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THE INTERNATIONAL CRIMINAL COURT

Third ICJ Position Paper

August 1995

Table of Contents

I.	Introduction	1
II.	Major Issues Addressed by the Ad Hoc Committee	3
III.	Establishment and Composition of the International Criminal Court	3
	A. Method of Establishment	
	B. Relationship with the United Nations	
	C. Nature of the Court as a permanent institution	
	D. Appointment and organisation of judges	
	E. Appointment and role of the Prosecutor	
	F. Adoption of the rules of Court	
IV.	Applicable Law and Jurisdiction of the Court	14
	A. Specification of the crimes under the Court's jurisdiction	
	B. Clarification of applicable law	
	C. Complementarity between the International Criminal Court and national courts	
V.	Exercise of Jurisdiction	27
	A. Inherent jurisdiction	
	B. Mechanism by which States accept the jurisdiction of the Court	
	C. Trigger mechanism	
	D. Conditions for the exercise of jurisdiction	
	E. Role of the Security Council	
	F. Statute of limitations	
VI.	Due Process	41
	A. Measures to ensure fair trial	
	B. Trials <i>in absentia</i>	
	C. Applicable penalties	
	D. Appeals and revision	
VII.	Relationship between States parties, non-States parties and the International Criminal Court	58
VIII.	Effect of Judgements	60
IX.	Budget and Administration	61

I. Introduction

This is the fourth document published by the International Commission of Jurists (ICJ)¹ on the establishment of a permanent International Criminal Court. The first paper, released during the 1993 UN World Conference on Human Rights in Vienna, focused on the need to establish such a Court and reviewed the ILC's work on the subject.² The second paper, published by the ICJ, examined the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Area of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia) and the role that this Tribunal may play as a step towards the creation of a permanent Court.³ The third paper provided the ICJ assessment of the ILC's Revised Draft Statute for an International Criminal Court, and offered an update on international efforts to establish such a Court.⁴

The ICJ is a non-governmental organisation devoted to promoting the understanding and observance of the Rule of Law and the legal protection of human rights world-wide. Throughout its history the ICJ has been working towards ending the impunity of those responsible for disregarding the Rule of Law and violating human rights. The comments made by the ICJ in this and the preceding papers reflect its devotion to these goals and its desire to ensure that the International Criminal Court has the ability to enforce the Rule of Law, protect human rights, and end impunity.

The UN Ad Hoc Committee on the establishment of a permanent International Criminal Court held its first meeting from 3 to 13 April 1995 at the UN Headquarters in New York. The ICJ is pleased to report that this meeting was largely a productive one, and believes that an important step in the progression towards a permanent Court has been taken. The Ad Hoc Committee will meet again from 14 to 25 August 1995 to continue its work, and will present its report to the UN General Assembly at the beginning of this year's fiftieth session.

The focus of the Ad Hoc Committee's discussions in April was the International Law Commission's (ILC) 1994 Revised Draft Statute for an International Criminal Court. The ILC adopted the Revised Draft Statute in July 1994, with the recommendation that the General

¹ The International Commission of Jurists (ICJ), headquartered in Geneva, is a non-governmental organization in consultative status with the United Nations Economic and Social Council, UNESCO, the Council of Europe and the OAU. Founded in 1952, its task is to defend the Rule of Law throughout the world and to work towards the full observance of the provisions in the Universal Declaration of Human Rights. The ICJ is composed of a maximum of 45 jurists from around the globe and has 75 national sections and affiliated organizations.

² *Towards Universal Justice*, June 1993.

³ *A System of International Criminal Prosecution is Taking Shape*, Christian Tomuschat, ICJ Review, vol. 50, p. 56 (1993).

⁴ "ICJ Campaign for the Establishment of the International Criminal Court", published in February 1995.

Assembly convene an international conference of plenipotentiaries to study the Statute and to conclude a convention on the establishment of an International Criminal Court.⁵

At its forty-ninth session, the Sixth Committee of the UN General Assembly discussed the work and recommendations of the ILC, and decided to establish the Ad Hoc Committee to review the major substantive and administrative issues arising out of the Revised Draft Statute. States and relevant international organs were invited to submit written comments on the Statute prior to the Ad Hoc Committee's first meeting. In light of its review, the Ad Hoc Committee is also to consider arrangements for the convening of an international conference of plenipotentiaries to conclude a convention on the establishment of a Court.⁶

This paper seeks to build on our previous work in several ways. First, it provides a thorough discussion of the ILC's approach to the issues that the Ad Hoc Committee focused upon at its first meeting. Second, the paper summarises the discussions of the Ad Hoc Committee concerning these issues. Third, it offers the ICJ's comments and suggestions on several of the issues, continuing and expanding upon the themes developed in the ICJ's earlier papers.

This comparison of the approaches taken by the ILC and the Ad Hoc Committee offers a useful insight into the issues that must be addressed in establishing a permanent Court. The ILC is a body of independent legal experts charged with the task of drafting the Statute of the Court. The Ad Hoc Committee is composed of governmental delegations from many of the world's nations. Certainly, some of the criticisms of the Statute made during the Ad Hoc Committee meeting reflect this difference in background.

The issues addressed by the Ad Hoc Committee were often highly complicated, and additional discussion is certainly necessary. The greatest hurdle to overcome in establishing a permanent International Criminal Court, however, is likely to be that of political will. Although the majority of the international community recognises the dire need to bring perpetrators of crimes under international law to justice, some States see such a Court as a potential affront to their national interests. With the vast tragedies of the former Yugoslavia and Rwanda as precedent, though, it is becoming increasingly clear that an effective international judicial mechanism will significantly contribute to the deterrence of such crises in the future. Every State should recognise that upholding the Rule of Law and preventing grave violations of human rights and serious breaches of humanitarian law is clearly in its national interest.

⁵ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), paragraphs 88, 90.

⁶ A/C.6/49/L.24 (23 November 1994); Resolution 49/53 of 9 December 1994.

II. Major Issues Addressed by the Ad Hoc Committee

In the Revised Draft Statute for an International Criminal Court, the ILC considers and attempts to address a broad range of often highly complex issues. The UN Ad Hoc Committee identified a number of the major substantive and administrative issues arising out of the Statute, and reviewed them at its meeting in April. In this Paper, the ICJ focuses upon the following topics chosen for discussion by the Ad Hoc Committee: (1) establishment and composition of the Court; (2) applicable law and jurisdiction of the Court; (3) exercise of jurisdiction; (4) due process; (5) relationship between States parties, non-States parties and the International Criminal Court; (6) the effect of judgements; and (7) budget and administration.

III. Establishment and Composition of the International Criminal Court

A. Method of establishment

1. Approach of the Revised Draft Statute

Article 2 indirectly provides that the Court would be established by means of a treaty, in that it anticipates the participation of "States parties." Article 2 states that: "The President, with the approval of the States parties to this Statute, may conclude an agreement establishing an appropriate relationship between the Court and the United Nations."

In the Commentary to Article 2, the ILC states more clearly its belief that a multilateral treaty would be the most effective means of establishing the International Criminal Court. The ILC explains that it considered and rejected two other main options for establishing the International Criminal Court: (1) by resolutions of the General Assembly and Security Council; and (2) by amendment to the United Nations Charter. These other options, while possessing certain advantages, were thought to entail greater difficulty than establishing the Court by treaty.⁷

2. Discussion by the Ad Hoc Committee

At the meeting of the UN Ad Hoc Committee, there was broad support for establishing the Court by means of a multilateral treaty. Many delegations expressed the view that establishing the Court by treaty would avoid the difficulties involved in establishing the Court by amendment to the UN Charter, or by Security Council or General Assembly resolution.⁸

Several states stressed the importance of ensuring the "universality" of the Court.⁹ In light

⁷ Commentary to Article 2, paragraphs (1)-(6).

⁸ UN Press Release, GA/8868, L/2714 (3 April 1995) (Comments of Finland, Canada, Argentina, Republic of Korea, United Kingdom, Venezuela, Ukraine, South Africa, Russian Federation, Sudan, China, Mexico, Poland, Sweden, Australia, France, Bulgaria, Thailand, Romania, Kuwait, Denmark, Brazil, Hungary, India).

⁹ GA/8868 (Comments of South Africa, China, Poland, Sweden, Brazil).

of this, it was suggested that a high number of ratifications be required for the treaty establishing the Court to come into force. For instance, one delegation proposed that a minimum of 65 ratifications be required. Similarly, another delegation proposed that approximately 60 ratifications be required for the treaty to enter into force, and criticised suggestions for a minimum of approximately 20 ratifications as being too low. One delegation stated that entry into force of the treaty should require a substantial number of parties. Another delegation, on the other hand, proposed that 25 ratifications should be required.¹⁰

3. ICJ Comments

The ICJ agrees that it would be impractical to establish the Court either by resolutions of the General Assembly and Security Council or by amendment of the UN Charter. The most practical method of establishment is by treaty. The ICJ believes that if the Court is to be established by multi-lateral treaty, then a substantial degree of support is essential to the Court's success. Requiring a high number of ratifications will only delay the operation of the Court. Moreover, the necessary support can be achieved by means other than requiring an extraordinarily high number of ratifications. For instance, the legitimacy of the Court as an international body can be achieved if it is closely associated with and funded by the United Nations. Its universality could be established or re-confirmed by a Resolution of the General Assembly.

The ICJ would also like to highlight that international human rights treaties do not generally require a large number of ratifications to enter into force. The following is a partial list of the most significant UN treaties on human rights and the number of ratifications that each required in order to enter into force:

- Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (20);
- Convention Relating to the Status of Refugees, 1951 (6);
- Convention on the Political Rights of Women, 1953 (6);
- Convention Relating to the Status of Stateless Persons, 1954 (6);
- International Convention on the Reduction of Statelessness, 1961 (6);
- International Covenant on Civil and Political Rights, 1966 (35);
- International Covenant on Economic, Social, and Cultural Rights, 1966 (35);
- International Covenant on the Elimination of All Forms of Racial Discrimination, 1966 (27);
- International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 (20);
- Convention on the Elimination of All Forms of Discrimination against Women, 1979 (20);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (20);
- Convention on the Rights of the Child, 1989 (20);
- International Convention on the Protection of the Rights of All Migrant Workers and Their Families, 1990 (20).

Furthermore, there is recent trend to require even fewer ratifications for entry into force.

¹⁰ GA/8868.

In the Inter-American system, which includes 37 countries,¹¹ recent treaties have required only a minimal number of ratifications:

- Inter-American Convention on the forced disappearance of persons, 1994 (2);
- Inter-American Convention on the prevention, punishment and eradication of violence against women, 1994 (2);
- Protocol to the American Convention on human rights to abolish the death penalty, 1990 (1).

In sum, the ICJ believes that the International Criminal Court ought to be established by a multilateral treaty that would enter into force following ratification by a reasonable number of states. Given the trend in human rights treaties to require a relatively small number of ratifications, the ICJ believes that it would be reasonable to require 20 to 25 ratifications. This being said, the ICJ recognises that the issue warrants further consideration as it has is one which has not been fully discussed by the Ad Hoc Committee.

B. Relationship with the United Nations

1. Approach of the Revised Draft Statute

Again, Article 2 states that: "The President, with the approval of the States parties to this Statute, may conclude an agreement establishing an appropriate relationship between the Court and the United Nations."

In the Commentary to Article 2, it is revealed that there was agreement within the ILC that the Court could only operate effectively if brought into a close relationship with the United Nations. The ILC comments that this relationship would be necessary both for administrative purposes, in order to enhance the Court's universality, authority and permanence, and because the exercise of the Court's jurisdiction could be consequential upon decisions by the Security Council.¹²

2. Discussion by the Ad Hoc Committee

A close relationship between the Court and the UN was viewed by many as being essential to success of the Court.¹³ The conclusion of a special agreement between the Court and the UN, as envisioned by Article 2, was also widely supported.¹⁴

3. ICJ Comments

There would appear to be widespread support for the proposition that the Court be

¹¹ 37 countries are bound by the Declaration and 25 by the American Convention on Human Rights.

¹² Commentary to Article 2, paragraph (7).

¹³ GA/8868 (Comments of Poland, Sweden, France, Tunisia, Romania, Denmark, Hungary).

¹⁴ GA/8868 (Comments of United Kingdom, Venezuela, South Africa, Russian Federation, Sudan, Sweden, France, Romania, Denmark, Hungary).

associated with the UN. The draft statute provides that the Security Council will be able to lodged complaints with the Procuracy. Although the ICJ is concerned with the procedure envisioned in the Revised Draft Statue regarding the crime of aggression, to be discussed in a below commentary, the ICJ does believe that the Court ought to be closely associated with the UN in order to enhance its legitimacy and to ensure that it can properly perform all its functions.

C. Nature of the Court as a permanent institution

1. Approach of the Revised Draft Statute

Article 4 of the Revised Draft Statute provides that while the International Criminal Court is to be a permanent institution, the Court is to sit only when required to consider a case submitted to it. The ILC comments that this provision is meant to achieve goals of flexibility and cost-reduction. Within the ILC, there were objections to this provision on the grounds that it is incompatible with the necessary permanence, stability and independence of a true International Criminal Court.¹⁵

Pursuant to Article 10(4), the States parties to the Statute of the Court may decide that the work-load of the Court requires that its judges serve on a full-time basis. This decision would require the approval of a two-thirds majority of the States parties.

2. Discussion by the Ad Hoc Committee

The approach adopted by the ILC to the issue of the Court's permanence received widespread support at the meeting of the Ad Hoc Committee. It was seen as constituting an acceptable balance between the requirements of flexibility and cost-effectiveness in the operation of the Court, and the need to promote a permanent judicial organ as an alternative to ad hoc tribunals.¹⁶

Moreover, it was commented that a permanent Court would help to address the constitutional difficulties encountered by some States in incorporating into their national laws the Security Council resolutions establishing the ad hoc International Tribunals for the Former Yugoslavia and for Rwanda.¹⁷

¹⁵ Commentary to Article 4, paragraph (1).

¹⁶ GA/8868 (Comments of Finland, Argentina, United Kingdom, Ukraine, Russian Federation, Mexico, Poland, Sweden, France, Romania, Denmark, Hungary).

¹⁷ GA/8868 (Comments of Finland, Germany).

3. ICJ Comments

A permanent institution is necessary for three reasons: first, to avoid the politicisation of matters by the involvement of the Security Council; second, to avoid administrative problems involved with the creation of ad hoc tribunals; and third, to avoid national constitutional prohibitions on the creation of special courts.

The ICJ supports the proposal that the Court, though permanent, meet only when necessary. Limited resources dictate a permanent, part-time approach, at least initially. The ICJ notes that the International Tribunal on Rwanda also only meets when necessary.

It is essential, however, for the President, Registrar and Prosecutor to be permanent and full-time positions to permit for the more efficient functioning of the Court. While judges of the Court need only be present when the Court is in session, these other offices should function full-time from the Court's establishment due to the nature of their responsibilities. In particular, the ICJ believes that the Court should have an independent and full-time prosecutorial organ to investigate complaints, bring charges against accused persons, and collect, prepare and present necessary evidence.

D. Appointment and organisation of judges

1. Approach of the Revised Draft Statute

Pursuant to Article 6(1), the judges of the International Criminal Court are to be of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. Additionally, they are to have either criminal trial experience or recognised competence in international law. As the ILC explains in the Commentary to Article 6, the requirement of criminal trial experience includes experience as a judge, prosecutor or advocate in criminal cases; the requirement of recognised competence in international law may be met by competence in international humanitarian law and international human rights law.¹⁸

Each State party may nominate not more than two persons, of different nationality, who possess the requisite criminal trial experience or recognised competence in international law. Eighteen judges are to be elected by an absolute majority vote of the States parties. Ten judges are to be elected from those nominated as having criminal trial experience, and eight judges are to be elected from those nominated as having recognised competence in international law. No two judges are to be nationals of the same State. Additionally, States parties are to bear in mind in electing judges that representation of the principal legal systems of the world should be assured.¹⁹

¹⁸ Commentary to Article 6, paragraph (2).

¹⁹ Article 6(2)-(5).

Judges of the Court will hold office for a term of nine years, and are not eligible for re-election. In order to maintain the balance of expertise on the Court, judges nominated as having criminal trial experience or as having recognised competence in international law are to be replaced by persons having the same qualifications.²⁰

Pursuant to Article 8, the judges will elect the Presidency of the Court, which consists of the President and two Vice-Presidents. The members of the Presidency are to serve in this capacity for a term of three years or until the end of their term of office as judges, whichever is earlier. Pre-trial proceedings and other judicial functions of a procedural or preliminary nature are entrusted to the Presidency in any case where a chamber of the Court is not seized of the matter. The Presidency also will be responsible for the due administration of the Court.

