</sup>

15. Some progress was achieved on this part at the second session of the 1996 PrepCom. An examination of the written proposals and re-

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32. See Report of the Preparatory Committee, *supra* note 1, vol. I, at 47-61, vol. II, at 150-234.

33. *Draft Report of the Preparatory Committee on the Establishment of an International Criminal Court, 12 - 30 Aug. 1996*, U.N. GAOR, 51st Sess., UN Doc. A/AC.249/L.2 (1996). A meeting was held July 11-13, 1996, at the International Institute of Higher Studies in Criminal Sciences which was attended by 34 experts acting in their individual capacities from 20 countries. These experts were delegates to the 1997 Prep Com. The meeting was also attended by NGO observers. Three texts were produced and are referred to hereinafter. The draft text on Rules of Procedure and Evidence was prepared by Australia and presented to the July 1996 Siracusa group of experts. On the basis of observations and discussions during that meeting, Australia updated the text and submitted it to the Second Session where an informal working group was established to review it as well as other submissions.

34. See Report of the Preparatory Committee, *supra* note 1, vol. I, at 11-15, vol. II,

view of the oral statements made by delegations at the 1996 PrepCom indicates that most of the delegations' intended textual proposals have been made. This should therefore expedite the work of that working group in 1997. Some basic issues however may not be fully resolved in 1997 because of their political judgments content. The 1997 delegates may not have sufficient instructions from their governments to make such judgments or they may be instructed to defer these choices to a later time, including possibly the diplomatic conference. This situation could delay reaching a consensus on this part, but without necessarily delaying the drafting which could have alternative bracketed texts. These issues include: (a) the number of judges and the method of their appointment; (b) the qualifications and method of appointing the prosecutor; (c) the permanent presence of all judges at the seat of the Court; (d) the role and powers of what the ILC's 1994 draft refers to as "The Presidency;" (e) the enactment of rules of court; and (f) (which is probably the most important of all these issues) the role and responsibilities of the Committee of States Parties. The question of the Committee of States Parties has not yet been adequately addressed by the 1995 *Ad Hoc* Committee and the 1996 PrepCom. It is further discussed below at paragraphs 36 and 37. The above issues, with the exception of (f), have a lower political judgment content than other issues discussed below and thus, it may be possible to make significant progress in 1997-98 on this part.

16. The International Human Rights Law Institute of DePaul University has prepared a study into the Financial and Administrative Implications of the ICC which follows in this publication. This study is based on the experiences of the Yugoslav and Rwanda Tribunals, and the Commissions of Experts that preceded them. The facts and figures presented are based on the discussions of the 1995 *Ad Hoc* Committee and the 1996 PrepCom.

17. In this context, it is necessary to mention one further issue which has not yet been dealt with by the 1996 PrepCom. This is whether the appeals chamber of the Tribunal will give a single, collegiate judgment, or whether each judge will have the right to give his or her own separate opinion, including dissenting or concurring opinions with the majority. The detrimental consequences of a relatively large number of broadly dissenting opinions is well illustrated by the effect which the appeal decisions in the *Tadic*<sup>35</sup> case before the ICTFY had on the jurisprudence of that Tribunal. The disparity between the various appeal judge's conclusions, and between the arguments which they used to reach those conclusions, did not serve well the development of a coherent jurisprudential basis for the Tribunal. If the juris-

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at 7-54.

35. The Prosecutor v. Dusko Tadic, Case No. IT-94-I-AR72 (2 Oct 1995), Decision of the Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, 1996.

prudence of the ICC is to become similarly fractured due to the number and diversity of opinions given by the members of its appeals chamber, this could create difficulties for the development of international criminal law. Alternatively, the argument can be made that a plurality of opinions helps to develop the law of the system. With this in mind, it is proposed that the appeals chamber initially give single, collegiate judgments, but once the Committee of States Parties is satisfied that the jurisprudence has developed sufficiently, it can decide to allow individual dissenting and concurring opinions. This question should be reviewed by the Committee of States Parties after the first five years of the ICC's existence.

### 3. General Principles of Criminal Law<sup>36</sup>

18. Progress has been made at the second session of the 1996 PrepCom by the informal working group on this part which relied essentially on a text submitted by Canada.<sup>37</sup> Several other exhaustive proposals have been made by France and Japan, and it is not likely that new proposals of a substantially different nature will be made in 1997-98. That working group will however face some difficult doctrinal legal questions and will need to bridge the gaps between different legal systems. A balance between legal and diplomatic expertise which will allow progress on that specialized issue will be needed on that working group. Some substantive legal issues pertaining to this part will however depend on the resolution of certain political judgment issues and the working group would have to prepare some alternate bracketed texts. The major issues that are likely to arise are in connection with: (a) recognition of penal judgments; (b) double jeopardy or *non bis in idem*; (c) the mental element for each of the four crimes presently deemed to be within the inherent jurisdiction of the Court; and (d) penalties.

