ROGER S CLARK*[1]

This is about a very practical set of issues raised in the Report of the Preparatory Committee on the Establishment of an International Criminal Court ("I.C.C.") at its 1996 meetings, under the heading "Establishment of the Court and relationship between the Court and the United Nations".[2] The Report breaks the general topic down into three sub-issues: status and nature of the Court and method of its establishment; relationship between the Court and the United Nations; and, financing of the Court. Like most of the myriad of issues that have been addressed in the preparatory efforts, how the general topic and each of its sub-parts gets ultimately resolved is contingent upon how other parts of the puzzle are ultimately put together. I hope that examining the present issues may serve to bring into sharper perspective some of the more obviously cosmic issues that are debated. In particular, they may point in the direction of modesty in the scope of the Court's jurisdiction. I want also to highlight some of the complexities of the powers of the General Assembly, and the complicated relationship between international standards and their domestic application.

---

* *Professor of Law, Rutgers University School of Law, Camden, New Jersey.*

[1] The author represents the Government of Samoa at meetings of the Preparatory Committee on the Establishment of an International Criminal Court. Any views expressed here should not be attributed to that Government. The research assistance of Jeanette Barnard, Hays Butler and Richard Gallucci is gratefully acknowledged. This is a revised version of a paper delivered at the Conference of the Society for the Reform of Criminal Law, London, 27 July - 1 August 1997.

[2] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, Proceedings of the Preparatory Committee during March-April and August 1996, UN GAOR, 51st Sess., Supp. No 22, at 8 - 10, UN Doc. A/51/22 (1996) ("1996 Report of Preparatory Committee"). See also, Vol. II of the Report, Compilation of Proposals (same document symbol). The Preparatory Committee began on the basis of the International Law Commission's Draft Statute for an International Criminal Court, Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, UN GAOR, 49th Sess., Supp. No. 10, at 43, UN Doc. A/49/10 (1994), ("I.L.C. Draft") but the Compilation contains text which ranges far and wide.

1. Status and nature: method of establishment

1.1. Status and nature

The ultimate object is a structure consisting of a prestigious and independent judicial institution, and the related prosecutorial and punishment apparatus, all of which has some connection with the United Nations system. The judges will need to be insulated from political pressures by being paid a substantial salary and having a lengthy term of office.[3] Before focusing too much on the judges, it is worth emphasizing a point that can get lost in thinking of the proposed entity as a "Court"[4]: unlike the International Court of Justice which comprises the 15 judges and their supporting bureaucracy, the I.C.C. would need, in addition to a Registrar's office, a substantial prosecutorial arm and a modest budget for maintaining prisons (or farming the prisoners out to willing states or private entrepreneurs). The prosecutorial office (called "The Procuracy" in the I.L.C. Draft), if it is meant to be a serious professional operation, is likely to be very expensive. There also needs to be some insulation between the parts so as to maintain the independence of the judges, and funds for the defense.

As I explain later, the judges will not be the most significant cost of the I.C.C. once it becomes operative. However stingy the funding of the prosecutor's office, it will exceed that of judicial salaries and the registry. The I.L.C.'s Draft, nevertheless, skimps a bit on judicial salaries, at least in the early stages, by making the job a part time one for most of the judges.[5] Combined with necessary proscriptions

---

[3] The I.L.C. Draft, *supra* at 50-51, suggests a single non-renewable term of nine years. Anyone who has witnessed the unedifying sight of members of the I.C.J. campaigning for re-election will understand the point.

[4] Professor Bassiouni suggests:
The ICC should more appropriately be named the International Criminal Tribunal because the Court is the adjudicating or judicial organ of the institution. To refer to the Court as the entire institution and also to the Court as the judicial organ within the institution can create unnecessary confusion. M Cherif Bassiouni, **Observations Concerning the 1997 - 98 Preparatory Committee's Work**, in The International Criminal Court: Observations and Issues before the 1997 - 98 Preparatory Committee; and Administrative and Financial Implications, 13 Nouvelles Etudes Penales 5, 21 (1997).

[5] ILC Draft, *supra* note, arts 10 and 17.

of incompatible employment[6], this may have a distinct impact on the pool of candidates for the job. Many of those who currently find it possible to be members of the I.L.C. or the human rights committees while holding an executive or judicial job at the national level would, if elected to a part-time I.C.C., be quite properly ineligible to continue such employment because of the incompatibility rules. At the same time, they would not be receiving a full time salary from the Court.[7] The pool of candidates would probably, in such a situation, consist mostly of academics, judges with limited criminal law functions and retired persons, perhaps not a terrible thing!