Article 9 provides that after each election of judges to the Court, the Presidency is to constitute an Appeals Chamber, consisting of the President and six other judges. At least three of the six other judges are to be drawn from judges nominated as having recognised competence in international law, thereby ensuring that a majority of judges with criminal trial experience will be available to serve in Trial Chambers. The President will preside over the Appeals Chamber, which, like the Presidency, is to be constituted for a term of three years. Judges may be renewed as members of the Appeals Chamber for subsequent terms.²¹

Judges who are not members of the Appeals Chamber will comprise the Trial Chambers and other chambers under the Statute, such as the Indictment Chamber (see discussion on trial *in absentia*). Additionally, these judges are to be available to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified. The Presidency is to nominate five judges to be members of the Trial Chamber for a given case, with three of the five judges being among those elected as having criminal trial experience. A judge who is a national of a State bringing a complaint or of a State of which the accused is a national cannot be a member of a chamber dealing with the case.²²

Finally, Article 10 emphasises that judges are to be independent in performing their functions. The ILC comments that as the Court will not be a full-time body, at least initially, and as judges will not be paid a salary but instead receive a daily allowance for each day that they perform their functions, it is anticipated that judges will continue to hold other positions. Judges are not to engage in any activity, however, which is likely to interfere with their judicial functions or to affect confidence in their independence. For instance, a judge cannot be, at the same time, a member of the legislative or executive branch of a national government. Similarly, a judge should not at the same time be engaged in the investigation or prosecution of crime at the

²⁰ Article 6(6),(8).

²¹ Article 9(1)-(3).

²² Article 9(4)-(7).

national level.²³

2. Discussion by the Ad Hoc Committee

Several delegations objected to the provisions in Article 6 concerning qualifications of judges. It was argued that the distinction between judges with criminal trial experience and those with competence in international law is too rigid, and might result in an unjustifiable quota system and complicate the selection of candidates.²⁴ The more flexible approach of the Statute of the International Tribunal for the Former Yugoslavia was suggested as an alternative.²⁵ Other delegations expressed the view that greater emphasis should be placed on the election of judges with experience in criminal law.²⁶

Moreover, the point was raised that the present qualification requirements may have the effect of excluding the election of judges from some developing countries.²⁷ It was suggested that Article 6 be amended to provide for equitable geographical representation in the election of judges,²⁸ as well as equitable representation of the principal legal systems of the world.²⁹

With respect to the election process, one country suggested that the pool of States nominating judges should be extended beyond States parties.³⁰ Election of judges by the UN General Assembly rather than by States parties was also proposed.³¹

Several delegations characterised the powers of the Presidency as being excessive and in need of further examination.³² The provision in Article 6 for rotation of judges between the trial and appellate chambers was also criticised. It was argued that these bodies should instead remain separate.³³

Additionally, it was suggested that the President of the Court serve on a full-time basis.³⁴

3. ICJ Comments

The ICJ concurs with the ILC that "the judges of the International Criminal Court are to be of high moral character, impartiality and integrity who possess the qualifications required in their

²³ Articles 10 and 17 and Commentary thereto.

²⁴ GA/8868 (Comments of Finland, Republic of Korea, Sweden, Bulgaria, Romania, Denmark).

²⁵ GA/8868 (Comments of Sweden); Article 13(1) of the Statute of the Tribunal for the former Yugoslavia states, in part: "In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."

²⁶ GA/8868 (Comments of United Kingdom, Poland).

²⁷ GA/8868 (Comment of Thailand).

²⁸ GA/8868 (Comments of Venezuela, Russian Federation, Trinidad and Tobago).

²⁹ GA/8868 (Comments of Russian Federation, Sudan).

³⁰ GA/8868 (Comments of United Kingdom).

³¹ GA/8868 (Comments of Thailand).

³² GA/8868 (Comments of Poland, China).

³³ GA/8868 (Comments of South Africa).

³⁴ GA/8868 (Comments of Argentina, Trinidad and Tobago, Italy).

respective countries for appointment to the highest judicial offices." However, the ICJ sees no need to limit the pool of potential judges by requiring that each candidate "must possess either criminal trial experience or recognised competence in international law." The ICJ agrees with those states that consider the Statute for the International Tribunal for the Former Yugoslavia to be more flexible and appropriate. It requires that in determining the overall composition of the Chambers, "due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."³⁵

The ICJ also believes that it is important for the membership of the Court to reflect the world's principal legal systems and geographical regions insofar as it is possible to do so given the number and make-up of States parties.

With regard to the composition of the Trial and Appellate Chambers, the ICJ believes that it is important for the two Chambers to remain independent and that there ought to be no rotation of membership between the Chambers. The ICJ would like to draw attention to Article 14(3) of the Statute for the International Tribunal for the Former Yugoslavia which stipulates that "[a] judge shall serve only in the Chamber to which he or she is assigned." A similar provision in the Statute for the International Criminal Court would prevent judges from sitting in judgement on the decisions of former colleagues and would therefore give parties who appear before both Chambers greater confidence in the independence of the judges.

The ICJ believes that careful consideration ought to be given to Article 10 (2) of the draft statute which reads, in part, that judges "shall not while holding that office of judge be a member ... of a body responsible for the investigation or the prosecution of crimes." This provision would appear to prohibit or deter many qualified candidates from sitting as judges on the Court. As the Court would not, at least initially, sit full time, many potential candidates may be reluctant to forego their permanent jobs in order to sit on the Court. The ICJ believes that the provisions of Article 11(6) of the Revised Draft Statute, which provide for the disqualification of judges where, for example, there is a conflict of interest, provides safeguards sufficient to permit judges to engage in the investigation and prosecution of crime at the national level without calling into question their independence or impartiality to try crimes under international law.

The Ad Hoc Committee may also want to give consideration to incorporating into the Statute a provision regarding the minimum and maximum ages for judges. The ICJ notes that many countries have such provisions in their national laws.

The ICJ also believes that the Revised Draft Statute should cite the UN Basic Principles on the Independence of the Judiciary. These Principles will help to solidify the independence of the

³⁵ Article 13(1).

Court from political and other pressure.

E. Appointment and role of the Prosecutor

1. Approach of the Revised Draft Statute

The Procuracy, headed by the Prosecutor and assisted by one or more Deputy Prosecutors, is an independent organ of the Court responsible for the investigation of complaints and for the conduct of prosecutions. A member of the Procuracy must not seek or act on instructions from any external source.³⁶

Pursuant to Article 12, the Prosecutor and Deputy Prosecutors are to be persons of high moral character and have high competence and experience in the prosecution of criminal cases. They are to be elected by an absolute majority of States parties, chosen from candidates nominated by States parties. The ILC comments that the election of the Procuracy by States parties rather than by the Court underlines the importance of the Procuracy's independence.³⁷ Additionally, the Prosecutor and Deputy Prosecutors are to be of different nationalities, and cannot act in relation to a complaint involving a person of the same nationality. They will hold office for a term of five years and are eligible for re-election.

2. Discussion by the Ad Hoc Committee

It was proposed that the Procuracy be appointed by the Court on the recommendation of the States parties, or vice versa, with States parties appointing the members of the Procuracy on the recommendation of the Court.³⁸ It was also proposed that the Procuracy should be a permanent, full-time organ of the Court.³⁹

With respect to the role of the Prosecutor, it was suggested that the Prosecutor be given the power to initiate investigations and prosecutions. This suggestion, however, was criticised as unrealistic.⁴⁰ Additionally, many delegations suggested that rules on disqualification of the Prosecutor be included in the Statute.

3. ICJ Comments

The ICJ concurs with the provisions of the Revised Draft Statute relating to the election of the Prosecutor and the selection of Deputy Prosecutors by the secret ballot of States parties. The independence of the Prosecutor vis-à-vis the Court is of the utmost importance and may be called into question if the Prosecutor is appointed by the Court. It is also important for the Prosecutor to be independent from the influence of State parties but the ICJ believes that the

³⁶ Article 12(1).

³⁷ Commentary to Article 12, paragraph (2).

³⁸ GA/8868 (Comments of United Kingdom).

³⁹ GA/8868 (Comments of Canada, Argentina).

⁴⁰ GA/8872 (Comments of Denmark).

Revised Draft Statute provides sufficient guarantees of the independence of the Procuracy. These guarantees are, first, the secret ballot method of selecting the prosecutors and, second, the provisions of Article 12 (1), which stipulate that "[a] member of the Procuracy shall not seek or act on instructions from any external source."

The ICJ also believes that it is important for the Statute to include rules regulating the disqualification of the Prosecutor and Deputy-Prosecutors analogous to those relating to the disqualification of Judges (as contained in Article 11(3) of the Revised Draft Statute). The office of the Prosecutor is an extremely important one and, as is discussed in subsequent commentary, the ICJ favours a Procuracy with the power to perform its functions adequately, as well as subject to corresponding checks on those powers.

The ICJ believes the Revised Draft Statute should refer to the UN Guidelines on the Role of Prosecutors in order to further define the duties and powers of the Procuracy.

F. Adoption of the Rules of the Court

1. Approach of the Revised Draft Statute

Article 19 provides that the judges may by an absolute majority make rules for the functioning of the Court. These include rules regulating the conduct of investigations, the procedure to be followed and the rules of evidence to be applied. The initial Rules of the Court are to be drafted by the judges and submitted to a conference of States parties for approval. After the initial Rules have been drafted, other rules that are drafted by the judges are to be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated their objections in writing. Also, a rule may provide for its provisional application in the period prior to its approval or confirmation.

2. Discussion by the Ad Hoc Committee

Several delegations argued that States rather than the judges should draft and adopt the rules of the Court.⁴¹ Additionally, it was suggested that the rules of the Court be adopted simultaneously with the Statute, or be incorporated into the Statute itself.⁴²

Other delegations suggested that States should draft the basic rules, with the details worked out by the judges of the Court.⁴³ Agreement was also voiced with the ILC's approach in the Revised Draft Statute.⁴⁴

⁴¹ GA/8868 (Comments of Finland, United Kingdom, China, Poland, Thailand).

⁴² GA/8868 (Comments of Thailand, Hungary, Czech Republic).

⁴³ GA/8868 (Comments of Argentina, Australia).

⁴⁴ GA/8868 (Comments of Russian Federation).

3. ICJ Comments

However desirable it may be for the rules of Court to be incorporated into the Statute, it is clear that doing so would be an inordinately time-consuming project. To accommodate those States who want the Rules incorporated into the Statute, the ICJ suggests one reasonable compromise: States parties would draft the most fundamental rules and incorporate them into the Statute. Thus, apart from certain principle rules, the judges would have the power to supplement the rules after the Court is established. This process would ensure that the most important procedures are part of the Court's rules without denying the Court the ability to amend, modify or clarify its rules as needs require.

The ICJ believes that the Ad Hoc Committee ought to take into account the way in which rules of procedure were drafted for the Inter-American Court of Human Rights; the European Court of Human Rights; and the International Tribunals for the Former Yugoslavia and for Rwanda.

The Inter-American Court of Human Rights was established by the American Convention on Human Rights, 1969. Section 3 of the Convention outlines the basic procedures for the Court. The Section stipulates, for example, that reasons shall be given for the judgement of the Court (Article 66); the judgement of the Court shall be final (Article 67); the States parties to the Convention undertake to comply with the judgement of the Court (Article 68); and the parties to the case shall be notified of the judgement of the Court. However, the Convention does no more than establish these basic procedures. The Court itself, as stated in Article 60, is responsible for adopting its own Rules of Procedure.

Similarly, the European Convention on Human Rights provides that the European Court of Human Rights "shall draw up its own rules and shall determine its own procedure" (Article 55). The Convention itself only addresses the principle procedural issues. For example, it requires the Court to give reasons for judgement (Article 51); permits judges to write separate opinions; states that the judgement of the Court is final (Article 52); and that the High Contracting Parties undertake to abide by the decision of the Court in a case in which they are parties (Article 53).

The International Tribunal for the Former Yugoslavia is also responsible for drafting its own rules of procedure. Article 15 of the Statute provides that "The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of pre-trial phase of the proceedings, trials, and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters."

Similarly, Article 14 of the Statute for the International Criminal Tribunal for Rwanda directs the judges of that Tribunal to adopt rules of procedure and evidence.

Other than the principle rules mentioned above, all rules relating to the conduct of investigations, the procedure to be followed and the rules of evidence to be applied ought to be formulated by an absolute majority of the judges as proposed by the ILC in the draft statute. Of course, any rules formulated by the Court must be in conformity with the Statute of the Court. For example, the Court's ability to draft rules of evidence would be constrained by, *inter alia*, Article 44 of the Statute, which sets out several basic evidentiary rules.

IV. Applicable Law and Jurisdiction of the Court

A. Specification of the crimes under the Court's jurisdiction

1. Approach of the Revised Draft Statute

Under Article 20 of the Revised Draft Statute (*Crimes within the jurisdiction of the Court*), the International Criminal Court would have jurisdiction with respect to the following crimes:

- (a) the crime of genocide;
- (b) the crime of aggression;
- (c) serious violations of the laws and customs applicable in armed conflict;
- (d) crimes against humanity;
- (e) crimes, established under or pursuant to the treaty provisions listed in the Annex of the Statute, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

In its Comments to Article 20, the ILC makes clear that the Revised Draft Statute is primarily a "procedural and adjectival" instrument. The function of the Statute, the ILC comments, is neither to define new crimes nor to authoritatively codify crimes under general international law. Rather, the Statute provides for the Court to exercise jurisdiction over crimes of an international character already well-established.⁴⁵

2. Discussion by the Ad Hoc Committee

A large number of delegations called for more specific definitions of the crimes within the Court's jurisdiction, on the ground that a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*). Instead, it was argued that the proscribed conduct or the constituent elements of each crime ought to be specified in the Statute to avoid any ambiguity and to ensure full respect for the rights of the accused.⁴⁶

⁴⁵ Revised Draft Statute, Part 3: Jurisdiction of the Court, *Development and Structure of Part 3*, paragraph (2); Commentary to Article 20, paragraph (4).

⁴⁶ A/AC.244/CRP.1/Add.1 (11 April 1995), page 2, para. 4.

Support for the ILC's approach in Article 20 was also expressed.⁴⁷ Moreover, one delegation stated that it shared the concerns of other representatives that the Court should avoid, where possible, alternative definitions of crimes where it was possible to refer to principles of law already accepted in other international covenants and treaties.⁴⁸

A summary of the suggestions for defining the subject-matter jurisdiction of the Court with greater specificity is presented here, along with the ICJ's comments. Additionally, it should be noted that as a general suggestion, several delegations proposed the adoption of all or some of the relevant provisions of the statutes of the International Tribunals for the former Yugoslavia and Rwanda.⁴⁹

3. ICJ Comments

The ICJ believes that it is of the utmost importance for the crimes under the Court's jurisdiction to be clearly defined. The ICJ recognises that the statute, as presently conceived, is designed to establish a Court and not to define new crimes or codify crimes under international law, which is the goal of the Draft Code of Crimes Against the Peace and Security of Mankind. However, the ICJ would like to point out that the Statutes creating the International Criminal Tribunals for the Former Yugoslavia and Rwanda did define the crimes under their jurisdiction. Definitions similar to those contained in the Statutes for the two International Criminal Tribunals would adequately meet the needs of the principle of *nullum crimen sine lege*.

(a) *Genocide*

Several delegations stated that the crime of genocide needed to be defined more clearly. It was suggested that the crime of genocide, referred to in Article 20(a), should be defined on the basis of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and was also suggested that the Statute of the Court should adopt the provisions of the statute of the International Tribunal for the former Yugoslavia concerning genocide.⁵⁰

ICJ Comments

The crime of genocide is defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The ICJ supports the ILC Commentary to the Revised Draft Statute that this should be the definition of the crime of genocide.⁵¹ However, the ICJ

⁴⁷ GA/8869 (4 April 1995) (Comments of Poland); GA/8870 (4 April 1995) (Comments of Russian Federation).

⁴⁸ GA/8869 (Comments of Canada).

⁴⁹ GA/8869 (Comments of Germany, Austria, Korea, France, Australia); GA/8870 (Comments of Finland, China, Greece).

⁵⁰ GA/8869 (Comments of Germany, Canada); GA/8870 (Comments of China).

⁵¹ Several commentators have indicated that the definition of the term genocide ought to be expanded to include killings on ideological or political grounds. Although the ICJ believes that such acts ought to be included in the Court's jurisdiction, the ICJ believes that such acts ought to be considered crimes against humanity. For a further discussion of this point see the below Commentary on Crimes Against Humanity.

believes the Statute should expressly incorporate the provisions of the Convention into the Statute itself.

(b) *Crime of Aggression*

Many delegations called for a clearer definition of the crime of aggression. It was pointed out that at present there is no commonly accepted definition.⁵² Moreover, it was observed that even with additional effort it might be difficult to arrive at a definition sufficient to justify the inclusion of the crime of aggression in the Statute.⁵³ One delegation suggested that inclusion of the crime within the jurisdiction of the Court should be an ultimate objective, but that inclusion should happen only when a very clear and generally accepted definition was available.⁵⁴

Several delegations questioned whether the crime of aggression should be included within the jurisdiction of the Court, with some arguing that aggression could be committed only by a State, whereas the Court was designed to prosecute only individuals.⁵⁵ Other delegations, however, expressed support for inclusion of the crime of aggression, with some emphasising the need to establish individual responsibility for the crime.⁵⁶

ICJ Comments

The ICJ believes that the crime of aggression ought not to be included within the group of crimes under the Court's jurisdiction. The suggestion in the Revised Draft Statute that the existence of an act of aggression be determined by the Security Council would, in the opinion of the ICJ, negatively affect the functions of the Court. UN General Assembly Resolution 3314 (XXIX) concerning the definition of aggression defines the *act* of aggression as an act committed by a State. According to the Revised Draft Statute, the Court is to try the *crime* of aggression, which entails individual criminal responsibility. Under the Revised Draft Statute, the Court may not review the Security Council's determination that an act of aggression has occurred; it may only determine whether an individual is criminally responsible for State action already deemed illegal. Thus what is, essentially, an element of the crime would be determined not by the Court but by a political organ of the UN, the Security Council. Further discussion of this matter is found in subsequent commentary below.