19. As to issues concerning (a) and (b), the relevant textual provisions will depend on political judgment issues concerning "complementarity" and the relationship of the ICC to national criminal jurisdictions, and more particularly whether the ICC will have "primacy" in that relationship. The two issues needing particular attention are: (c) the mental element and (d) penalties. As to (c) the mental element, it seems necessary to develop not only generally applicable provisions, but also specific provisions on the mental element required for each of

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36. See Report of the Preparatory Committee, *supra* note 1, vol. I, at 41-47, vol. II, at 79-104.

37. Applicable Law and General Principle of Law: Working Paper Submitted by Canada, Draft Report of the Preparatory Committee on the Establishment of an International Criminal Court, 12-30 Aug. 1996, U.N. GAOR, 51st Sess., UN Doc. A/AC.249/L.4. The draft Canadian text was presented at the July Siracusa meeting of experts where it was discussed. Canada then made the appropriate changes based on the Siracusa discussions and submitted the text at the second session.

the crimes within the inherent jurisdiction of the ICC. This is necessitated by the diversity of these crimes and their peculiarities in light of their history and development. Furthermore, as to the four crimes presently contemplated to be within the inherent jurisdiction of the ICC, the particularized mental element as to each of these crimes should also distinguish between what is required for decision-makers and what is required for executors, down to the lowest echelons of the chain of command.

20. As to (d) penalties, the Statute should contain principles and guidelines for penalties, leaving to the ICC the initiative of proposing specific penalties provisions to the Committee of States Parties for approval, within the basic principles and guidelines set forth in the Statute. That will facilitate the 1997-98 PrepCom's task and at the same time insure a more reflective and deliberate set of penalties which will have the benefit of the ICC's expertise.

21. Because of the highly technical nature of this part, the working group should avoid ambiguous textual language, which may produce acceptable compromise results at the 1997-98 PrepCom but which would, because of their lack of precision, create future difficulties. The more this working group accomplishes, the less burden will fall on the diplomatic conference which will be more concerned with other issues involving political judgments and may not, therefore, be adequately prepared to deal with the complicated technical issues presented by this part. Notwithstanding the above, this working group is anticipated to proceed well and to produce a text with bracketed provisions for unresolved questions.

22. There are a number of other issues that should be mentioned at this point. The 1996 PrepCom has accepted the position that the ICC's jurisdiction will be solely prospective. This is a major concession which may create the impression that the four core crimes of the ICC's jurisdiction are not punishable before the establishment of the ICC. Such a perception would be incorrect, and would seriously undermine the efforts of some states to prosecute violators within their own national legal systems. Hence, it would be useful to include a provision in the statute to avoid the implications of an interpretation that would lead to the conclusion that past violators cannot be prosecuted before national tribunals.

23. Another danger to be avoided is the implication that statutes of limitation can apply to war crimes, crimes against humanity, and genocide. This is contrary to the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,<sup>38</sup> and the 1974 European Convention on the Non-

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38. United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 6, 1968, 754 U.N.T.S. 73, 8 I.L.M. 68 (entered into force Nov. 11, 1970).

Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes.<sup>39</sup> Therefore, it must be clear that while the ICC will only deal with crimes which occur after its establishment; it does not imply that national legal systems cannot prosecute such crimes under the theory of universality or other theories, or that statutes of limitations can apply to genocide, crimes against humanity and to war crimes. Indeed these are crimes contemplated to be within the inherent jurisdiction of the ICC, are *jus cogens* and create obligations *erga omnes*.

B. *Parts Involving Substantially Mixed Political and Technical Issues*

1. Rules of Cooperation and Mutual Legal Assistance<sup>40</sup>

24. While this part appears to be essentially technical, and it is, it nonetheless depends on a fundamental political judgment concerning the relationship of the ICC to States Parties and to other States. If the Court is deemed to have "primacy" over national systems (like the ICTFY<sup>41</sup> and the ICTR<sup>42</sup>), the framework of cooperation will be substantially different than if the ICC is deemed to be the equivalent of any other State engaging in bilateral relations. One of the proposals currently before the PrepCom concerning the relationship between the ICC and States Parties places the ICC at the same level as any State engaging in bilateral relations with another State concerning interstate cooperation in penal matters. That approach presents serious problems of enforcement for the ICC. It must be emphasized that in order for the ICC to be effective it should have "primacy" on the basis of the provisions of the Statute.