The ICJ further believes that the inclusion of the crime of aggression in the statute is not necessary because the consequences of aggression will be covered by other crimes under the Court's jurisdiction.

⁵² GA/8869 (Comments of Austria); GA/8870 (Comments of Romania, Japan).

⁵³ GA/8869 (Comments of United Kingdom, Australia).

⁵⁴ Id. (Comments of Germany).

⁵⁵ GA/8869 (Comments of Thailand, France, Mexico); GA/8870 (Comments of Japan, Uruguay, China, Romania); GA/8871 (Comments of Argentina).

⁵⁶ GA/8869 (Comments of Croatia); GA/8870 (Comments of Russian Federation, Greece, New Zealand, Italy, Finland, Antigua and Barbuda, Belarus); GA/8871 (Comments of Germany).

(c) *War Crimes*

Delegations again called for greater specificity. It was suggested that there should be specific reference to certain articles of the Geneva Conventions,⁵⁷ and was also suggested that the relevant provisions of the statute of the International Tribunal for the Former Yugoslavia be adopted by the Court.⁵⁸ The International Committee of the Red Cross (ICRC) proposed that reference to already recognised laws on armed conflict should be included in Article 20, and stated that at present certain acts committed during non-international conflicts could be included under those laws. The ICRC added that there had been a clear evolution in international law in that direction.⁵⁹ Another delegation stated that priority should be given to national courts to prosecute war crimes.⁶⁰ Additionally, it was commented that it the right of a State to discipline its armed forces should be recognised, and that it should be clear that military personnel are not covered by treaties to which their governments are not parties.⁶¹

ICJ Comments

The ICJ is concerned that the definition of war crimes in the Revised Draft Statute may create uncertainty in the law in this area. War crimes are currently defined in the Revised Draft Statute as "serious violations of the laws and customs applicable in armed conflict." However, war crimes have been traditionally defined as "grave breaches of the law and customs applicable in armed conflict, whether international or national."⁶² The ICJ believes that the well-understood "grave breaches" standard ought to be included in the Statute. If the present wording is adopted there would have to be a clarification of the word "serious" and the relationship between the terms "serious violations" and "grave breaches." The danger of using new terminology is that a new standard or definition of war crimes may evolve which unnecessarily alters the current well-established body of law in the area.

(d) *Crimes Against Humanity*

Many delegations also called for a clearer definition of crimes against humanity. In an effort to define crimes against humanity more precisely, several delegations suggested that the Statute of the Court adopt the relevant provisions of the Statute of the International Tribunal for

⁵⁷ GA/8870 (Comments of New Zealand).

⁵⁸ GA/8869 (Comments of Canada); GA/8870 (Comments of Finland).

⁵⁹ GA/8870.

⁶⁰ GA/8869 (Comments of Egypt).

⁶¹ GA/8869 (Comments of United States); GA/8871 (Comments of United States).

⁶² As defined in art. 50 of the 1949 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the field; art. 51 of the 1949 Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at sea; art. 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War; art. 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War; art. 85 (2-4) of the 1979 Additional Protocol I relating to the Protection of Victims of International Armed Conflicts to the Geneva Conventions.

the Former Yugoslavia.⁶³

ICJ Comments

The ICJ believes that it is necessary to clarify the scope of crimes against humanity. The Charters for the Nuremberg and Tokyo Tribunals, the Draft Code of Crimes Against the Peace and Security of Mankind, and the Statutes for the International Tribunals for the Former Yugoslavia and for Rwanda offer such clarification. It is the position of the ICJ that crimes against humanity under the jurisdiction of the Court should include:

- torture or other cruel or inhuman treatment, as defined in the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- slavery and slave trade, as defined in the 1926 UN Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;
- killing of political opponents or killings with the intent to destroy in whole or in part a group for their political opinion (to cover the gaps in the Genocide Convention);
- killing of persons in what is known as "ethnic cleansing" or "social cleansing" (killings of street children, marginal or disabled persons, or criminals);
- outrageous assaults on personal dignity, such as sexual assault and enforced prostitution, (in both cases when used as a political weapon);
- forced disappearances of persons, as defined in the UN Declaration on the Protection of all Persons from Enforced Disappearances);
- forced transfer or deportation of populations, even within the borders of a State, committed in time of war or in time of peace, or during an internal armed conflict.

A common feature of crimes against humanity is that they are committed as a systematic or mass practice. That is, a single act cannot amount to a crime against humanity. Although these crimes can occur either in peace or during war, they may, during war be both a crime against humanity and a war crime.

(e) *Treaty Crimes*

(i) drug trafficking

Several delegations expressed opposition to the inclusion of drug trafficking among the crimes under the jurisdiction of the Court, primarily on the ground that cases involving such crimes were better handled by national legal systems and international co-operation.⁶⁴ Likewise,

⁶³ GA/8869 (Comments of Germany, Austria, Korea, France, Canada); GA/8870 (Comments of Finland).

⁶⁴ GA/8869 (Comments of Sweden, United Kingdom, The Netherlands, United States, Thailand); United Kingdom Mission to the UN, Press Release No. 32/95, page 4; GA/8870 (Comments of Japan).

some delegations argued that to include drug trafficking crimes under the jurisdiction of the Court would be contrary to the aim of complementarity between the Court and national systems, and would overburden the Court.⁶⁵ It was predicted that to include drug trafficking crimes in the Statute would probably deter many countries from acceding to the treaty establishing the Court.⁶⁶

Several other delegations, however, spoke in favour of the Court's proposed jurisdiction over drug trafficking. One delegation argued that drug trafficking and associated crimes were of great concern, especially when those crimes posed a threat to an entire nation or region, and should be included within the Court's jurisdiction.⁶⁷ Similarly, it was observed that the involvement of the Court would help the prosecution efforts of small states, who are threatened by international drug traffickers who use their sea lanes and territories to transport large amounts of drugs.⁶⁸ Another delegation observed that the inclusion of drug trafficking crimes could help remove any superfluous political factors that might arise, such as in a case involving extradition.⁶⁹ Others stated that only the most serious drug trafficking crimes should be included under the jurisdiction of the Court.⁷⁰

(ii) terrorism

Some support was expressed for including the crime of terrorism in the Statute of the Court.⁷¹ In supporting the inclusion of both the crime of terrorism and drug-trafficking crimes, one delegation described terrorism as an exceptional crime, and noted that terrorism was internationally recognised as often being supported by drug trafficking.⁷²

Other delegations, however, opposed the inclusion of the crime of terrorism within the jurisdiction of the Court. One delegation argued that to extend the Court's jurisdiction to crimes related to terrorism would increase the burden on the Court.⁷³ Another delegation reserved its position on terrorism, but expressed concern that exercising jurisdiction over acts of terrorism would undermine national jurisdiction.⁷⁴ Similarly, it was stated that crimes of terrorism were already covered by an effective network of multilateral conventions, which allocated jurisdiction among States concerned,⁷⁵ and it was suggested that crimes of terrorism should be handled through international co-operation.⁷⁶

⁶⁵ GA/8869 (Comments of Thailand, Germany, Mexico); United Kingdom Mission to the UN, Press Release No. 32/95, page 4.

⁶⁶ GA/8869 (Comments of Sweden).

⁶⁷ GA/8869 (Comments of Trinidad and Tobago).

⁶⁸ GA/8870 (Comments of Antigua and Barbuda).

⁶⁹ GA/8870 (Comments of Russian Federation).

⁷⁰ GA/8869 (Comments of Canada, Australia).

⁷¹ GA/8869 (Comments of Algeria); GA/8870 (Comments of Turkey).

⁷² GA/8870 (Comments of Turkey).

⁷³ GA/8870 (Comments of Germany).

⁷⁴ GA/8870 (Comments of United States).

⁷⁵ GA/8869 (Comments of United States).

⁷⁶ GA/8869 (Comments of Thailand, The Netherlands).

(iii) other

With respect to the inclusion of the crime of torture in Article 20, one delegation suggested that it should be excluded, given the limited powers of the Court and the preference to be accorded national courts.⁷⁷ Another delegation questioned the inclusion of torture, emphasising that the crime was already covered in other existing treaties under the jurisdiction of the Court.⁷⁸

As to the crime of apartheid, it was suggested that the crime was better dealt with under national legal systems.⁷⁹ Other delegations expressed serious doubts about whether apartheid should be under the Court's jurisdiction, and it was pointed out that the crime was already covered in existing treaties.⁸⁰

Two delegations suggested that crimes defined by the convention on the protection of United Nations personnel, currently under consideration, should be included within the jurisdiction of the Court.⁸¹ Another delegation opposed this suggestion, however, on the ground that avenues and procedures for handling cases under this convention already exist.⁸²

One delegation suggested including in the list of treaty crimes under Article 20(e) the 1977 Additional Protocol II of the Geneva Conventions relating to the protection of victims of non-international armed conflict, on the ground that recent events have shown that most serious violations of international humanitarian law currently occur in armed conflicts of a non-international character.⁸³

ICJ Comments

The ICJ is no comment on the provisions concerning drug trafficking or terrorism.

As mentioned above, the ICJ stresses that the crime of torture should be under the Court's subject-matter jurisdiction as a crime against humanity.

(f) Draft Code of Crimes Against the Peace and Security of Mankind

Rather than achieving greater specificity of the crimes within the jurisdiction of the Court by including more detailed definitions in the Statute of the Court, it was suggested that such specificity should be achieved by focusing on the completion and adoption of the Draft Code of

⁷⁷ GA/8870 (Comments of China).

⁷⁸ GA/8869 (Comments of United States).

⁷⁹ GA/8870 (Comments of Japan).

⁸⁰ GA/8869 (Comments of The Netherlands, United States).

⁸¹ GA/8869 (Comments of Australia); GA/8870 (Comments of Japan).

⁸² GA/8871 (Comments of India).

⁸³ A/AC.244/1, para. 14 (Comments of Belarus).

Crimes against the Peace and Security of Mankind.⁸⁴ It was argued, however, that the question of establishing a Court should be kept separate from the question of completing and adopting the Draft Code.⁸⁵ Additionally, one delegation stated that the need for a Code of Crimes might become superfluous if crimes under the Court's jurisdiction are clearly defined in the Statute of the Court.⁸⁶

ICJ Comments

As indicated above in the opening commentary to this section (Specification of crimes under the Court's jurisdiction), the ICJ believes that it is essential for the crimes under the Court's jurisdiction to be more clearly defined. This clarification may occur in either the statute of the Court or in the Draft Code. If in the Statute, it will still be helpful for the Code to be included under the subject matter of the Court once it is completed. If, on the other hand, the crimes are defined in the Draft Code alone, it will be essential for the Code to be included under the subject matter of the Court.

B. Clarification of applicable law

1. Approach of the Revised Draft Statute

Article 33 addresses the issue of applicable law. It provides that the Court shall apply (a) the Statute of the Court; (b) applicable treaties and the principles and rules of general international law; and (c) to the extent applicable, any rule of national law.

The ILC explains that the expression "principles and rules of general international law" includes general principles of law. Thus, in cases of jurisdiction based on treaties under Article 20(e), the Court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or international practice, whenever it needs guidance on matters not clearly regulated by treaty.⁸⁷

The ILC also comments that the dictates of the *nullum crimen sine lege* principle require that the Court be able to apply national law to the extent consistent with the Statute, applicable treaties, and general international law. Also, the ILC comments that in the event of a conflict between national and international law, the latter will prevail.⁸⁸

2. Discussion by the Ad Hoc Committee

Several delegations called for clarification of the laws to be applied by the Court. In particular, it was argued that the national laws to be applied should be clearly defined in the

⁸⁴ GA/8869 (Comments of Indonesia); GA/8870 (Comments of Uruguay); GA/8871 (Comments of Tunisia); GA/8872 (Comments of Gabon, Nigeria).

⁸⁵ A/AC.244/1/Add.2 (Comments of France).

⁸⁶ GA/8871 (5 April 1995) (Comments of The Netherlands).

⁸⁷ Commentary to Article 33, paragraph (2).

⁸⁸ Commentary to Article 33, paragraph (3).

Statute of the Court, as it is uncertain which State's laws are to be chosen by the Court for application.⁸⁹ It was also commented that clarification is needed as to which aspects of national laws are to be considered by the Court.⁹⁰ One delegation remarked that Article 33 is highly imprecise with regard to what laws are to be applied, and that it may not satisfy the requirements of the basic principle of *nullum crimen sine lege*.⁹¹

C. Complementarity between the International Criminal Court and national courts

1. Approach of the Revised Draft Statute

In the Preamble to the Revised Draft Statute, the ILC emphasises that the International Criminal Court "is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole," and further emphasises that the Court "is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective."

Thus, the Court is envisioned as a body which will complement existing national jurisdictions and existing procedures for international judicial co-operation in criminal matters. It is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements. Instead, it is intended to operate in cases where there is no prospect of persons accused of committing serious crimes of international concern being duly tried in national courts.⁹²

The ILC comments that the Statute seeks to ensure complementarity between the Court and national criminal justice systems by a combination of a defined jurisdiction, clear requirements of acceptance of that jurisdiction and principled controls on the exercise of that jurisdiction.⁹³ For instance, the Statute limits the Court's jurisdiction under the treaties in the Annex to those crimes which constitute exceptionally serious crimes of international concern. This provision is included on the ground that many of the treaties in the Annex could cover conduct which, though serious in itself, is within the competence of national courts to deal with and does not require elevation to the level of an international jurisdiction.⁹⁴

⁸⁹ A/AC.244/1 (Comments of Venezuela); A/AC.244/1/Add.2 (31 March 1995) (Comments of United States); GA/8869 (Comments of Kuwait, United Kingdom).

⁹⁰ GA/8869 (Comments of Australia); A/AC.244/1/Add.2 (31 March 1995) (Comments of United States).

⁹¹ A/AC.244/1 (20 March 1995) (Comments of China).

⁹² Commentary to Preamble, paragraph (1).

⁹³ Commentary to Part 3 of the Revised Draft Statute, paragraph (11).

⁹⁴ Article 20(e) and Commentary thereto, paragraph (20).

Article 35 of the Statute (*Issues of admissibility*) also addresses the issue of complementarity. It provides that the Court, having regard to the purposes of the Statute set out in the Preamble, may decide that a case before it is inadmissible. The grounds for holding a case to be inadmissible are that the crime in question: (a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed is apparently well-founded; (b) is under investigation by a State with jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or (c) is not of such gravity to justify further action by the Court. The Court may make this decision on the basis of an application by the accused or at the request of an interested State at any time prior to commencement of trial, or of its own motion.

The ILC comments that Article 35 goes to the exercise of jurisdiction, as distinct from the existence of jurisdiction. It also notes that the provision is meant "to ensure that the Court only deals with cases in the circumstances outlined in the Preamble, i.e. where it is really desirable to do so."

Also important to the issue of complementarity is the principle of *non bis in idem*, or "double jeopardy", which means that no person shall be tried twice for the same crime. Article 42(1) provides that "[n]o person shall be tried before any other court for acts constituting a crime of the kind referred to in Article 20 for which that person has already been tried by the [International Criminal] Court."

The ILC explains in the Commentary to Article 42(1) that the *non bis in idem* principle applies both to cases where (a) an accused person has been first tried by the International Criminal Court, and a subsequent trial is proposed before another court, and (b) to the converse situation of a person already tried before some other court and subsequently accused of a crime under the Statute of the International Criminal Court. In both situations, the ILC states, the principle only applies where the first court actually exercised jurisdiction and made a determination on the merits with respect to the particular acts constituting the crime, and where there was a sufficient measure of identity between the crimes which were the subject of the successive trials. As to the requirement of identity, the *non bis in idem* prohibition does not extend to crimes of a different kind, notwithstanding that they may have arisen out of the same fact situation. As an example of this point, the ILC describes a situation where an accused might be charged with genocide but acquitted on the ground that the particular killing which was the subject of the charge was an isolated criminal act and did not constitute genocide. Such an acquittal would not preclude the subsequent trial of the accused before a national court for murder.⁹⁵

⁹⁵ Commentary to Article 42, paragraph (3).