25. The 1996 PrepCom established an informal working group on this part and considered a text submitted by South Africa and Lesotho.<sup>43</sup> Understandably, this working group did not resolve the political judgment question raised above which affects the overall structure of this part and it is unlikely that the 1997-98 PrepCom will be able to do so. However, if the drafting continues on the premise that the ICC does not have "primacy" over the national legal systems of the States Parties, it will make the whole scheme of cooperation only as

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39. European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, Jan. 25, 1974, E.T.S. No. 82.

40. See Report of the Preparatory Committee, *supra* note 1, vol. I, at 68-74, vol. II, at 245-85.

41. ICTFY Statute, *supra* note 8, art. 9.

42. ICTR Statute, *supra* note 10, arts. 8 & 9.

43. International Cooperation and Judicial (Mutual) Assistance: Working Paper Submitted by South Africa and Lesotho, Draft Report of the Preparatory Committee on the Establishment of an International Criminal Court, 12-30 Aug. 1996, U.N. GAOR, 51st Sess., U.N. Doc. A/AC.249/L.5. The draft of that text was prepared for the July 1996 Siracusa meeting of experts where it was discussed. Thereafter, South Africa made the appropriate changes and the text was presented at the Prep Com's Second Session.

good as the national laws and practices of each State Party (since the Court would have to go through the procedures of each State Party in accordance with the laws of each State Party). If this approach prevails, it may turn out to be the Achilles Heel of the ICC. Some new and imaginative ideas are therefore necessary in order to avoid the sensitivity expressed by some governments concerning the "primacy" approach reflected in the Statutes of the ICTFY<sup>44</sup> and ICTR<sup>45</sup> and yet avoid placing the ICC in a subordinate position to national legal systems. The working group should, therefore, prepare alternative texts in brackets to allow the Diplomatic Conference to make an easy selection so that the Diplomatic Conference does not have to engage in prolonged drafting that would repeat the discussions of the 1996, and presumably the 1997-98 PrepCom's work, thus delaying its conclusion.

### C. *Parts Involving Political Judgments*

#### 1. Nature of the ICC<sup>46</sup>

26. The ICC is to be an international treaty-created body. The Convention will govern the relations of the new institution and State Parties, as well as the relations between the ICC and the UN. This seems to be a policy choice which may not necessarily be the best one to make. The benefits of establishing an international criminal justice system as an integral part of the United Nations system, such as the International Court of Justice, outweigh all the perceived negative implications of the UN's bureaucracy and its present financial difficulties. But that policy choice which emerged from the deliberations of the *Ad Hoc* Committee and the 1996 PrepCom may hopefully still be subject to reconsideration, although that prospect appears doubtful.

#### 2. Naming<sup>47</sup>

27. The ICC should more appropriately be named the International Criminal Tribunal because the Court is the adjudicating or judicial organ of the institution. To refer to the Court as the entire institution and also to the Court as the judicial organ within the institution can create unnecessary confusion. This was the Choice of the Security Council when it established the ICTFY and the ICTR.

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44. See ICTFY Statute, *supra* note 8, art. 9 (which provides for primacy).

45. See ICTR statute, *supra* note 8, arts. 8 & 9 (which provide for primacy).

46. Report of the Preparatory Committee, *supra* note 1, vol. I, at 8-9, vol. II, at 3-6.

47. See generally M. Cherif Bassiouni, *Draft Statute International Criminal Tribunal*, 9 & 10 NOUVELLES ÉTUDES PÉNALES (1993).



### 3. Relationship between the ICC and National Jurisdictions<sup>48</sup>

28. The 1995 *Ad Hoc* Committee<sup>49</sup> and 1996 PrepCom<sup>50</sup> selected the term “complementarity” to characterize the nature of the ICC and its relationship to national legal systems. This term is an English transposition of the French term *complémentarité*. But to know the origin of that term does not necessarily contribute to the clarity of its meaning, nor the specificity of its import. Some see it as jurisdiction-sharing concept to be amplified, such as the Maastricht Treaty<sup>51</sup> concept of “subsidiarity” which does not detract from the primacy of the Treaty of European Union. Others see the term “complementarity” as meaning that the ICC can be seized with a matter only after national jurisdictions have agreed to it or whenever said jurisdictions are unable to act fairly and effectively. Complementarity should not however be interpreted in a way that places the ICC in a subsidiary position to national criminal justice systems. To do so might frustrate the purposes and work of the ICC.

29. There are four core international crimes which are to be the ICC's inherent subject-matter jurisdiction:<sup>52</sup> “aggression;” “genocide;” “crimes against humanity;” and “war crimes.” These are crimes that affect or have the potential of affecting the peace and security of humankind, that shock the universal human conscience, and that are deemed part of *jus cogens*. Prosecuting violators of these crimes is therefore as much the separate task of States as it is the collective task of the international community. Such prosecutions and the enforcement of judicial orders and judgments inherent thereto will require the action and cooperation of all States Parties. Thus, these crimes are best suited to be within the inherent jurisdiction of the ICC, even if national jurisdictions are given, whenever appropriate, the opportunity to act. In this respect, the formula adopted in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTFY)<sup>53</sup> in Articles 9 and 10, constitutes one of the models to draw upon.<sup>54</sup> Quite clearly, the question of primacy of the ICC, and how it is to be exercised, has to be resolved.

30. “Complementarity” is a useful concept to draw upon in determining the relationship of the ICC and national legal institutions, but

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48. Report of the Preparatory Committee, *supra* note 1, vol. I, at 36-41, vol. II, at 55-78.

49. Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50th Sess., Supp. No. 22, at 6-10, U.N. Doc. A/50/22 (1995). [hereinafter Report of the *Ad Hoc* Committee].

50. See UN Doc. A/51/22, *supra* note 1.

51. TREATY ESTABLISHING THE EUROPEAN UNION, Feb. 7, 1992, O.J.(C 224) 191 (1992).

52. See Report of the *Ad Hoc* Committee, *supra* note 49; see also Report of the Preparatory Committee, *supra* note 1.

53. UN Doc. S/RES/835.

54. See generally BASSIOUNI, *supra* note 8.

it is not useful in respect of the relationship between the ICC and the Security Council. Indeed, the Council may refer matters to the ICC, and may be called upon to enforce ICC decisions. Thus, the relationship between the ICC and the Security Council must necessarily be articulated on a different basis than that on which the relationship between the ICC and the national jurisdiction is established. However, this does not exclude a differentiated approach concerning each crime. That differentiated approach should be reflected in the Jurisdictional Triggering Mechanisms.<sup>55</sup>

31. States Parties to the convention establishing an ICC will have to cede some jurisdiction to the ICC, and to give effect to the orders and judgments of the Court. Jurisdictional cession and the recognition of orders and judgments of an international judicial organ by domestic legal orders will depend on national constitutions' limitations and other aspects of national *ordre public*. But this should not be a way by which to stifle the work and judgments of the ICC. Furthermore, there should not be any significant disparity in the relationship between the ICC and each and every State Party. Otherwise, the ICC's judgments and orders will lack uniformity of enforcement and that will affect the fairness and effectiveness of the system as a whole.

32. Some member-States may deem the ICC an extension of their own national judicial systems. Others can characterize it as an alternative judicial body or another forum to which cases can be ceded to or transferred as in the model of the European Convention on Transfer of proceedings in Criminal Matters.<sup>56</sup> Each State Party will have to accommodate its participation in this new international judicial system in a manner that is more consonant with the requirements of its own national legal system, but without sacrifice to the equal and fair treatment of ICC judgments.

#### 4. Definition of the Crimes<sup>57</sup>

33. On the basis of the *Ad Hoc* Committee's Report<sup>58</sup> and the 1996 PrepCom Report,<sup>59</sup> the following appears to be the likelihood of the 1997-98 PrepCom's direction.

*Aggression* — Whether aggression is included, how it is defined, and whether only the Security Council will be able to refer a situation in-

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55. *See infra*.

56. European Convention on the Transfer of Proceedings in Criminal Matters 1972, 73 European Treaty Series. *See* Ekkehart Muller-Rappard, *The European System*, in INTERNATIONAL CRIMINAL LAW, (M. Cherif Bassiouni ed., 1986).

57. *See generally* M. Cherif Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal (1987).

58. Report of the *Ad Hoc* Committee, *supra* note 49.

59. Report of the Preparatory Committee, *supra* note 1.

volving aggression to the ICC is an essentially political judgment question which is so far not entirely resolved.