The Revised Draft Statute, however, does not in all cases bar a second trial. Under Article 42(2), a person who has been tried by another court for acts constituting a crime of the kind referred to in Article 20 may be tried by the International Criminal Court only if:

- (a) the acts in question were characterised by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or
- (b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

In its Commentary to Article 42(2), the ILC defines the term "ordinary crime" as referring "to the situation where the act has been treated as a common crime as distinct from an international crime having the special characteristics of the crimes referred to in Article 20 of the Statute. For example, the same act may qualify as the crime of aggravated assault under national law and torture or inhuman treatment under article 147 of the Fourth Geneva Convention of 1949. The prohibition in Article 42 [against double jeopardy] should not apply where the crime dealt with by the earlier court lacked in its definition or application those elements of international concern, as reflected in the elements of general international law or applicable treaties, which are the basis of the International Criminal Court having jurisdiction under Article 20."⁹⁶

The ILC comments that the second exception to the *non bis in idem* principle (Article 42(2)(b)) is designed to deal with exceptional cases only, and reflects the view that the Court should be able to try an accused if the previous criminal proceeding for the same acts was really a "sham" proceeding. Additionally, the ILC explains that the words "the case was not diligently prosecuted" in Article 42(2)(b) are not intended to apply to mere lapses or errors on the part of the earlier prosecution, but to a lack of diligence of such a degree as to be calculated to shield the accused from real responsibility for the acts in question.⁹⁷

2. Discussion by the Ad Hoc Committee

Many delegations emphasised the importance of complementarity between the International Criminal Court and national jurisdictions.

In order to achieve the appropriate complementarity, several delegations stated that the jurisdiction of the Court should be limited to only the most serious crimes of an international nature.⁹⁸ It was also stated that the jurisdiction of the Court should not supersede, disrupt or hamper the jurisdiction and proceedings of national courts.⁹⁹ One delegation added that as the Statute now stood, the Prosecutor of the Court might wind up competing with national

⁹⁶ Commentary to Article 42, paragraph (6).

⁹⁷ Commentary to Article 42, paragraph (7).

⁹⁸ GA/8869 (Comments of Germany, Algeria, Sweden, Trinidad and Tobago, The Netherlands, United States, Thailand, France); GA/8870 (Comments of Italy, Finland, Japan, Romania, Norway, Hungary, South Africa); GA/8872 (Comments of Morocco).

⁹⁹ GA/8869 (Comments of Thailand, Egypt); GA/8871 (Comments of Japan, United States).

prosecutions.¹⁰⁰

As to the crimes that do fall within the jurisdiction of the Court, it was stated that jurisdiction should be restricted, both to alleviate the financial burden on the Court and to avoid overburdening the Court.¹⁰¹ Similarly, one delegation argued that when national courts could adequately prosecute a case also under the jurisdiction of the Court, the national court should prevail unless there exists a special reason for the Court to take the case.¹⁰² Putting it differently, another delegation stated that the Court should not be used as a "dumping ground" for cases that should be tried under national laws.¹⁰³

Several delegations criticised the exceptions to Article 42, concerning *non bis in idem* or "double jeopardy". One delegation stated that a bona fide national decision not to prosecute should also be recognised under the Statute of the Court, and that as it stood, the Statute could actually undermine national prosecution.¹⁰⁴ It was also argued that the distinction between ordinary crimes and international crimes in Article 42 was inappropriate, and that the Court should not retry individuals for offences for which they had already been tried by national courts.¹⁰⁵ Similarly, Article 42 was criticised on the ground that it would enable the Court to interfere seriously in national jurisdictions through such powers as the right to assess national courts, and that it could call into question the powers of national courts and, hence, national sovereignty.¹⁰⁶ Support for the ILC's approach in Article 42 was also expressed.¹⁰⁷

Other delegations suggested that the importance of the principle of complementarity between the Court and national courts warranted that the principle should be stated expressly in the Statute, rather than only in the Preamble.¹⁰⁸

3. ICJ Comments

The ICJ endorses the provisions of the Revised Draft Statute with regard to complementarity between the International Criminal Court and national courts. The preamble to the Statute states that the Court is to operate where there is no prospect of persons accused of committing serious violations of crimes of international concern being duly tried in national courts. This expression of the principle of complementarity is reflected in Article 35 of the Revised Draft Statute. This Article gives the Court the ability to rule a case inadmissible on the grounds that the crime in question is being or has been duly investigated or that the crime is not

¹⁰⁰ GA/8871 (Comments of United States).

¹⁰¹ GA/8869 (Comments of Thailand).

¹⁰² GA/8871 (Comments of France).

¹⁰³ GA/8869 (Comments of Canada).

¹⁰⁴ GA/8871 (Comments of United States).

¹⁰⁵ GA/8873 (Comments of Czech Republic, Austria, United Kingdom).

¹⁰⁶ GA/8873 (Comments of Russian Federation, Sudan).

¹⁰⁷ GA/8875 (Comments of Belarus).

¹⁰⁸ GA/8872 (Comments of China, Mexico); GA/8873 (Comments of Russian Federation); GA/8875 (Comments of China).

serious enough to warrant international action.

As a general rule, then, national courts, and not the International Criminal Court, are to try violations of their national criminal law, which may include provisions of international criminal law. There are two limitations, however, that operate to restrict this rule. First, there is the requirement, expressed in the Preamble and Articles 35 and 42, that investigations and trials of crimes under international law must be duly undertaken at the national level. If they are not, the Court may find that the exercise of national jurisdiction does not prevent the exercise of jurisdiction of the International Criminal Court.

Second, persons tried at the national level for an ordinary crime may be tried at the international level for a crime under international law, even if the two crimes arise out of the same fact situation. According to Article 42 and corresponding ILC Commentary, the *non-bis-in-idem* does not extend to crimes of a different kind. For example, a national prosecution for murder would not preclude trial by the International Criminal Court for genocide.

Similar limitations are found in the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Tribunal for Rwanda. Article 10(2) of the Statute of the Former Yugoslavia Tribunal provides limited circumstances when the Tribunal may subsequently try a person who has been subject to trial at the national level:

A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

- (a) the act for which he or she was tried was characterised as an ordinary crime, or
- (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Some countries have expressed concern that their national jurisdiction will be adversely affected by the provisions of the Revised Draft Statute. It is the position of the ICJ that the Revised Draft Statute poses no such threat to the jurisdiction of national tribunals. The Court is meant to complement national courts, and to neither replace nor review them. Where competent national authorities, following ordinary procedures, conduct an investigation, there will be no need for the International Criminal Court to act. As the commentary to Article 35 states, the Court will only deal with cases in the circumstances outlined in the Preamble, that is "where it is really desirable to do so."¹⁰⁹

It is, however, necessary for the Court to have the authority to determine whether a matter before it is admissible or not. In other words, the Court is properly empowered to decide if a national investigation is being duly performed. If the Court is denied this power, the very purpose of the complementarity provisions, indeed of the Court itself, would be undermined, as

¹⁰⁹ Commentary to Article 35.

sham proceedings could be initiated at the national level for the very purpose of preempting the Court's jurisdiction.

The procedures of the Revised Draft Statute effectively balance national sovereignty and the need for an international criminal jurisdiction. If States indeed desire an International Criminal Court, they must recognise that in some very limited instances, the Court may be able to determine if their national legal systems are effective. Where national legal systems effectively deal with crimes under international law, there is no need for action -- and indeed there will be no action taken -- by the International Criminal Court under the terms of the Revised Draft Statute.

Furthermore, this limited cession of sovereignty is not a new concept. In many, if not most, international agreements, States voluntarily agree to do just that. For example, States parties to the ICCPR oblige themselves to submit periodic reports to the treaty-monitoring body, the Human Rights Committee. Another example is the Optional Protocol to the ICCPR under which states agree that the Human Rights Committee can consider complaints submitted by individuals against States. There are many other such examples in international, regional and bilateral agreements.

V. Exercise of Jurisdiction

A. Inherent jurisdiction

1. Approach of the Revised Draft Statute

Under the Revised Draft Statute, the Court has "inherent jurisdiction" over the crime of genocide. That is, the Court has jurisdiction over the crime of genocide solely by virtue of States participating in the Statute of the Court, without any further requirement of consent or acceptance by any particular State, as is the case with all other crimes under the Court's subject-matter jurisdiction.¹¹⁰ Thus, Article 25(1) provides that any State party to the Statute of the International Criminal Court which is also a Contracting Party to the Genocide Convention¹¹¹ may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed. Pursuant to Article 21(1)(a), the Court may exercise its jurisdiction over a person in the case of genocide if such a complaint is brought.¹¹²

¹¹⁰ See *Part 3: Jurisdiction of the Court; Development and structure of Part 3*, paragraph (7); Commentary to Article 20, paragraph (5).

¹¹¹ Specifically, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

¹¹² Article 21(1)(a) and Commentary thereto, paragraph (7).

2. Discussion by the Ad Hoc Committee

Some delegations voiced support for the approach adopted by the ILC in the Statute, taking into account the need to ensure broad acceptance of the Statute.¹¹³

Several delegations, however, suggested that the Court's inherent jurisdiction should be extended to the other Article 20 crimes under general international law, in particular to serious violations of the laws and customs applicable in armed conflicts.¹¹⁴ One delegation argued that particular acceptance of the Court's jurisdiction by States should only be needed in cases of treaty crimes under Article 20(e).¹¹⁵

Other delegations expressed concern over the notion of inherent jurisdiction, even with respect to the crime of genocide, primarily on the grounds that inherent jurisdiction is contrary to the principles of consent and complementarity on which the Statute is based.¹¹⁶

3. ICJ Comments

The concept of inherent jurisdiction is founded upon the notion that crimes recognised as being international in nature may be tried by an international tribunal. Where States have determined a crime serious enough to warrant international action, the Court should have inherent jurisdiction over it.

The clearest example is genocide, where the Court is designed to have inherent jurisdiction. In the Convention against Genocide, Contracting Parties have already accepted international criminal jurisdiction with regard to genocide. Article VI provides that "Persons charged with genocide ... shall be tried ... by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." No further requirements are needed in order for the relevant court to assert its jurisdiction over the crime of genocide. The 116 Contracting Parties to the Genocide Convention have so agreed.

Following the same reasoning, other crimes should also be included under the inherent jurisdiction of the Court. The Statutes for the Tribunals for the Former Yugoslavia and Rwanda offer a clear codification of the universal nature of not only the crime of genocide, but violations of the laws of war and crimes against humanity as well.

The Amicus Curiae Brief presented by the Government of the United States of America to

¹¹³ A/AC.244/CRP.1/Add.2 (12 April 1995), paragraph (1).

¹¹⁴ GA/8871 (Comments of Greece, Germany, Sweden, Argentina, Italy); GA/8872 (Comments of Denmark).

¹¹⁵ GA/8871 (Comments of Austria).

¹¹⁶ A/AC.244/CRP.1/Add.2 (12 April 1995), paragraph (1); GA/8871, L/2717 (5 April 1995); GA/8871 (Comments of Japan, India).

the International Criminal Tribunal for the Former Yugoslavia explains why:¹¹⁷

...we disagree with the assertion by Counsel for the Accused that the creation of the Tribunal improperly gives the Council authority over individuals accused of offences within the Tribunal's jurisdiction. The relevant law and precedents for the offences in question here -- genocide, war crimes and crimes against humanity -- clearly contemplate international as well as national action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all states, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals. Moreover, criminal responsibility for these acts was a part of the law of the former Yugoslavia at the time the offences were committed. The [Security] Council has simply created a new international mechanism for the trial of crimes that were already the subject of international responsibility.

Furthermore, the Geneva Conventions oblige High Contracting Parties to respect and *ensure respect* for humanitarian law. In Article 146 of the Fourth Geneva Convention relative to the protection of civilian persons in time of war (similar provisions are found in the other Geneva Conventions as well), High Contracting Parties have agreed to provide effective penal sanctions for those found have committed a grave breach of the Conventions, whether the acts were committed in the State's territory or not. In other words, the Geneva Conventions gives any High Contracting Party inherent jurisdiction over these crimes.

It is the position of the ICJ, therefore, that an international tribunal ought to have the inherent jurisdiction to try individuals charged with genocide, grave breaches of the laws of war, and crimes against humanity.

B. Mechanism by which States accept the jurisdiction of the Court

1. Approach of the Revised Draft Statute

The Revised Draft Statute provides for an "opting-in" system of jurisdiction with respect to crimes other than genocide. That is, when a State becomes a party to the Statute of the Court, jurisdiction over the crimes referred to in Article 20 is not conferred automatically on the Court,¹¹⁸ but is instead conferred when a State party makes an additional declaration accepting the jurisdiction of the Court with respect to those crimes that the State party specifies. A State party may make this declaration at the time of becoming a party to the Statute or at any time thereafter, and may limit the declaration's effect to a specified period of time.¹¹⁹ A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time. A declaration may also be given in relation to a single case.¹²⁰ Additionally, States that are not parties to the Statute may consent to the Court's jurisdiction with

¹¹⁷ Amicus Curiae Brief presented by the Government of the United States of America (25 July 1995) in *The Prosecutor of the Tribunal v. Dusan Tadic* (Case No. IT-94-I-T), page 20.

¹¹⁸ With the exception of genocide as to those States parties that are Contracting Parties to the Genocide Convention (see discussion on Court's jurisdiction with respect to genocide).

¹¹⁹ Article 22(1) and Commentary, paragraphs (2),(3).

¹²⁰ Article 22(2),(3) and Commentary, paragraph (4).

respect to a particular case by lodging a declaration with the Court.¹²¹

In favouring an opt-in approach to jurisdiction, the ILC comments that several factors were emphasised, including the importance of the voluntary acceptance of the Court's jurisdiction; distinguishing acceptance of the Statute of the Court from acceptance of its jurisdiction; the dependence of the Court on the co-operation of States; and the need to limit the Court's jurisdiction to situations in which national courts are unable or unwilling to exercise jurisdiction. Others in the ILC favoured an "opt-out" approach, questioning the value of becoming a party to the Statute without accepting the Court's jurisdiction and warning against creating an ineffective institution as a result of excessive restrictions on its jurisdiction.¹²²

2. Discussion by the Ad Hoc Committee

Support was expressed for the opt-in approach of the Revised Draft Statute, on the grounds that it would promote broad acceptance of the Statute and that the various methods of acceptance, particularly the possibility of case-by-case consent, would provide desired flexibility.¹²³

An opt-out approach was also proposed, under which a State party would be presumed to accept the Court's jurisdiction over the crimes covered by Article 20(a)-(d) unless the State party declared otherwise.¹²⁴ It was suggested that such a combination would give the Court a jurisdiction of reasonable scope and make it more responsive to the needs of the international community.¹²⁵

3. ICJ Comments

The ICJ believes that the "opt out" approach of accepting jurisdiction is the better approach. States often sign international instruments and accept the whole of a document, while expressing specific reservations to their adhesion, as governed by the 1969 Vienna Convention on the Law of Treaties. Similarly, States parties to the Statute would be free to express certain restrictions to the exercise of the Court's jurisdiction; if they make no such reservation they have consented to accept the whole of the Statute. By ratifying the Statute, States have consented in principle to the Court's jurisdiction, and any exception to it would have to be expressly made.

The "opt in" approach, on the contrary, is less workable. This procedure would put the burden on States to specifically accept each of the sources under the subject-matter jurisdiction of the Court. This would be a complicated and time-consuming practice.

¹²¹ Article 22(4) and Commentary, paragraph (6).

¹²² Report of the International Law Commission on the work of its 46th session (A/49/10), Chapter II, paragraph (61).

¹²³ GA/8871 (Comments of United Kingdom); GA/8872 (Comments of Australia); A/AC.244/CRP.1/Add.2 (12 April 1995), paragraph (2).

¹²⁴ GA/8872 (Comments of Finland).

¹²⁵ A/AC.244/CRP.1/Add.2 (12 April 1995), paragraph (2).

As discussed above, the ICJ believes that grave breaches of the laws of war and crimes against humanity should be dealt with in the same manner as genocide. In other words, if a State has previously signed a treaty under the subject-matter of the Court, and then becomes a State Party to the Court without making a specific reservation, then the crime should be in the inherent jurisdiction of the Court for that State Party.

C. Trigger mechanism

1. Approach of the Revised Draft Statute

Under Article 25, only States parties to the Statute of the Court may bring a complaint, thereby triggering an investigation of an alleged crime. Limiting resort to the Court to States parties, the ILC notes, may encourage States to accept the rights and obligations provided for in the Statute and to share in paying the operating costs of the Court. Additionally, the ILC observes that in practice the Court could address a prosecution initiated by a complaint in a satisfactory manner only if the State bringing the complaint is a State party, as such States are obliged under Article 51 of the Statute to co-operate with the Court in connection with criminal investigations and proceedings.¹²⁶

Article 25 distinguishes between a complaint alleging the crime of genocide and a complaint alleging other crimes under the jurisdiction of the Court. Article 25(1) provides that any State party to the Statute of the International Criminal Court which is also a Contracting Party to the Genocide Convention¹²⁷ may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed. As to crimes under the Court's jurisdiction other than genocide, under Article 25(2) only a State party which accepts the jurisdiction of the Court with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed. Additionally, it should be noted that in cases where the Court has jurisdiction by virtue of a Security Council referral pursuant to Article 23(1), concerning the crime of aggression, Article 25(4) provides that a complaint is not required for the initiation of an investigation.

Additionally, Article 25(3) states that a complaint is to specify as far as possible the circumstances of the alleged crime and the identity and whereabouts of any suspect. Moreover, it is to be accompanied by such supporting documentation available to the State bringing the complaint.

2. Discussion by the Ad Hoc Committee

¹²⁶ Article 25 and Commentary thereto.