Irrespective of the policy question about its inclusion as a crime within the ICC's inherent jurisdiction, "aggression" needs to be defined. The 1974 General Assembly consensus resolution<sup>60</sup> can be a basis for the definition, but it is clearly unsatisfactory with respect to providing the necessary elements required by the principles of legality, and individual as opposed to State responsibility. Thus, this category of crimes will require the greatest attention and work in the formulation of its definition and legal elements. At the First Session of the 1996 PrepCom, a chairman's text was presented with the Bureau's full support, and certain delegations added proposals which appear in a compiled text in the 1996 PrepCom Report.<sup>61</sup>

*Genocide* — It seems settled that Genocide will be part of the ICC's inherent jurisdiction and that it will be defined as stated in Article 2 of the 1948 Genocide Convention.<sup>62</sup> But that definition nonetheless has several flaws: (i) it does not include social and political groups among those protected; (ii) the genocidal acts protecting a certain group seem to address only an entire homogenous group and do not specifically cover groups within a group (for example, the intellectual elite); (iii) the specific intent requirement makes its proof very difficult and it seems geared only to perpetrators who are part of the highest echelons of the decision-making process; and (iv) there is no stated intent requirement for perpetrators who carry out superiors' orders that result in or are part of a policy or plan to commit genocide.

Notwithstanding the above, the 1996 PrepCom's discussions revealed a reluctance to alter the terms of Article 2 of the Genocide Convention<sup>63</sup> and it is unlikely to change in 1997. But some language in the Commentary or in some other text could allow the ICC's jurisprudence to fill these legislative gaps in light of the law and jurisprudence of the ICTFY and ICTR.

*Crimes Against Humanity*<sup>64</sup> — It also seems settled that this category of international crimes will be part of the ICC's inherent jurisdiction. Its definition is not, however, settled. Article 6(c) of the IMT<sup>65</sup> and 5(c) IMTFE<sup>66</sup> define that category of crimes as does Article 5 of the

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60. See generally M. Cherif Bassiouni & Benjamin Ferencz, *The Crime Against Peace*, reprinted in *INTERNATIONAL CRIMINAL LAW* (M. Cherif Bassiouni ed., 1986).

61. Report of the Preparatory Committee, *supra* note 1.

62. United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1 UN GAOR Res. 96 (Dec. 11, 1946).

63. See Report of the Preparatory Committee, *supra* note 1, at 17.

64. See generally M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1992).

65. 82 U.N.T.S. 279, *supra* note 14.

66. T.I.A.S. No. 1589, *supra* note 15.

ICTFY<sup>67</sup> and Article 3 of the ICTR.<sup>68</sup> All four definitions vary slightly however, and all four of them have some general and vague terms that need to be clarified. The following concerns have been raised in 1995 and 1996 need to be addressed: (i) rape and sexual assault should be specifically included (as in the case of Article 5 of ICTFY); (ii) "extermination," "deportation" and "enslavement" need to be clarified; (iii) "other inhumane acts" needs to be clarified or narrowed to mean nothing more than an interpretation *ejusdem generis*; (iv) the mental element has to be specified with a distinction between decision-makers and executors (preferably in the same way as with the intent requirements for "genocide," though bearing in mind that "crimes against humanity" presently requires a general intent and not a specific intent for all categories of perpetrators).

At the First Session of the 1996 PrepCom a Chairman's draft was introduced with full support of the Bureau. Several delegations made additional proposals. The compiled text appears in Volume II of the 1996 PrepCom Report. But the divergences between these proposals need to be reconciled.

Notwithstanding the problems raised above, "crimes against humanity" and the articulation of its elements do not pose any difficult drafting problems and could be accomplished with relative ease.

*War Crimes*<sup>69</sup> — The deliberations of the 1995 Ad Hoc Committee and the 1996 PrepCom revealed that the ILC's attempted distinction between "serious crimes against the laws and customs of war" and "grave breaches of the Geneva Convention" was not felicitous. The so-called "Law of the Hague" and "Law of Geneva" are in some respects so intertwined that it is neither appropriate nor feasible to make the type of distinction made by the ILC, particularly since that category of crimes is aimed at providing a comprehensive definition on the basis of which combatants may face international criminal prosecution. "War Crimes" must therefore be an appropriate combination of the "Law of Geneva" and the "Law of the Hague" in connection with conflicts of an international character and conflicts of a non-international character. This includes:

- (i) "grave breaches" of the 1949 Conventions and Protocol I,<sup>70</sup> as well as violations of Common Article 3 of the 1949 Conventions<sup>71</sup>

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67. SC Res. 808, *supra* note 8.

68. SC Res. 935, U.N. SCOR, 49th Sess., 3400th mtg., UN Doc. S/RES/935 (1994).

69. See generally HOWARD LEVIE, TERRORISM AND WAR CRIMES.

70. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391.