¹²⁷ Specifically, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

The Ad Hoc Committee discussed the issue of bringing complaints under the heading of "trigger mechanism"; that is, mechanisms by which investigations may be triggered or initiated.

Concerning Article 25(1), it was argued that all States parties should be able to lodge a complaint alleging genocide, and that there was no need to limit the ability to lodge complaints of genocide to parties to the Genocide Convention.¹²⁸

With respect to Article 25(2), it was suggested that only interested countries should be able to lodge a complaint with the Court, on the ground that if all countries were allowed to lodge complaints, the Court could become overburdened.¹²⁹ It was also suggested that to prevent unnecessary complaints from being lodged with the Court, it might be necessary to adopt restrictions requiring agreement among the State where the alleged crime occurred, the custodial State and the State of the alleged victim's nationality.¹³⁰

It was also argued that the threshold for triggering an investigation pursuant to Article 25(3) is too low. One delegation complained that a State had only to lodge an allegation, without any requirement of proof, in order to trigger the Court's jurisdiction and an investigation by the Prosecutor.¹³¹ Another delegation suggested that States bringing complaints should be required to substantiate that there are sufficient grounds for initiating the investigation process. Addressing the same issue, it was also suggested that States which initiated cases be required to bear part of the cost of the prosecution.¹³²

Complaints by Individuals

Two delegations expressed support for the view that individuals, in addition to States parties, should be able to bring complaints to the Court. One delegation stated that such a right is particularly important for victims unable to find justice in national courts in matters that fall within the jurisdiction of the Court. This delegation also stated that such a right should only be given to victims or their relatives; that such individuals must have first used all legal opportunities offered by their own national law; and that such individuals must also belong to States parties to the Statute of the Court.¹³³ It was also stated that individuals should be able to have recourse to the Court, even without the consent of State parties.¹³⁴

Several delegations, however, argued against permitting individuals to bring complaints.¹³⁵ One delegation reasoned that the Court would be overwhelmed by cases if individuals were to

¹²⁸ GA/8871 (Comments of The Netherlands, Russian Federation).

¹²⁹ GA/8871 (Comments of Thailand).

¹³⁰ GA/8871 (Comments of Japan).

¹³¹ GA/8871 (Comments of United States).

¹³² GA/8871 (Comments of Thailand).

¹³³ GA/8871 (Comments of Czech Republic).

¹³⁴ GA/8870 (Comments of Chile).

¹³⁵ GA/8871 (Comments of United Kingdom, France, Russian Federation, Thailand); GA/8872 (Comments of Denmark).

have the power to initiate cases,¹³⁶ and another stated that allowing individuals to bring complaints was unrealistic.¹³⁷ It was also suggested that for an alleged victim of a crime to bring a case before the Court, he or she would first be required to find a State willing to bring a complaint.¹³⁸

3. ICJ Comments

As presently conceived by the ILC, the complaint procedure is limited. As discussed above, the ICJ favours a complaint procedure more in keeping with the universal nature of international crime. To this end the ICJ believes that both the inherent jurisdiction of the Court should be expanded (as discussed in above commentary) and the complaints procedure opened up. Without this type of broader complaint procedure, it is difficult to envision how the Court will be empowered to try cases of alleged crimes under international law (excluding genocide) that are committed within a single State. Indeed, it is situations such as these that warrant the establishment of an International Criminal Court in the first instance, and it is an ICJ priority that the Statute of the Court provide a clear way to address them.

Absent from the Revised Draft Statute is a procedure by which victims of crimes under international law can lodge complaints. The ICJ believes that such a procedure should be included in the Statute of the International Criminal Court. At the minimum, victims who are nationals of States parties to the Statute should be capable of bringing complaints to the Court. These complaints, like others, should be made to the Prosecutor, who shall initiate an investigation "unless the prosecutor concludes that there is no possible basis for a prosecution...."¹³⁹ This procedure will ensure that victims of crimes under international law are able to seek justice.

The jurisdictional basis of this comment concerning the right of victims to bring a complaint is well-established in international law. States which have accepted the Statute of the Court are obliged to comply with it, both with respect to other States as well as with respect to their own people. Illustrative precedent is provided by the Inter-American Court of Human Rights in its Advisory Opinion No. 2, issued in September of 1982: "in concluding these human rights treaties, the States can be deemed to substitute themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction."¹⁴⁰

Attention should also be given to the European Court of Human Rights which, pursuant to Protocol 9 of the European Convention on Human Rights, permits individuals, non-

¹³⁶ GA/8871 (Comments of Thailand).

¹³⁷ GA/8872 (Comments of Denmark).

¹³⁸ GA/8870 (Comments of United Kingdom).

¹³⁹ Article 26(1).

¹⁴⁰ Quoted in A. Artucio, *Justice -- Not Impunity*, 183, at 194 (ICJ 1992).

governmental organisations and groups of individuals to bring applications before the Court.

Domestic criminal law also give the victim the right to submit a complaint on the basis of an alleged crime. As the Statute of the International Court carefully balances the dictates of international and domestic criminal law, in this context we feel that the victim's right to bring a complaint must be preserved.

Some argue that any broadening of the complaint procedure will over-burden the Court. This is a very real concern; however, the ICJ believes any potential over-burdening must be balanced against the purpose and nature of the Court. It is the Court's function to try individuals accused of having committed crimes under international law. To fulfil this task, the Court and the Prosecutor must have the maximum access to information and evidence of criminal wrongdoing.

D. Conditions for the exercise of jurisdiction

1. Approach of the Revised Draft Statute

In order for the Court to exercise jurisdiction over any of the crimes referred to in Article 20 of the Statute, other than genocide, a State party *which has accepted the jurisdiction of the Court with respect to the crime that is being alleged* must first bring a complaint pursuant to Article 25(2).¹⁴¹ Thus, a State Party which itself does not accept the Court's jurisdiction with respect to a particular crime does not have the right to bring a complaint against another State alleging that same crime.

In addition to an appropriate complaint, under Article 21(1)(b) the Court's jurisdiction with respect to the crime alleged is dependent upon the acceptance of its jurisdiction:

- (i) by the State which has custody of the suspect with respect to the crime ("the custodial State"); and
- (ii) by the State on the territory of which the act or omission in question occurred.

Under Article 21(2), if the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the requesting State's acceptance of the Court's jurisdiction with respect to the alleged crime is also required.

The ILC explains that the term "custodial State" is intended to cover a range of situations. A "custodial State" would include a State which has detained or detains a person who is under investigation for a crime, or has that person in its control. The term would also include a State

¹⁴¹ Again, in the case of genocide where the Court has jurisdiction without any additional requirement of acceptance, the State party bringing the complaint must simply be a Contracting Party to the Genocide Convention.

which has arrested the suspect for a crime, either pursuant to its own law or in response to a request for extradition. Additionally, the term would encompass a State whose armed forces are visiting another State and have detained under military law a member of the force who is suspected of a crime.¹⁴²

It should also be noted that the Statute does not require acceptance of the Court's jurisdiction by the State of the accused's nationality, as well as or instead of the State on whose territory the crime was committed.¹⁴³

Under Article 34, an accused or any interested State may challenge the jurisdiction of the Court at any time after confirmation of an indictment up to the commencement of the hearing. An accused may also challenge the jurisdiction of the Court at any later stage of the trial. The ILC notes that the term "interested State" is to be interpreted broadly.¹⁴⁴

2. Discussion by the Ad Hoc Committee

Concerning Article 21(1)(b), it was suggested that acceptance of the Court's jurisdiction by the State of the accused's nationality should also be required as a condition for the exercise of the Court's jurisdiction.¹⁴⁵ Other delegations, however, disagreed with this suggestion.¹⁴⁶

One delegation expressed concern that the Court might have trouble taking up a case because of the consent provisions of Article 21. For this reason, it was suggested that the consent requirement should be limited to the custodial State and not necessarily the State of the accused's nationality or residence.¹⁴⁷ Another delegation argued that particular acceptance of the Court's jurisdiction by States should only be needed with respect to treaty crimes.¹⁴⁸

Additionally, it was argued that consent of the State where the crime was committed and of the State of the accused's nationality should be obtained before the Prosecutor may launch an investigation.¹⁴⁹ It was also argued that before an investigation begins, the Prosecutor should receive the consent of all States having an interest in the case.¹⁵⁰

3. ICJ Comments

The ICJ favours an alteration of these provisions on two grounds. First, as expressed in above commentary, the ICJ believes that the Court should have inherent jurisdiction over crimes in addition to genocide. Where States parties have consented to the subject-matter jurisdiction in

¹⁴² Commentary to Article 21, paragraph (4).

¹⁴³ Commentary to Article 21, paragraph (6).

¹⁴⁴ Commentary to Article 34, paragraph (1).

¹⁴⁵ GA/8869 (Comments of Korea); GA/8871 (Comments of India).

¹⁴⁶ GA/8871 (Comments of Austria, Italy); GA/8872 (Comments of Denmark).

¹⁴⁷ GA/8870 (Comments of Switzerland).

¹⁴⁸ GA/8871 (Comments of Austria).

¹⁴⁹ GA/8871 (Comments of India).

¹⁵⁰ GA/8871 (Comments of Thailand); GA/8872 (Comments of China).

question, they should be able to submit complaints with no further prerequisites. Second, as discussed above, the ICJ also believes that victims and non-governmental organisations should be able to submit complaints to the Prosecutor.

E. Role of the Security Council

1. Approach of the Revised Draft Statute

Article 23(1) of the Revised Draft Statute provides that the Security Council, acting under Chapter VII of the Charter of the United Nations, may refer matters to the International Criminal Court. The Court has jurisdiction with respect to the crimes described in Article 20 as a consequence of the referral of a matter by the Security Council.

The Commentary to Article 23(1) explains that the provision allows the Security Council to initiate recourse to the Court by dispensing with the requirement of acceptance by a State of the Court's jurisdiction under Article 21,¹⁵¹ and of the lodging of a complaint under Article 25. For example, this power may be exercised in circumstances where the Security Council might have authority to establish an *ad hoc* tribunal under Chapter VII, such as with respect to the Tribunals established for the former Yugoslavia and Rwanda. The ILC notes that it felt such a provision was necessary in order to enable the Security Council to make use of the Court, as an alternative to establishing *ad hoc* tribunals and as a response to crimes which affront the conscience of mankind. On the other hand, the ILC states that it did not intend in any way to add to or increase the Security Council's powers as defined in the Charter.¹⁵²

In a further Commentary to Article 23(1), the ILC expresses its understanding that the Security Council would not normally refer a "case" to the Court, in the sense of an allegation against named individuals. Instead, it is envisaged that the Security Council would refer a "matter" to the Court, which the ILC describes as a situation to which Chapter VII of the Charter applies. It would then be the responsibility of the Prosecutor to determine which individuals should be charged with crimes in relation to that matter.¹⁵³

The Revised Draft Statute also provides for Security Council involvement in complaints alleging the crime of aggression. Under Article 23(2), "[a] complaint of or directly related to an act of aggression may not be brought unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint."

The Commentary to Article 23(2) explains that any criminal responsibility of an individual

¹⁵¹ Under Article 21(b), in cases other than genocide, the jurisdiction of the Court must be accepted under Article 22 by the custodial State and by the State on the territory of which the alleged crime occurred. See ICJ discussion on "When may the International Criminal Court exercise jurisdiction over an alleged crime?".

¹⁵² Commentary to Article 23, paragraph (1).

¹⁵³ Commentary to Article 23, paragraph (2).

for an act or crime of aggression necessarily presupposes that a State has been held to have committed aggression, and such a finding would be for the Security Council to make in accordance with Chapter VII of the Charter. The consequential issues of whether an individual could be indicted, for example because that individual acted on behalf of the State in such a capacity as to have played a part in the planning and waging of the aggression, would be for the Court to decide.¹⁵⁴ Additionally, the ILC comments that although a Security Council determination of aggression is a necessary preliminary to a complaint being brought in respect of or directly related to the act of aggression, the normal provisions concerning acceptance of the Court's jurisdiction and the bringing of a complaint apply, unless the Security Council also acts under Article 23(1) with respect to the aggression (that is, referring a "matter" to the Court).¹⁵⁵

Finally, Article 23(3) of the Revised Draft Statute provides that a prosecution cannot be commenced arising from a situation which the Security Council is dealing with as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides. The ILC comments that this provision is an acknowledgement of the priority given by Article 12 of the Charter of the United Nations, as well as for the need for co-ordination between the Court and the Security Council in such cases. On the other hand, the ILC notes, it does not give the Security Council a "negative veto" over the commencement of prosecutions. It is necessary that the Security Council be acting under Chapter VII to maintain or restore international peace and security, or in response to an act of aggression. Once the Chapter VII action is terminated, the possibility of prosecutions being commenced would revive.¹⁵⁶

2. Discussion by the Ad Hoc Committee

Many delegations spoke in favour of the power of the Security Council to refer matters to the Court under Article 23(1). This power was widely viewed as being necessary to obviate the need for the establishment of ad hoc tribunals by the Security Council in the future.

Some delegations, however, were critical of Article 23(1). The objection was raised that under Article 23(1) the Security Council would have the power to refer matters involving States that are not parties to the treaty creating the Court, or that have not accepted the jurisdiction of the Court with respect to particular crimes.¹⁵⁷ Article 23(1) was also criticised on the grounds that the Court was not a subsidiary body of the Security Council, and that the Court was not a substitute body for carrying out the Security Council's functions.¹⁵⁸

Additionally, two delegations suggested that the General Assembly should be given the

¹⁵⁴ Commentary to Article 23, paragraph (8).

¹⁵⁵ Commentary to Article 23, paragraph (9).

¹⁵⁶ Commentary to Article 23, paragraph (12).

¹⁵⁷ A/AC.244/1 (20 March 1995), pages 17-18 (Comments of Switzerland); GA/8872 (5 April 1995), (Comments of Mexico, Algeria).

¹⁵⁸ GA/8871 (Comments of India); GA/8872 (Comments of Gabon).

power to refer matters to the Court. This proposal was made on the grounds that the General Assembly also had competence in issues of international peace and security, and that it would counter concerns about politicisation of the Court due to the Security Council's power to refer matters.¹⁵⁹ It was pointed out, however, that this proposal may not be possible in that General Assembly decisions are not binding.¹⁶⁰

The role of the Security Council under Article 23(2) in cases alleging the crime of aggression received significant criticism. A number of delegations argued that complaints alleging the crime of aggression should not be dependent upon a prior Security Council determination.¹⁶¹ Moreover, it was suggested that the Statute be amended to allow the Court to make this determination of aggression on its own.¹⁶² The judges of the Tribunal for the former Yugoslavia issued a strong criticism of Article 23(2), stating that: "[I]t does not seem necessary to provide that the court defer to the Security Council on the subject of aggression, the effect of which would be to give the Security Council, and in particular the permanent members, exclusive rights of definition over the term 'aggression', making it the 'mouth of the oracle' for this category of crimes."¹⁶³ On the other hand, one delegation stated that if the crime of aggression is to be retained in the Statute, Article 23(2) should probably be retained, despite its inherent inequity of power.¹⁶⁴

The relationship between the Security Council and the Court provided for by Article 23(3) was also questioned. One delegation suggested that Article 23(3) should be deleted, on the ground that it encompasses a category of situations far broader than acts of aggression, and that the Court should only be bound by Security Council decisions when an act of aggression has been committed, as under Article 23(2).¹⁶⁵ Similarly, other delegations argued that Article 23(3) would create a hurdle to be overcome before a case is considered by the Court, thus compromising the Court's independence.¹⁶⁶

3. ICJ Comments

Although the ICJ is in favour of UN involvement in the workings of the International Criminal Court, the provisions of the Revised Draft Statute regarding the role of the Security Council with regard to the crime of aggression are problematic.

The ICJ has difficulty understanding the procedure relating to bringing complaints and trying the crime of aggression. First, it is unclear in Article 20 exactly what is meant by the

¹⁵⁹ GA/8871 (Comments of Tunisia, Thailand).

¹⁶⁰ GA/8871 (Comments of Argentina).

¹⁶¹ GA/8870 (Comments of Turkey); GA/8871 (Comments of Sweden).

¹⁶² GA/8871 (Comments of Greece).

¹⁶³ A/AC.244/1 (20 March 1995), page 30.

¹⁶⁴ Comments of Canada.

¹⁶⁵ A/AC.244/1 (20 March 1995), page 5 (Comments of Belarus).

¹⁶⁶ GA/8872 (5 April 1995), page 4 (Comments of New Zealand); Comments of Canada.

crime of aggression. As stated in above ICJ commentary, UN General Assembly Resolution 3314 (XXIX) concerning the definition of aggression defines the *act* of aggression committed by a State. The *crime* of aggression under the jurisdiction of the Court in the Revised Draft Statute entails individual criminal responsibility.

Second, the procedure outlined in Article 23(2) causes concern. According to this provision, a complaint alleging the crime of aggression can only be lodged if the UN Security Council has determined that a State has committed the act of aggression that is the subject of the complaint. It appears that once a determination is made concerning a State by the Security Council, a complaint can be made, either by a State party or the Security Council, alleging the crime of aggression against an individual.