71. Common Article 3 to: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No.I), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention of the Amelioration of the Condition of Wounded, Sick, and Shipwrecked of Armed Forces at Sea (Geneva Convention No.II),

and Protocol II.<sup>72</sup>

(ii) whether to define the customary law of armed conflicts in some general terms, adding some specifics, or alternatively to make only make a general reference to the laws and customs of war with some specifics as in the case of ICTFY<sup>73</sup> Articles 2 & 3. But that approach may violate the principles of legality in many legal systems. Thus, a well-defined provision is more advisable than a general statement purporting to incorporate by reference the customary law of armed conflicts. In either case, that part of the "war crimes" provision will necessarily be more general than the provision dealing with the "Law of Geneva," and thus less responsive to the requirements of legality in some States.

#### 5. Jurisdictional Triggering Mechanisms for the Four Core Crimes within the Inherent Jurisdiction of the ICC

34. On the assumption that a diversified approach is elected by the 1997 PrepCom, the following may be considered:

(a) *Aggression*: The Security Council and a State Party may refer a situation to the ICC for investigation by the Prosecutor and determination of whether a person may be prosecuted for such a crime. The Prosecutor may refer a given individual case if it is deemed to be in the best interests of justice, but subject to the approval of the Indictment Chamber. If a case is pending before a national criminal jurisdiction, at the request of the Prosecutor, the Indictment Chamber would either ask a State to defer to it the investigation or prosecution of such a crime. However, such a procedure would not be allowed if the situation was initiated by the Prosecutor without the Council's approval. There should also be textual language in the Statute designed to avoid conflict between the ICC, the Security Council, and the ICJ.

(b) *Genocide*: Initiation of the prosecutorial phase can be by a State Party or the Security Council and also by any State Party to the Genocide Convention. Deferral procedure and waiver of ICC jurisdiction would be the same as for "Aggression."

(c) *Crimes Against Humanity*: Same as for "Genocide."

(d) *War Crimes*: Same as for "Genocide" and "Crimes Against Humanity," but with the added formula that State Parties whose armed forces are part of a UN or regional organization multinational force, or are on a peace-keeping force sanctioned by the Security Council or any

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Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No.III), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in the Time of War (Geneva Convention No.IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

72. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 (1997).

73. UN Doc. S/RES/808, *supra* note 8.

other regional organization are first subject to the jurisdiction of the national military justice of that State under whose flag the alleged perpetrator acted. Additionally, if the individual legislation is not part of the policy, a consistent practice of the armed forces to which the accused belonged, the national military justice system would have primacy. The only exception would be wherever the national military justice system of that State is demonstrably unable or unwilling to act. In this case, the Prosecutor can request the Indictment Chamber to act before the ICC.

#### 6. Institutional Relations Issues

35. There are two issues that arise in this context:

##### a. The role of the Committee of States Parties

36. The structure of the 1979 draft statute to enforce the *Apartheid* Convention<sup>74</sup> envisaged the inclusion of a Committee of State Parties. In article XVIII of the statute, it is referred to as the 'Standing-Committee.'<sup>75</sup> This body had a role in electing officials, determining the annual budget, ensuring compliance with court judgments, and conducting general administrative oversight. The 1992 International Law Commission Report on the creation of an international criminal court draft statute included a similar body. It was left out of the ILC's 1994 draft statute in an attempt to distinguish the ICC statute from that of the *Apartheid* Convention. In the Updated Siracusa Draft,<sup>76</sup> Proposed Article 5(e) envisages "a standing Committee of States Parties" as one of the Articles of the ICC. Proposed Article C creates a Standing Committee of States Parties consisting of one member for each of the States Parties, electing officers by a simple majority, and meeting at least two times each year for at least a week each time. Regarding the role of the Committee in the Updated Siracusa Draft:

Article 4. The Standing Committee shall have the power to perform the functions expressly assigned to it under this Convention, plus any other functions that it determines appropriate in furtherance of the purposes of the Tribunal that are not inconsistent with the Convention, but in no way shall those functions impair the independence and integrity of the Court [Tribunal] as a judicial body.

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74. APARTHEID STATUTE, *supra* note 4.

75. *Id.* art. XVIII.

76. In June 1995, a group of experts acting in their individual capacity convened at the International Institute of Higher Studies in the Criminal Sciences (ISISC - Siracusa) to contribute alternative and supplemental text to the International Law Commission's 1994 Draft Statute for an International Criminal Court. The outcome of the meeting was the 'Updated Siracusa Draft' which was presented to the UN *Ad Hoc* Committee on the Establishment of an International Criminal Court. See also 9 & 10 NOUVELLES ÉTUDES PÉNALES with translation into French and Spanish.

Article 5. In particular, the Standing Committee may:

- a. offer to mediate disputes between States Parties relating to the functions of the Tribunal;
- b. encourage States to accede to the Convention; and
- c. propose to States Parties international instruments to enhance the functions of the Tribunal.

Article 6. The Standing Committee may exclude from participation representatives of States Parties that have failed to provide financial support for the Tribunal as required by this Statute or States Parties that failed to carry out their obligations under this Statute

Article 7. Upon request by the Procuracy, or by a party to a case presented for adjudication to a chamber of the Court, the Standing Committee may be seized with a mediation and conciliation petition. In that case, the Standing Committee shall within 60 days decide on granting or denying that petition, from which decision there is no appeal. In the event that the Standing Committee grants the petition, Court proceedings shall be stayed until such time as the Standing Committee concludes its mediation and conciliation efforts, but not for more than one year except by stipulation of the parties and with the consent of the Court.

37. The role that the committee had in the 1992 ILC draft statute structure has not been adequately filled in the 1994 ILC model. In order to properly and effectively deal with the relevant issues, the committee should be re-established in the structure before the end of the PrepCom sessions. There is an potential problem to be settled in regard to the committee of States Parties and the law of treaties. The statute should clarify the binding nature of decisions of the committee, even with regard to such things as the possible adoption of new treaty crimes into the jurisdiction of the court in the future. Were a negative vote in the Committee of States Parties to be interpreted as equivalent to a treaty reservation, this would lead to unnecessary problems in jurisdiction over international or transnational crime.

b. The relationship of the ICC to the UN

38. It is far more beneficial to have the ICC as a separate body but part of the UN system, as opposed to a completely unrelated body with a treaty relationship to the UN. Neither the implications of the choice at hand or the nature of the relationship have been adequately discussed by the 1995 *Ad Hoc* Committee or the 1996 PrepCom. Because this is such a complex issue there is a danger in relegating it to the end of the 1997-98 PrepCom's work. Early discussion with senior UN officials to ascertain the method and means by which either of these options could be implemented is therefore necessary.

c. Financing the ICC<sup>77</sup>

39. This issue has been briefly addressed by the *Ad Hoc* Committee and the 1996 PrepCom. Three options can be identified from these discussions. The first is that the budget of the Court should come directly from the regular budget of the UN. But that depends on the International Criminal Tribunal's relationship to the UN. The arguments used to support this position are that this would give the new institution a definite and dependable source of finance, and would avoid the problems that other directly financed bodies have faced. It would also encourage more States to ratify the Statute of the court, as there would be no significant financial cost involved. The second option is that the Court be funded directly by the States Parties either on a *pro-rata* basis, or on the basis of some other assessment system such as the UN assessment formula, where each member pays according to the size of their economy, or the International Postal Union assessment formula where assessments are calculated on the basis of a number of categories of States (*e.g.*, five), with each category receiving an increasing number of shares, on the basis of which they pay a proportion of the budget. The latter system is advocated on the basis that it allows the size of the economy of a State to be taken into account, but prevents overdependence on any single contributor. Proponents of the tier system also argue that the precarious state of UN finances means that it could not properly support the ICC. The third proposal is a form of combination of the previous two approaches. There have been many proposals regarding different forms of combination. There is general support for a mechanism by which voluntary contributions can be made to the coffers of the court in order to augment the regular income. Some have argued that the complainant State should be required to pay some of the costs of any case that results from their complaint, but there has been widespread disapproval of this. There has also been the proposal that the Security Council budget pay for any case that it brings to the court. The PrepCom should deal with this issue bearing in mind the needs of the Court, or at least reduce the broad proposals which have been made to bracketed texts which can then be dealt with at the conference of diplomats.

#### IV. CONCLUSION

40. A number of delegations have also met regularly during the 1996 PrepCom sessions, and once inter-sessionally. This group of delegations which is known as the "like-minded States" have been a significant driving force behind the ICC's momentum. Their contributions

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77. See generally Daniel Mac Sweeney, *Prospects for the financing of an International Criminal Court*, Discussion paper of the World Federalist Movement, UN/ NGO. See also Thomas Warrick, *Organization of the International Criminal Court: Administrative and Financial Implications*, 25 DENV. J. INT'L L. & POL'Y 333.



have been effective and constructive. This group, which has benefitted from the hospitality of the Canadian mission, has been growing in number. At the November meeting of the Sixth Committee, it included: Australia, Austria, Argentina, Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad and Tobago (representing 12 Caricon States), Uruguay, and Venezuela. Participation by other delegations is expected to increase in 1997-98.