The Security Council's decision is political rather than legal. The ICJ wonders whether the International Criminal Court, in trying the individual, should have judicial review of the determination made by the Security Council concerning the State. If so, how will the Court do so? If not, the sole question for the Court is whether the individual in question bears responsibility for the act of the State already deemed illegal by the Security Council. If the International Criminal Court will not have the capability of adequately trying the crime of aggression, then it should not have jurisdiction over it.

In its Commentary to the Revised Draft Statute, the ILC states that such a provision is needed to enable the Security Council to make use of the Court, as an alternative to establishing ad hoc tribunals.¹⁶⁷ This connection may not be necessary. The need to take an ad hoc approach to crimes under international law will be supplanted by the establishment of a permanent International Criminal Court. An effective international judicial mechanism, which justly and objectively addresses alleged crimes under international law wherever they take place, replaces the need to address such crimes in an ad hoc manner in an international political forum. Further the inclusion of the crime of aggression in the statute may not be necessary because the consequences of aggression will be covered by other crimes under the Court's jurisdiction.

F. Statute of limitations

1. Approach of the Revised Draft Statute

There is no statute of limitations in the Revised Draft Statute. Article 39, however, addresses the principle of legality (*nullum crimen sine lege*), which prohibits the retrospective application of criminal law. It provides that an accused shall not be held guilty, unless, at the time the act or omission in question occurred:

¹⁶⁷ Article 23, Commentary, paragraph (1)

- (a) in the case of a prosecution with respect to a crime referred to in Article 20(a)-(d), the act or omission in question constituted a crime under international law;
- (b) in the case of a prosecution with respect to a crime referred to in Article 20(e), the treaty in question was applicable to the conduct of the accused.

In its Commentary to Article 39, the ILC explains that the application of the *nullum crimen sine lege* principle varies according to whether the crime in question is a crime under general international law (Articles 20(a)-(d)), or whether it involves a crime under or in conformity with a treaty provision listed in the Annex to the Statute (Article 20(e)). As to crimes under general international law, Article 39(a) ensures that the relevant crime will not be applied to conduct which was not a crime under international law at the time it was committed. In the case of treaty crimes, the ILC emphasises that the principle of *nullum crimen sine lege* has an additional and crucial role to play, since it is necessary that the treaty in question should have been applicable to the conduct of the accused which is the subject of the charge. Whether this requirement is satisfied in any case will be a matter for the Court to decide.¹⁶⁸

2. Discussion by the Ad Hoc Committee

Some delegations felt that a statute of limitations should be provided in the Statute, in light of wide differences between national laws. Moreover, the importance of the legal principle underlying statutes of limitations was raised, which reflects the decreasing social importance of bringing criminals to justice and the increased difficulties in ensuring a fair trial with the passage of time. Other delegations, however, questioned the applicability of the statute of limitations to the types of serious crimes under consideration, and drew attention to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.¹⁶⁹

3. ICJ Comments

The ICJ does not believe that a statute of limitations ought to be incorporated into the Statute. First, many States already have international obligations in this regard. The Court will have to honour the obligations of States parties who have ratified the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Second, many States have national obligations which prevent the application of statutory limitations. The 1971 Constitution of Egypt, for example, expressly states that there is no limitation period for the crime of torture. Due to the number of States that have either similar international or national obligations and due to the seriousness of the crimes under the jurisdiction of the Court, the Court should not apply a statute of limitations.

¹⁶⁸ Commentary to Article 39, paragraphs (2),(3).

¹⁶⁹ A/AC.244/CRP.1/Add.2 (12 April 1995), paragraph 12; GA/8871, L/2717 (5 April 1995).

VI. Due Process

A. Measures to ensure fair trial

1. Investigation and commencement of prosecution

(a) Approach of the Revised Draft Statute

Article 26 of the Statute addresses the investigation of alleged crimes. Article 26(1) provides that the Prosecutor, upon receiving a complaint or upon referral of a matter by the Security Council (see Article 23(1)), shall initiate an investigation unless the Prosecutor concludes that there is no possible basis for a prosecution by the Court. If the Prosecutor decides not to initiate an investigation, the Prosecutor must inform the Presidency.

In investigating an alleged crime, under Article 26(2) the Prosecutor may request the presence of and question suspects, victims and witnesses; collect documentary and other evidence; conduct on-site investigations; take necessary measures to ensure the confidentiality of information or the protection of any person; and, as appropriate, seek the co-operation of any State or of the UN. Article 26(3) provides that at the request of the Prosecutor, the Presidency may issue subpoenas and warrants for the purposes of an investigation, including a warrant for the provisional arrest of a suspect (see Article 28(1)).

Under Article 26(4), if upon investigation the Prosecutor concludes that there is not a sufficient basis for a prosecution by the Court and decides not to file an indictment, the Prosecutor must inform the Presidency. The Prosecutor must give details of the nature and basis of the complaint and of the reasons for not filing an indictment. At the request of a complainant State or, in a case to which Article 23(1) applies, at the request of the Security Council, Article 26(5) provides that the Presidency is to review the Prosecutor's decision not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision.

The ILC comments that the phrase "sufficient basis" in Article 26(4) is intended to cover a number of different situations where further action by the Court would not be warranted. These situations are (a) where there is no indication of a crime within the jurisdiction of the Court; (b) where there is some indication of such a crime but the Prosecutor concludes that the evidence available is not strong enough to make a conviction likely; and (c) where there is a *prima facie* evidence of a crime within the jurisdiction of the Court, but the Prosecutor is satisfied that the case would probably be inadmissible under Article 35.¹⁷⁰

Concerning the Presidency's review under Article 26(5) of the Prosecutor's decision not to

¹⁷⁰ Commentary to Article 26, paragraph (9).

initiate an investigation or not to file an indictment, the ILC comments that this procedure reflects the view that there should be some possibility of judicial review of the Prosecutor's decision not to proceed with a case. On the other hand, the ILC notes, for the Presidency to direct a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties given that responsibility for the conduct of the prosecution is a matter for the Prosecutor. For this reason, Article 26(5) provides that the Presidency may request the Prosecutor to review the matter, but leaves the ultimate decision to the Prosecutor.¹⁷¹ The ILC also comments, however, that the Presidency should have the power to annul decisions of the Prosecutor concerning whether to proceed to an investigation or to file an indictment that are shown to be contrary to law.¹⁷²

Additionally, Article 26(6) provides for certain rights of a person suspected of a crime under the Statute of the Court. Prior to being questioned, a person suspected of a crime is to be informed that the person is a suspect and of the rights (a) to remain silent, without such silence being a consideration in the determination of guilt or innocence, and (b) to have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the Court. Moreover, a suspect is not to be compelled to testify or to confess guilt. Provision for interpretation and translation during questioning is also made.

In the Commentary to Article 26(6), the ILC notes that there is some overlap between the provisions concerning the rights of a suspect and those concerning the rights of the accused (see Article 41). The ILC explains that since the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation, a separate provision guaranteeing the rights of a person during the investigation phase, before the person has actually been charged with a crime, was included. Additionally, the ILC comments that the rights of the suspect are not as extensive as those of the accused. For example, the suspect does not have the right during the investigation phase to examine witnesses or to be provided with the prosecution evidence.¹⁷³

Article 27 establishes procedures for the commencement of prosecution by the Court. Article 27(1) states that: "If upon investigation the Prosecutor concludes that there is a *prima facie* case, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged." The ILC defines a "*prima facie* case" as "a credible case which would (if not contradicted by the defence) be a sufficient basis to convict the accused on the charge."¹⁷⁴

¹⁷¹ Commentary to Article 26, paragraph (7).

¹⁷² Commentary to Article 26, paragraph (8).

¹⁷³ Commentary to Article 26, paragraph (6).

¹⁷⁴ Commentary to Article 27, paragraph (1).

Under Article 27(2), the Presidency is to examine the indictment and any supporting material and determine: (a) whether a *prima facie* case exists with respect to a crime within the jurisdiction of the Court; and (b) whether it is appropriate that the case be heard by the Court. If so, the Presidency is to confirm the indictment and establish a trial chamber. The ILC comments that it is at this point in time, when the indictment is affirmed by the Court, that the person is formally charged with the crime and a "suspect" becomes an "accused."¹⁷⁵

If the Presidency decides not to confirm the indictment, after any adjournment that may be necessary to allow any additional material to be produced, Article 27(3) provides that the Presidency is to inform the complainant State or, if applicable, the Security Council. The ILC remarks that any adjournment for the production of additional material must not unnecessarily delay the procedure, particularly where the suspect is in custody.¹⁷⁶ The ILC also states that if the indictment is not confirmed, the suspect would normally be entitled to release if in custody in relation to the complaint, unless there is some other lawful basis for detention, such as under national law.¹⁷⁷

The ILC also comments that although this review of the indictment by the Presidency "is necessary in the interests of accountability and in order to ensure that the Court only exercises jurisdiction in circumstances provided for by the Statute, it must be emphasised that confirmation of the indictment is in no way to be seen as a pre-judgement by the Court as to the actual guilt or innocence of the accused. The confirmation occurs in the absence of and without notice to the accused, and without any assessment of the defence as it will be presented at the trial."¹⁷⁸ Additionally, the ILC notes that the Court will only publish an indictment at the beginning of a trial or as a result of a decision of an Indictment Chamber (see discussion on trial *in absentia*), as opposed to some legal systems where an indictment is a public document unless it is ordered sealed.¹⁷⁹

After an indictment has been confirmed, under Article 27(4) the Presidency may amend the indictment at the request of the Prosecutor, in which case the Presidency is to make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence.

Pursuant to Article 27(5), the Presidency may also make any further orders required for the conduct of the trial, such as determining the language or languages to be used during the trial; requiring the disclosure to the defence of evidence available to the Prosecutor; providing for the exchange of information between the Prosecutor and the defence; and providing for the

¹⁷⁵ Id., paragraph (2).

¹⁷⁶ Id., paragraph (3).

¹⁷⁷ Id., paragraph (8).

¹⁷⁸ Id., paragraph (4).

¹⁷⁹ Id., paragraph (5).

protection of the accused, victims, witnesses and confidential information. The ILC notes that the Trial Chamber should assume subsequent pre-trial procedures once it is convened.¹⁸⁰

(b) Discussion by Ad Hoc Committee

A substantial number of delegations expressed concern over the broad powers of the Presidency with respect to indictments. The view was expressed that these powers undermined the independence of the Prosecutor.¹⁸¹ The use of the term "*prima facie*" in Article 27(1) was criticised as imprecise and subjective. It was proposed that the term "substantiated" should be used instead, in order to accord the appropriate legal significance and to be in keeping with the terminology used by most legal systems.¹⁸²

Emphasis was placed on the need to clarify the Prosecutor's discretion to file and possibly amend the indictment. It was suggested that the suspect should be entitled to be heard, in order to ensure that the amendment of the indictment did not infringe upon his or her rights.¹⁸³ Concerning Article 27(5), the remark was made that attention should be paid to the disclosure of sensitive information because of possible adverse consequences.¹⁸⁴

(c) ICJ Comments

The ICJ believes that there ought to be a re-evaluation of the powers of the Prosecutor and of the Court vis-à-vis the Prosecutor. The Prosecutor should act on complaints received from a broader variety of sources, including from individuals and non-governmental organisations. Unless the Prosecutor is granted this increased authority to receive complaints, there is the very real danger that many allegations of serious human rights violations will go uninvestigated. The ICJ recognises the concern that the Prosecutor may become inundated with complaints and recognises that mechanisms ought to be implemented to ensure that this does not happen. Formal requirements of complaints (such as those used to other human rights monitoring bodies like the Human Rights Committee) could be established as one such mechanism.

The ICJ can also envision a system whereby the Procuracy could initiate investigations itself, without having been moved by a formal complaint. This initiative would greatly increase the Prosecutor's ability to efficiently handle crimes under international law. This would also remedy a potential problem with the complaints procedure as envisioned in the Draft Statute. As presently formulated, the Prosecutor may be restrained in conducting his or her investigation by the terms of the original complaint. If, for example, the Prosecutor discovers, in the course of his or her investigation, more perpetrators (or more crimes) than contained in the original

¹⁸⁰ Id., paragraph (7).

¹⁸¹ "Identification of the Main Issues Pertaining to Methods of Proceedings," Informal paper (no. 4) prepared by an open ended Working Group under chairmanship of Mr. Gerhard Hafner (Austria), page 4, paragraph 14; GA/8871 (Comments of Austria).

¹⁸² A/AC.244/1 (Comments of Venezuela).

¹⁸³ Informal paper (no. 4), page 4, paragraph 15.

¹⁸⁴ Id., paragraph 16.

complaint, he or she may not be able to prosecute. If the Prosecutor is given the power of self-initiation this problem will disappear.

It is obvious, however, that any self-initiative of the Procuracy would greatly increase not only its effectiveness, but also its power. Indictments which follow self-initiated investigations should therefore be reviewed by a separate body, conceivably of the Court, to ensure that there is no abuse of this increased authority. The ICJ maintains that a reasonable check on self-initiated investigations and indictments would be able to ensure fairness as well as prosecutorial effectiveness.

Article 27 of the Draft Statute provides for such a check. It deals with, *inter alia*, the review of indictments by the Presidency. The ICJ believes that it is important for the Court to review the indictment to determine whether there is a *prima facie* case and whether the case is apparently one over which the Court should exercise its jurisdiction.

Article 35 provides a further check on the prosecutor. According to this Article, an interested State, the accused or the Court itself may make a pre-trial motion that the matter has been or is being investigated in national jurisdiction, or that the matter is not sufficiently important for international action. Such cases may be found to be inadmissible to the International Criminal Court. This Article supports the notion of complementarity between international and domestic courts, a subject discussed above.

Article 26 also limits prosecutorial authority by providing that the Prosecutor must inform the Presidency of the decision not to issue an indictment on the basis of a complaint. At the request of the complainant State, or, where appropriate, the Security Council, the Presidency is to review the Prosecutor's decision not to indict and may request that the Prosecutor reconsider the decision.

The ICJ recognises the importance of checks and balances and the necessity for the review of decisions not to prosecute. However, the ICJ questions whether the President must be responsible for the review of such decisions, as such responsibility might overburden the office of the President. The ICJ suggests that a single judge or, possibly, a panel of judges, be given the responsibility to review prosecutorial decisions.

2. Provisional arrest and pre-trial detention

(a) Approach of the Revised Draft Statute

At any time after an investigation has been initiated, Article 28(1) provides that the Presidency may issue a warrant for the provisional arrest of a suspect if there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court, and if

there is a real risk that the suspect's presence at trial cannot otherwise be assured. The ILC notes that provisional arrest is intended as an exceptional remedy, since it would occur prior to any determination that the necessary conditions for the exercise of the Court's jurisdiction appear to exist.¹⁸⁵

Pursuant to Article 28(2), a suspect who has been provisionally arrested is entitled to release if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow.

Article 28(3) provides that as soon as practicable after the confirmation of the indictment, the Prosecutor is to seek from the Presidency a warrant for the arrest and transfer of the accused. The Presidency is to issue such a warrant unless it is satisfied that the accused will appear for trial voluntarily, or that there are special circumstances making it unnecessary to issue the warrant at that time. In its commentary to this provision, the ILC states that in contrast to the exceptional remedy of provisional arrest, once the indictment has been confirmed, every effort should be taken to ensure that the accused is taken into custody so as to be available for trial. The ILC also explains that the Presidency will normally grant a warrant for arrest of an accused unless it is clear that the accused will appear, or special circumstances exist, such as if the accused is detained by a State party or is serving a sentence for some other crime.¹⁸⁶

Additionally, Article 28(4) provides that a person arrested must be informed at the time of arrest of the reasons for the arrest and must be promptly informed of the charges.

Article 29 addresses pre-trial detention or release. The ILC comments that it is drafted so as to conform with Article 9 of the ICCPR.¹⁸⁷

As an initial matter, Article 29(1) provides that a person arrested must be promptly brought before a judicial officer of the State where the arrest occurred. The judicial officer must determine, in accordance with the procedures applicable in that State, whether the warrant was duly served and whether the rights of the accused have been respected.

Under Article 29(2), a person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at trial.

A person arrested may also apply to the Presidency under Article 29(3) for a determination of the lawfulness of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it must order the release of the accused, and may award

¹⁸⁵ Commentary to Article 28, paragraphs (2),(3).

¹⁸⁶ *Id.*, paragraph (3).

¹⁸⁷ Commentary to Article 29, paragraph (1).

compensation.

Article 29(4) provides that a person arrested is to be held, pending trial or release on bail, in the arresting State, in the State in which the trial is to be held, or, if necessary, in the host State (i.e., the seat of the Court). The ILC notes that this provision is based on the assumption that detention will usually occur on the territory of the arresting State, but that there may be good reasons for another location, such as to provide for the secure detention of the accused or to ensure the accused's physical safety.¹⁸⁸

(b) Discussion by the Ad Hoc Committee

Concerning Article 28, one delegation commented that the conditions for arrest of a suspect should be set forth in the Statute and that it should be ensured that the suspect be brought before the competent judge within a short time.¹⁸⁹

With respect to Article 28(2), it was argued that the period of 90 days set for provisional arrest is excessive, since it conflicts with the actual nature of such arrest and contradicts the principle, recognised by States, that the period of provisional arrest must be as short as possible.¹⁹⁰

Concerning pre-trial detention under Article 29, one delegation remarked that as now worded, an individual in custody in the territory of a State party may apply for release only to the Court, which means that the courts of the State party would no longer have jurisdiction over person in custody in its national territory. It was stated that this provision hardly seems compatible with the constitutional rules of many States or with the treaty obligations they may have under regional arrangements for the protection of human rights.¹⁹¹

It was also remarked that the provisions on pre-trial detention did not make sufficient determination of the rights of the accused person which must be respected, and it was suggested that a reference to international standards be made.¹⁹²

With respect to Article 29(2), one delegation stated that it had doubts as to the advisability of including a provision concerning the possible release on bail of persons held in detention, given the seriousness of the crimes under the Court's jurisdiction.¹⁹³ Additionally, it was stated that the decision on detention of a suspect should not be made solely by the Presidency.¹⁹⁴

¹⁸⁸ Commentary to Article 29, paragraph (4).

¹⁸⁹ German Statement on the Revised Draft Statute, Sixth Committee, 27 October 1994, page 5.

¹⁹⁰ A/AC.244/1 (Comments of Venezuela).

¹⁹¹ A/AC.244/1/Add.2, pages 6-7, paragraph 16 (Comments of France).

¹⁹² GA/8875 (Comments of Italy).

¹⁹³ A/AC.244/1 (Comments of Belarus); GA/8875 (Comments of Belarus).

¹⁹⁴ GA/8873 (Comments of Canada).

(c) ICJ Comments

It is of great importance that the Statute of the International Criminal Court conform with the provisions of Article 9 of the International Covenant on Civil and Political Rights, 1966 (ICCPR).

The ICJ believes that the rights of suspects during pre-trial investigation are sufficiently protected in the Revised Draft Statute. The ICJ, however, shares the concerns of Amnesty International¹⁹⁵ that although the draft statute "includes a significant number of guarantees for the accused in pre-trial detention ... the draft statute does not appear to fulfil the drafter's intention to be consistent with Article 9 of the ICCPR with respect to the provisional arrest of suspects." Among the rights that suspects under provisional arrest should have are the right to be informed of the reasons for the arrest; the right to have one's family notified of the detention; the right to prompt access to a lawyer; the right to prompt access to medical attention; the right to prompt access to the Court; the right to take proceedings before the Court for a determination of the lawfulness of the detention; the right to release if the trial does not occur within a reasonable time; and the right not to be tortured or subjected to other cruel, inhuman or degrading treatment or punishment.

The ICJ is also concerned with the powers of the President with regard to the pre-trial detention of suspects. Under Article 28, such suspects may be detained for 90 days or for such longer time as the Presidency may allow. The ICJ believes that the President should not have the authority to detain suspects indefinitely without trial or without the review of the President's decision. Prosecutors may have less incentive to expedite an investigation or prosecution and innocent suspects may be imprisoned for extremely lengthy periods. To remedy this, there ought to be a maximum limit on pre-trial detention of, for example, 180 days. Suspects could be held for 90 days, or for such longer time as the Presidency may allow, to a maximum of 180 days.

3. Trial rights and other related issues

(a) Approach of the Revised Draft Statute

Article 40 of the Revised Draft Statute provides for the presumption of innocence, stating that: "An accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt." In the Commentary to Article 40, the ILC notes that the Prosecutor should have the burden of proving every element of the crime beyond reasonable doubt.

¹⁹⁵ as expressed in its report of October 1994 entitled *Establishing a Just, Fair and Effective International Criminal Court*.

Article 41 provides for a number of rights of an accused. Article 41(1) states that in the determination of any charge, the accused is entitled to a fair and public hearing, and to the following minimum guarantees:

- (a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;
- (b) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing;
- (c) to be tried without undue delay;
- (d) subject to Article 37(2) (see discussion of "*Trials in absentia*"), to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court, without payment if the accused lacks sufficient means to pay for such assistance;
- (e) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;
- (f) if any of the proceedings or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;
- (g) not to be compelled to testify or to confess guilt.

The ILC comments that the minimum guarantees to which an accused is entitled in relation to a trial, as set forth in Article 41(1), reflect as closely as possible the fundamental rights of the accused set forth in Article 14 of the International Covenant on Civil and Political Rights.

Additionally, Article 41(2) provides that exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence, with any doubts as to the application of this provision or as to the admissibility of the evidence to be decided by the Trial Chamber.

Article 43 of the Revised Draft Statute provides for protection of the accused, victims and witnesses. It states that: "The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means." The ILC comments that this list of steps that the Court may take to protect the accused, victims and witnesses is non-exhaustive. Moreover, the ILC states that the Court's due regard for the protection of victims and witnesses must not interfere with full respect for the right of the accused to a fair trial. Thus while the Court may order the non-disclosure to the media or the general public of the identity of a victim or witness, an accused's right to question the prosecution witnesses must be respected. On the other hand, the ILC notes, such procedures as giving testimony by video camera may be the only way to allow a particularly vulnerable victim or witness (e.g. a child who has witnessed some

atrocities) to speak.¹⁹⁶

(b) Discussion by the Ad Hoc Committee

The discussion by the Ad Hoc Committee on trial rights focused on the issue of trials in absentia, which is discussed in a subsequent sub-section. With regard to trial rights generally, one delegation suggested that the system provided in the draft statute satisfied the principles regarding the protection of the fundamental rights of the accused.¹⁹⁷ Another delegation called for the further review of the draft statute in order to ensure that every accused should be guaranteed the basic rights of equality before the law, presumption of innocence, appeal and the right against double jeopardy.¹⁹⁸

Furthermore, it was stated that the right to defence counsel should be available at all stages to the accused, from the initial charge to the final appeal. The same delegation also suggested that the investigation of complaints ought to be subject to international standards and that the consent of the states concerned ought to be a prerequisite.

(c) ICJ Comments

It is the position of the ICJ that, as a minimum, the Statute of the International Criminal Court should reiterate the fair-trial guarantees found in Article 14 of the ICCPR. In several important respects the Revised Draft Statute fails to meet the Article 14 standards. For example, Article 41 of the Revised Draft Statute fails to state that "[a]ll persons shall be equal before the courts and tribunals" as guaranteed in Article 14(1) of the ICCPR.

Amnesty International has pointed out a number of troubling omissions in the Draft Statute that the ICJ would like to confirm. Although Article 41(1) gives the accused certain minimum guarantees, the Statute does not expressly state that the right to a fair trial does not include other guarantees not expressly included in the statute. Although it may be inferred that the accused has more than the "minimum" guarantees, the Statute ought to include by reference other well-established rights. Similarly, the statute "does not include the extensive internationally recognised rights related to the conduct of one's defence - such as the right to communicate confidentially with one's lawyer."¹⁹⁹

The Amnesty International report also expresses concern with the disclosure requirements placed upon both the prosecution and the defence. It believes that the statute ought to expressly state that the defence is entitled to the evidence by the prosecutor. It also stresses that the

¹⁹⁶ Commentary to Article 43, paragraphs (1), (2).

¹⁹⁷ GA/8875 (Comments of Italy).

¹⁹⁸ GA/8875 (Comments of India).

¹⁹⁹ Amnesty International, *Establishing a Just, Fair and Effective International Criminal Court*, p. 36.

disclosure responsibilities of the defence must be consistent with the defendants right to consult with counsel and to silence. While the ICJ shares these concerns, it recognises that many matters, including the production of evidence, can be dealt with in the Rules of Procedure and Evidence. Article 15 of the Statute for the International Tribunal for the Former Yugoslavia, for example, merely states that the "Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial proceedings, trials and appeals, admission of evidence, the protection of victims and witnesses and other appropriate matters." Section 3 of the Rules provide for disclosure of evidence by the prosecutor, reciprocal disclosure by the defence, disclosure of exculpatory evidence, protection of victims and witnesses and matters not subject to disclosure.

The ICJ is also concerned with the provisions of the Draft Statute relating to the openness of the Court's proceedings. Article 43 of the Revised Draft Statute provides that the Court may close proceedings in order to protect special interests of the accused, *e.g.*, privacy. Here, the Court must balance competing interests: the rights of the accused and the freedom of expression of the media and public at large. While recognising that in certain circumstances judicial proceedings may be closed to the public, the ICJ stresses the general rule that judicial proceedings, on the national and international level, are public. Any exceptions to this rule, *i.e.*, any restrictions on the freedom of expression, must be narrowly construed and be for compelling reasons. The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR offer guidelines for when and how such restrictions can take place.²⁰⁰ The Revised Draft Statute should refer to these guidelines. Furthermore, the Statute should provide that the burden of proof of necessity for closed proceedings is on the party requesting the restriction. Furthermore, when the Court orders a restriction on public access to proceedings, the media (as well as any other person affected) shall have the right to be heard for the purpose of objecting to the Court's action.²⁰¹

B. Trials *in absentia*

1. Approach of the Revised Draft Statute

Article 37(1) of the Revised Draft Statute provides that: "As a general rule, the accused should be present during the trial." Article 37(2), however, provides for three situations in which the Court may conduct a trial in the absence of the accused:

- (a) the accused is in custody, or has been released pending trial, and for reasons of security or ill-health of the accused it is undesirable for the accused to be present;
- (b) the accused is continuing to disrupt the trial; or
- (c) the accused has escaped from lawful custody under the Revised Draft Statute or has broken bail.

²⁰⁰ UN Document E/CN.4/1984/4, reprinted in *ICJ Review* N° 36 (June 1986), pp. 47-56.

²⁰¹ For a fuller discussion of these issues see The Madrid Principles on the Relationship between the Media and Judicial Independence (ICJ, 1994) and vol. IV of the *CJIL Yearbook: The Media and the Judiciary* (to be published, 1995).

If the Court decides to proceed in the absence of the accused under Article 37(2), Article 37(3) provides that the rights of the accused must be protected. In particular, the Court must ensure that all reasonable steps have been taken to notify the accused of the charge, and that the accused is legally represented, by a court-appointed lawyer if necessary.

Article 37(4) addresses the situation of the deliberate absence of an accused. In such a situation, the Court may establish an Indictment Chamber which would record the evidence against an accused, including hearing witnesses, and would determine publicly whether the evidence establishes a *prima facie* case. If a *prima facie* case is established, the Indictment Chamber would issue a warrant of arrest for the accused. If the accused is subsequently tried by the Court, the record of evidence before the Indictment Chamber would be admissible. Additionally, in the event of a subsequent trial, any judge who was a member of the Indictment Chamber could not also be a member of the Trial Chamber.

In the Commentary to Article 37 of the Revised Draft Statute, the ILC reveals that the issue of trial *in absentia* was debated extensively in drafting the Revised Draft Statute. One widely held view was that trial *in absentia* should be excluded entirely from the Statute, the primary rationale being "that the Court should only be called into action in circumstances where any judgement and sentence could be enforced, and that the imposition of judgements and sentences *in absentia* with no prospect of enforcement would bring the Court into disrepute".²⁰² There was also support within the ILC for trial *in absentia* only in very limited circumstances, as well as support for trial *in absentia* generally.

2. Discussion by the Ad Hoc Committee

The general principle of Article 37(1) that an accused should be present at trial received wide support at the meeting of the Ad Hoc Committee. Many delegations expressed concern, however, that the Statute's exceptions to the general principle do not afford adequate due process guarantees, and called for additional discussion of the matter. For instance, one delegation commented that a more cautious approach to trial *in absentia* was needed, with such trials allowed only in exceptional circumstances and with the rights of the accused respected at all times.²⁰³ It was also suggested that the exceptions to the general principle, particularly those of Article 37(2)(a), merit careful consideration, and questioned whether the exceptions go too far.²⁰⁴ Another delegation expressed stronger criticism of the Statute's provisions concerning trial *in absentia*, and predicted that as drafted Article 37 "will present a political and legal obstacle for many countries when the time comes for them to ratify the Statute, and could also damage the prestige of the international criminal court."²⁰⁵

²⁰² Revised Draft Statute, Article 37, Commentary, paragraph (1).

²⁰³ GA/8873 (Comments of Indonesia), L/2719 (6 April 1995), page 2.

²⁰⁴ UK Mission to the United Nations, New York, Press Release No. 32/95 (7 April 1995).

²⁰⁵ A/AC.244/1 (Comments of China) (20 March 1995), page 10.

Support for the Statute's approach to trial *in absentia*, was also expressed. It was stated that the Statute strikes a proper balance between the need for such trials and the right of an accused to be present at trial.²⁰⁶ Likewise, the judges of the International Tribunal for the former Yugoslavia expressed their approval of Article 37.²⁰⁷

3. ICJ Comments

Trial *in absentia* is a difficult issue that highlights differences in legal systems. The fundamental principle that accused persons must be tried in their presence is reflected in Article 37(1) of the Revised Draft Statute. The limited exceptions to the general rule are outlined in Article 37(2). These exceptions are an attempt to balance the rights of the accused with the necessity to continue with judicial proceedings when exceptional circumstances prevent the accused's presence. It is the opinion of the ICJ that these exceptions are not overly broad and do not throw the general principle into question; however, more deliberation on this issue may be needed to ensure that any use of trial *in absentia* is for extremely limited circumstances and for clearly compelling reasons.

The ICJ believes that Article 37(4) concerning the establishment of an Indictment Chamber is of extreme importance. In order to prevent accused persons from eluding justice, the Court must have some power to indict them *in absentia*. Article 37(4) envisions such a procedure. Consideration ought to be given to broadening this procedure along the lines of the indictment procedure of the International Tribunal for the Former Yugoslavia. While not providing for trial *in absentia*, Rule 61 of the Rules of Procedure and Evidence of the Tribunal for the Former Yugoslavia (*Procedure in Case of Failure to Execute a Warrant*) establishes a procedure to issue an international arrest warrant. This procedure is utilised in cases where an accused cannot be brought before the Tribunal. In such a situation, the Prosecutor is to submit the indictment of the accused to the Trial Chamber in open court, together with all evidence used to confirm the indictment. The Prosecutor may call and examine any witness whose statement was submitted to the judge in confirming the indictment, and may offer any additional evidence that has been obtained. From this evidence, the Trial Chamber is to determine whether it is satisfied that there are reasonable grounds for believing that the accused has committed any of the crimes charged in the indictment, and, if so, it is to issue an international arrest warrant for the accused, which will be transmitted to all States. Such a procedure included in the Statute of the International Criminal Court would achieve the effect of a trial *in absentia* without calling into question the integrity of the Court.

²⁰⁶ Id. (Comments of the Netherlands).

²⁰⁷ A/AC.244/1 (20 March 1995), page 31.

C. Applicable penalties

1. Approach of the Revised Draft Statute

Article 46 establishes the Court's sentencing procedures. It states that in the event of a conviction, the Trial Chamber is to hold a further hearing to hear any evidence relevant to the sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed. In imposing the sentence, the Trial Chamber is to take into account such factors as the gravity of the crime and the individual circumstances of the convicted person. The ILC comments that the fundamental procedural guarantees inherent in a fair trial, notably the right to counsel, also extend to the sentencing hearing.

The applicable penalties that the Court may impose are covered by Article 47. Under Article 47(1), the Court may impose on a convicted person one or more of the following penalties: (a) a term of life imprisonment, or of imprisonment for a specified number of years; (b) a fine. In the Commentary, the ILC states that the Court is not authorised to impose the death penalty.²⁰⁸

Article 47(2) provides that in determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of (a) the State of which the convicted person is a national; (b) the State where the crime was committed; and (c) the State which had custody of and jurisdiction over the accused.

Under Article 47(3), fines paid may be transferred, by order of the Court, to one or more of the following: (a) the Registrar, to defray the costs of trial; (b) a State whose nationals were the victims of the crime; (c) a trust fund established by the UN Secretary-General for the benefit of crime victims. The ILC remarks that the provisions of the 1993 draft Statute which authorised the Court to order restitution or forfeiture of property used in conjunction with the crime have been deleted. On balance the Commission considered that these issues were best left to national jurisdictions and to international co-operation agreements.

2. Discussion by the Ad Hoc Committee

Several delegations called for greater specificity in the Statute of the length of sentences and amount of fines that the Court might impose for a particular crime.²⁰⁹ It was argued that an accused should know, at the outset, what penalty he or she could expect.²¹⁰

²⁰⁸ Commentary to Article 47, paragraph (1).

²⁰⁹ GA/8869 (Comments of Gabon); GA/8871 (Comments of Egypt); GA/8873 (Comments of Czech Republic, Austria, United States, United Kingdom); GA/8875 (Comments of Republic of Korea); A/AC.244/1/Add.2 (Comments of France).

²¹⁰ GA/8873 (Comments of Austria).