41. Significant progress that has been made since the ILC presented its draft 1994 statute. Non-Governmental Organizations, and particularly the NGO Coalition for an ICC<sup>78</sup> have played an important and useful part in the process. Their contributions have taken the form of aiding the PrepCom through publishing expert NGO papers which contributed to a deeper understanding of the issues, and

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78. NGO Coalition for an ICC participating organizations as of November 1996 are: African Law Students - Young Lawyers Association, All Saints Newman Center, ALTERLAW, American Bar Association, Amnesty International, Avocats Sans Frontieres, B'nai B'rith International, Baha'i International Community, Campaign for Tibet, Canadian Network for an International Criminal Court, Carter Center, Center for Civil Human Rights, Center for development of International Law, Center for Reproductive Law and Policy, Center for UN Reform Education, Center for Women's Global Leadership, Coordinating Board of Jewish Organizations, Counselling and Mediation Center, Crusade Against Violence, Drug Free Society, Egyptian Organization for Human Rights, Equality Now, European Law Students Association, European Peace Movement, Evangelical Lutheran Church in America, Federation Internationale des Ligues Droits de l'Homme, FN-Forbundet/Danish UNA, Global Policy Forum, Guatemala Human Rights Commission/USA, Helsinki Citizens Assembly, Human Rights Internet, Human Rights Watch, Humanitarian Law Center, International Law Association (U.S Branch) Committee on an International Criminal Court, Institute for the study of Genocide, Istituto Superiore Internazionale di Scienze Criminali, Interkeekelyk Vredesberaad, International Bar Association, International Commission of Jurists, International Human Rights Law Group, International Human Rights Law Institute - DePaul University School of Law, International Indian Treaty Council, International League for Human Rights, International Service for Human Rights, International Society for Human Rights, International Society for Traumatic Stress Studies, International Committee for the Convention against Microwave Weapons, Lawyers Committee for Human Rights, Lawyers Committee on Nuclear Policy, League of Human Rights, Legal Aid for Women and Environmental Development, Leo Kuper Foundation, Manobik Unnayan Parishad, Maryknol Society Justice and Peace Office, Medecins Sans Frontieres, Morgan, Lewis & Bockius LLP, No Peace Without Justice (TRP), Nuclear Age Peace Foundation, Nurnberger Menschenrechtszentrum, Ordre des Avocats a la Cour de Paris, Organization for Defending Victims of Violence, Pace Peace Centre, Pace Law School, Parliamentarians for Global Action, Procedural Aspects of International Law Institute, Quaker U.N. Office, Redress, Robert F. Kennedy Memorial Center for Human Rights, SOS Balkanes, Syracuse University, The People's Decade of Human Rights Education, Transnational Radical Party, United Church Board for World Ministries, United Nations Association, Urban Morgan Institute for Human Rights, War & Peace Foundation, Washington Office on Latin America, World Federalist Movement - Institute for Global Policy, Womens Environment and Development Organization, World Federalist Association, World Order Models Project, and World Organization of Building Officials.

creating opportunities for generating ideas, and for informal meetings with delegates (such as that which produced the 'Siracusa drafts' and the July 1996 meeting of delegates from the so-called "like-minded States" which resulted in three major texts being presented at the 1996 PrepCom) through which experts can offer advice to the delegates. Equally, the close attention which NGOs have paid to the proceedings of the PrepCom, the meetings which NGO Coalition have held during the PrepCom with various States, groups of States, and other influential elements inside the ICC process, and the lobbying which has gone on at the UN, have all served to sustain and strengthen the momentum of the process. At a broader level, outside of the PrepCom, efforts to influence political leaders, to create worldwide awareness of the Court issue, and hence support for the court has been crucial to the level of development at which the court process finds itself today. The influence which NGOs have had to date and will have until the end of this process is crucial to its success, and should be acknowledged as such.

42. The outcome of the 1997-98 PrepCom sessions will have a determining impact on the convening and success of a diplomatic conference in 1998. However, if the 1997-98 PrepCom does not produce a satisfactory Draft Statute, it will delay the convening of a diplomatic conference, or else add so much work to that conference that it may take several sessions extending beyond 1998 for its conclusion. To avoid this potential situation the nine weeks of the 1997-98 PrepCom must be used most effectively.

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