With respect to fines, one delegation noted that fines would have to be enormously high, considering the crimes that would come before the Court.²¹¹ It was also suggested that the confiscation of property might be more appropriate than fines in some cases,²¹² and that, in addition to imprisonment and fines, the Court should be able to order illegally obtained profits to be withdrawn.²¹³

Several delegations also called for the inclusion of provisions concerning compensation of victims.²¹⁴

It was argued that in determining the applicable penalty there should be a more precise linkage with a specific national law, and that such references should be to the law of the State where the crime was committed.²¹⁵ It was added that a proviso could be included that such national law must be consistent with international norms.²¹⁶

Delegations expressed support for the ILC 's exclusion of the death penalty from the Statute of the Court, and it was suggested that there should be a clear statement in the Statute stating that the death penalty would not apply.²¹⁷ One delegation, however, suggested that the death penalty should be included.²¹⁸

3. ICJ Comments

The ICJ shares the concerns of several delegations to the Ad Hoc Committee with regard to the failure of the Revised Draft Statute to state with greater specificity the length of sentences to be imposed for various crimes. The ICJ recognises that it is important for the Court to have discretion in sentencing in order to tailor specific sentences to specific cases. Nevertheless, the ICJ believes that it is the fundamental principle of legality that penalties be adequately defined.

To remedy the shortcomings of the present Statute, three provisions ought to be added to the Revised Draft Statute to give the Court further guidance in sentencing. The Statute should state that as a general principle, offenders convicted of similar offences in the same jurisdiction should be given similar sentences. That being said, the ICJ is concerned that offenders convicted of similar crimes in different countries will receive markedly different penalties due to national differences in sentencing guidelines. To remedy this, the Statute should also state that the Court should strive to establish an international standard in the setting of sentences.

²¹¹ GA/8875 (Comments of Chile).

²¹² GA/8875 (Comments of Republic of Korea).

²¹³ GA/8873 (Comments of The Netherlands).

²¹⁴ GA/8873 (Comments of Japan, Australia, Greece, Switzerland, Ukraine); GA/8875 (Comments of Mexico).

²¹⁵ GA/8873 (Comments of Poland); GA/8875 (Comments of Italy).

²¹⁶ GA/8875 (Comments of Italy)

²¹⁷ GA/8873 (Comments of Germany, Canada); GA/8875 (Comments of Italy, Mexico, Chile).

²¹⁸ GA/8873 (Comments of Sudan).

It is also important that aggravating and mitigating circumstances be taken into consideration when determining the appropriate sentences. The ICJ believes that aggravating and mitigating circumstance are so important to criminal proceedings that they should be included in the Statute itself, perhaps under the section of the Statute that defines the crimes under the Court's jurisdiction.

D. Appeals and revision

1. Approach of the Revised Draft Statute

Article 48 provides that both the Prosecutor and the convicted person have the right to appeal a judgement or sentence. Appeal may be made on the grounds of procedural error, error of fact or law, or disproportion between the crime and the sentence. The ILC Commentary cites Article 14(5) of the ICCPR: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher court according to law."

Pursuant to Article 49, decision in the Appeals Chamber would be reached by majority (i.e., four judges) and would be published. Separate and dissenting opinions on appeal are not permitted. If the convicted person successfully appeals a judgement, the Appeals Chamber may reverse or amend the decision, or, if necessary, order a new trial; if the Prosecutor successfully appeals an acquittal, the Appeals Chamber may only order a new trial. The Appeals Chamber may vary an accused's sentence if it finds that the sentence is "manifestly disproportionate" to the crime.

While Article 49 provides that the Appeals Chamber shall have all the powers of the Trial Chamber, the ILC comments that an appeal is not meant to be a retrial. The Appeals Chamber would have the power to allow new evidence to be presented, but would normally rely on the transcript of the trial proceedings.²¹⁹

Article 50 provides that the convicted person or the Prosecutor may apply for revision of a conviction on the ground that evidence has been discovered which was not known to the accused at the time of trial or appeal, and which could have been a *decisive* factor in the conviction. The ILC explains that this procedure is not available in the case of an acquittal, since allowing revision of an acquittal on the grounds of the discovery of new evidence would constitute a violation of the *non bis in idem*, or "double jeopardy", principle.²²⁰ The Presidency determines whether or not to accept an application for revision, and if it decides to accept an application, it may reconvene the Trial Chamber, constitute a new Trial Chamber, or refer the matter to the Appeals Chamber.

²¹⁹ Commentary to Article 49, paragraph (6).

²²⁰ Commentary to Article 50, paragraph (1).

2. Discussion by the Ad Hoc Committee

The Ad Hoc Committee generally found the Statute's procedures for appeal and revision to be acceptable. Several delegations, however, suggested that dissenting opinions should be allowed in judgements of the Court in order to assist the appeals process. It was also suggested that dissenting opinions be allowed in decisions of the Appeals Chamber.²²¹ Other suggestions included a broadening of appeal and revision procedures,²²² and the specification of a time-limit for appeals to be lodged, subject to the Court's discretion to extend the time for appeal.²²³

3. ICJ Comments

While the ICJ generally supports the provisions of the Revised Draft Statute with regard to appeals, particularly that the accused has the right to an appellate review of his conviction and sentence.

The ICJ believes that separate and dissenting opinions ought to be permitted in the decisions of both the Trial and Appeal Chambers.

The suggestion made by the ILC that dissenting judgements threaten to undermine the authority of the Court and its judgements is not persuasive. If dissenting judgements are not permitted because they threaten to undermine the authority of the Court, appellate judgements should be prohibited for having the same effect. Most international and national tribunals and courts permit separate and dissenting opinions. Among these bodies are: The International Court of Justice (Article 57); the International Tribunal for the Former Yugoslavia (Article 23); the International Tribunal for Rwanda (Article 22); the European Court of Human Rights (Article 51); and the Inter-American Court of Human Rights (Article 66). One of the advantages of having separate and dissenting opinions is that they provide Appellate Chambers with potentially persuasive alternative reasoning which may help the prosecution or the defence win an appeal. The authority of the Court and its judgements will be ultimately determined not by the lack of dissent but by the strength of its judgements. If strong dissent results in the criticism of the Court, that criticism will help the Court in the future, either by strengthening its reasoning in subsequent cases or re-evaluating the propriety of its previous decisions.

The ICJ would also like to draw attention to the fact that the Revised Draft Statute makes no provision for the appeal of interlocutory decision of the Trial Chamber, the existence of which may help expedite decision-making by avoiding subsequent appeals and re-trials caused by an improper decision at the interlocutory stage.

²²¹ A/AC.244/1 (20 March 1995), page 31 (Comments of the judges of the International Tribunal for the former Yugoslavia).

²²² UK Mission to the United Nations, New York, Press Release No. 32/95 (7 April 1995).

²²³ A/AC.244/1 (20 March 1995), page 13 (Comments of Singapore).

VII. Relationship between States parties, non-States parties and the International Criminal Court

1. Approach of the Revised Draft Statute

Article 51 provides that States parties are to co-operate with the Court in connection with criminal investigations and proceedings. The Court may issue a request for co-operation and judicial assistance with respect to a crime, including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, and the arrest or detention of persons. In a case involving genocide, upon receipt of such a request all States parties must respond without undue delay. In any other case, States parties that have accepted the jurisdiction of the Court with respect to the crime in question must respond to the request without undue delay.

In its commentary to Article 51, the ILC observes that the effective functioning of the Court will depend upon the international co-operation and judicial assistance of States. The ILC also notes that Article 51 is adapted from Article 29 of the Statute of the International Tribunal for the Former Yugoslavia.

Article 52 provides that the Court, in case of need, may request a State to take necessary provisional measures. These measures include the provisional arrest of a suspect, seizure of documents or other evidence, prevention of injury to or intimidation of a witness, and prevention of the destruction of evidence.

Article 53 provides for transfer of an accused to the Court. Under Article 53(1), the Court is to transmit a warrant for the arrest and transfer of an accused (issued under Article 28) to any State on the territory of which the accused may be found, and is to request the co-operation of that State in the arrest and transfer of the accused. Pursuant to Article 53(2), upon receipt of such a request in a case involving genocide, all States parties must respond take immediate steps to arrest or transfer the accused to the Court. As to crimes other than genocide, upon receipt of a request from the Court all States parties that have accepted the jurisdiction of the Court with respect to the crime in question must take immediate steps to arrest or transfer the accused to the Court.

With respect to treaty crimes (Article 20(e)), a State party which is a party to the treaty in question but which has not accepted the Court's jurisdiction as to that crime must, if it decides not to transfer the accused to the Court, take all necessary steps to extradite the accused to a requesting State or refer the case to its own authorities for prosecution. In cases where a State party has not accepted the jurisdiction of the Court with respect to the crime in question, upon receipt of a request from the Court the State party is to consider whether it can, in accordance

with its legal procedures, take steps to arrest and transfer the accused to the Court, or whether it should take steps to extradite the accused to a requesting State or refer the case to its own authorities for prosecution.

Article 53 also establishes certain exceptions to the provisions concerning transfer of an accused. Under Article 53(5), a State party may delay complying with a request for transfer of an accused if the accused is in its custody or control and is being proceeded against for a serious crime, or is serving a sentence for a crime. Additionally, under Article 53(6) a State party may file an application with the Court to have the request for transfer set aside on specified grounds.

Article 53(4) provides that a State party which accepts the jurisdiction of the Court with respect to the crime in question must, as far as possible, give priority to a request for transfer from the Court over requests for extradition from other States. Moreover, under Article 53(3) transfer of an accused to the Court constitutes, as between States parties which accept the Court's jurisdiction with respect to the crime, sufficient compliance with a provision of any treaty requiring extradition or prosecution of a suspect.

In a case involving a treaty crime, Article 54 provides that a custodial State party which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of Article 21 must either take all necessary steps to extradite or for an obligation on a custodial State party to extradite or prosecute the suspect.

Pursuant to Article 56, States not parties to the Statute of the Court may co-operate with and provide assistance to the Court. This may be done on the basis of comity, a unilateral declaration, an *ad hoc* arrangement or other agreement with the Court.

2. Discussion by Ad Hoc Committee

Article 51(1) was criticised for being "overly coercive," and for not granting States parties the appropriate leeway in determining how much assistance they wish to provide. It was suggested that this provision be revised to read "shall make the utmost effort to co-operate," in accordance with the language used in previous international agreements.²²⁴

With respect to Article 53(2), it was suggested that a State party that has accepted the Court's jurisdiction as to a specific crime should still enjoy the option of choosing whether or not to comply with a request by the Court for co-operation in the arrest and transfer of an accused.²²⁵ Another delegation suggested that decisions regarding the transfer of a defendant should be decided according to national legislation and according to procedures laid down by

²²⁴ A/AC.244/1, page 11, para. 14 (Comments of China). See also GA/8876 (Comments of China).

²²⁵ *Id.*

the relevant national courts.²²⁶ It was also stated that it would be preferable in Article 53(6) to define the grounds upon which a State party may base an application to set aside a request for transfer of an accused.²²⁷

VIII. Effect of Judgements

1. Approach of the Revised Draft Statute

Under the Revised Draft Statute, States parties would undertake to recognise the judgements of the Court.²²⁸ That is, a judgement of the Court should be capable of founding a plea of *res judicata* or issue estoppel or their equivalents under legal systems which recognise those pleas. In order to give authoritative effect to judgements of the Court and their enforcement, States parties may need to enact legislation or introduce administrative measures.

Prison sentences are to be served in the prison facilities of a State designated by the Court from a list of States which have offered the use of such facilities. If no State is designated, the prison sentence is to be served in the State where the Court has its seat.²²⁹

While the prison facilities would continue to be administered by the relevant national authority, a sentence of imprisonment is to be subject to the supervision of the Court. Moreover, the terms and conditions of imprisonment are to be in accordance with international standards.²³⁰

The Revised Draft Statute provides for the possibility of pardon, parole and commutation of sentences.²³¹ If a convicted person would be eligible for pardon, parole or commutation of sentence under the laws of the State of imprisonment, the State is to notify the Court. The convicted person may then apply to the Court for an order granting pardon, parole or commutation of the sentence. Alternatively, when imposing a sentence of imprisonment, the Court may delegate the issue of pardon, parole and commutation of the sentence to the State of imprisonment by stipulating that the sentence is to be governed by the applicable national law.

Additionally, with respect to the substantial costs involved in enforcing sentences, the Revised Draft Statute states that it is desirable that States parties share the burden of such costs as expenses of the Court. As with the funding of the Court generally, the Statute defers consideration of funding for enforcement of sentences until a later date.²³²

²²⁶ GA/8876 (Comments of Algeria).

²²⁷ A/AC.244/1, page 7, para. 30 (Comments of Belarus); GA/8876 (Comments of Australia).

²²⁸ Article 58.

²²⁹ Article 59.

²³⁰ Id.

²³¹ Article 60.

²³² Commentary to Article 59, paragraph (3).

2. Discussion by the Ad Hoc Committee

One delegation suggested that the statute should provide for the automatic recognition of judgements of the Court by States.²³³ Another delegation stated that implementation of Court decisions would have to take into account the fact that the responsibilities of States to co-operate with the Court would have to be exercised through domestic law.²³⁴ It was suggested that Article 58 should mention that recognition of the Court's judgements will be subject to the procedures established for that purpose in the national legislation of States parties.²³⁵

One delegation expressed concern that the draft statute was silent with respect to instances where a State did not carry out the Court's order due to the involvement of a person in power in the commission of the crime.²³⁶

3. ICJ Comments

The ICJ is concerned with the provisions in the Revised Draft Statute which determine parole eligibility with regard to national standards. The ICJ believes that international standards ought to be set with regard to parole - as with sentencing - to ensure that individuals convicted of international crimes receive similar punishment regardless of the jurisdiction in which they serve their sentences. While reference may be made to national standards, the ICJ believes that the Statute ought to state that the Court should strive to establish an international standard in the determination of parole eligibility.

The ICJ feels that there should also be more specificity as regards prisons and prison conditions. The Statute should, for example, refer to the UN Standard Minimum Rules for the Treatment of Prisoners.

IX. Budget and Administration

1. Approach of the Revised Draft Statute

The Revised Draft Statute does not attempt to address the issue of how the operations of the Court would be financed. The Commentary to Article 2 explains that while the ILC envisages that the Court will have a close relationship with the UN, any budgetary arrangements with the UN are left to be worked out as part of the process of adopting a Statute. Such arrangements, the ILC comments, can only be worked out satisfactorily in the context of an overall willingness of States to proceed to the establishment of an International Criminal

²³³ GA/8876 (Comments of Greece).

²³⁴ GA/8876 (Comments of United States).

²³⁵ A/AC.244/1, page 25, para. 30 (Comments of Venezuela).

²³⁶ GA/8876 (Comments of Thailand).

2. Discussion by the Ad Hoc Committee

In addressing the issue of financing the Court, the Committee did not reach a consensus of opinion. The main options considered were funding by States parties, by the United Nations, or by a combination of the two. Additionally, several delegations expressed the opinion that the issue should be postponed, on the grounds that issues such as the relationship of the Court to the UN, the role of the Security Council, and the universality of the Court should be addressed first.²³⁸

Most delegations spoke in favour of financing the Court through the regular budget of the UN.²³⁹ One argument in favour of UN funding is that funding by States parties alone could deter some developing countries from joining the Statute, as costs may be significant.²⁴⁰ The UN Security Council's ability to refer matters to the Court was another rationale that was offered for UN funding.²⁴¹

A combination of payment by the UN and by States parties was also proposed. For instance, if the Security Council referred a situation to the Court, it was suggested that the UN should bear the costs of the matter. If a State party brought a complaint, it was suggested that only parties to the treaty should be responsible for financing the case.²⁴²

Additionally, it was suggested that a State which brings a complaint to the Court should be required to bear some part of the costs of prosecuting the case,²⁴³ but that due consideration should be given to the financial situation of developing countries so as not to bar use of the Court by such countries.²⁴⁴ It was also suggested that States with a particular interest in a case might be encouraged to make contributions to a trust fund for that particular case.²⁴⁵

3. ICJ Comments

The ICJ, like the majority of the delegates to the Ad Hoc Committee, believes that the Court ought to be funded out of the UN regular budget. The ICJ is concerned that if States parties in general or the States parties that lodge complaints are responsible for funding the Court, some states may be discouraged from ratifying the treaty or lodging complaints. If State complainants are responsible for funding litigation, there may also be inconsistency in the

²³⁷ Commentary to Article 2, paragraphs (7), (8).

²³⁸ GA/8876 (Comments of United Kingdom, Germany, Norway, Mexico, Croatia, Tunisia).

²³⁹ GA/8876 (Comments of Argentina, Canada, Germany, The Netherlands, Egypt, Trinidad and Tobago, Tunisia, Greece).

²⁴⁰ GA/8876 (Comments of Thailand).

²⁴¹ GA/8876 (Comments of Canada).

²⁴² GA/8876 (Comments of United States, Mexico, Czech Republic, China).

²⁴³ GA/8876 (Comments of United States, Japan, India, China).

²⁴⁴ GA/8876 (Comments of United States, India).

²⁴⁵ GA/8876 (Comments of Norway).

quality of prosecutions and decisions. Prosecutions funded by rich states would be thoroughly investigated and well litigated, whereas prosecutions brought by poor states may not meet the same standards. Consequently, the wealth and ability to pay of the State complainant would become of the utmost importance. Under such circumstances the Court may well be brought into disrepute as being an instrument accessible only by the rich. If the Court is to be truly international, all states must have equal access to it, regardless of their ability to support the Court financially. It must be emphasised that the Court is to be a criminal court not a civil court and, as such, should not be financed by the parties.

Consideration may also be given to establishing a trust fund for the Court or permitting the Court to receive donations from states, organisations or individuals.