The size of the prosecutorial enterprise will be affected by decisions made in respect of the independence of the prosecutor, or at least the extent to which the prosecutor is given a mandate to search the world for genocidists (or drug dealers) and the like, *sua sponte*.[8] Such a mandate would entail the development of substantial data bases, an intelligence system of some sort, perhaps field offices, certainly something that could operate in much more depth, and using a lot more resources, than the existing United Nations early warning systems. Who will do the leg work? Who will make the arrests? Will the Prosecutor have an International Secret Service? Will the Prosecutor who sees a developing situation then inevitably need to go cap in hand to the budgetary people in New York and ask for help? Or is it more likely that states with existing diplomatic (and

---

[6] ILC Draft, *supra* note, art. 10, para. 2, for example, provides:
Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular, they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes.

[7] The States Parties to the Convention on the Law of the Sea seem to be having difficulty in grappling with a similar problem in relation to the Tribunal on the Law of the Sea and some of its judges must have made hard career choices. See Remuneration Decisions, in Meeting of States Parties, United Nations Convention on the Law of the Sea, Decisions on Budgetary Matters of the International Tribunal for the Law of the Sea for the Year 1998, UN Doc. SPLOS/L. 7 (1997). (Judges paid a third of a notional salary of $145,000 as a kind of retainer; further payment depends upon the amount of time spent on Tribunal business).

[8] "Everyone" favors an independent prosecutor when it comes to dealing with a particular case against a particular person; the independence is not so assured when it comes to dealing generally with a particular "situation", say genocide in country X; there is certainly no consensus yet about letting the prosecutor choose his or her own situation-targets.

spying) intelligence capabilities will provide initial information which will be filtered into the system.[9] Then the Prosecutor will work on a particular situation with whatever resources are already available (perhaps with the aid of seconded personnel from interested states?). Arrests will presumably be made (if at all) by individual states or by entities like the NATO forces that have been so successful in rounding up the accused in Former Yugoslavia. Resources are an all-important chicken and egg question to different organizational models.

1.2. Method of establishment

Several precedents of structures that are comparable, in at least some respects, spring to mind and many of them have been noted in the debates. The most visible models are the International Court of Justice and the Tribunals for Former Yugoslavia and Rwanda.

The International Court of Justice, which deals with disputes between states and renders advisory opinions at the request of certain United Nations organs and Specialized Agencies, is one of the six "principal organs" listed in the Charter of the United Nations. Its constitutive document, the Statute of the Court, is annexed to and "forms an integral part of" the Charter.[10] The Tribunals for Former Yugoslavia and Rwanda, on the other hand, were created by the Security Council pursuant to its powers under Chapter VII of the Charter, to try individuals accused of breaches of humanitarian law in the belief that the trials would "contribute to the restoration and maintenance of peace".[11]

The tidiest and most prestigious way to create the proposed Court

---

[9] The United States has raised persuasively the question whether an under-resourced prosecutor's office might not upset delicate and complex state investigations, especially in respect of terrorism and drug offenses. See Comments from States, UN Doc. A/AC. 244/1/Add. 2, at 13 - 18 (1995). (The U.S. draws the conclusion that such offenses should probably be excluded; others might draw a conclusion in favor of more resources.)

[10] UN Charter, art. 92. Non-Members of the UN may, with the concurrence of the General Assembly, become parties to the Statute, Charter, art. 93. Switzerland and Nauru have done so. The Court began its life, as the Permanent Court of International Justice, under a Protocol of Signature adopting its Statute that made it a charge on the League of Nations budget and in a close relationship with the League, which elected the judges.

[11] S.C. Res. 808 (1993) (preamble) (Former Yugoslavia); S.C. Res. 955 (1994) (preamble) (Rwanda). The preambles also speak of putting an end to such crimes and bringing those responsible "to justice".

would presumably be to follow the I.C.J. precedent and, by way of Charter amendment, to add it as another principal organ. That strategy seems to have fallen foul to some serious problems. One is the perceived wisdom that any Charter amendment is unacceptable because of the "can of worms" theory. Open up amendments here and you would need to face dealing with Security Council restructuring and problems of the veto and other structural change that nobody wants to face. Moreover, there is the distinct possibility that any Charter amendment to add the Court would not garner the necessary ratifications - two-thirds of the membership including all the permanent members of the Security Council.[12] Those who object to funding of the I.C.C. by the U.N.[13] tend to want to cut that off at the pass by insisting that the entity not be a UN organ.

Creation of a permanent institution by the Security Council with broad subject-matter jurisdiction and substantial scope for prosecutorial initiative would seem to stretch the Council's powers close to or beyond breaking point. The Council's actions in respect of Former Yugoslavia and Rwanda have been based on its broad competence to deal with particular situations where the peace was threatened. It is rather more difficult to justify a permanent establishment by the Security Council, although one cannot rule out all possibilities. The Council could, for example, presumably have a "permanent ad hoc" structure in place, with a passive prosecutor, awaiting use by the Council itself in individual cases in which it decided to take action, like a Rwanda or a Former Yugoslavia.[14] If the jurisdiction of the Court were to include the kind of treaty offenses (including narcotics offenses) contemplated by the ILC in its draft[15], then the connection with a threat to

---

[12] UN Charter, art. 108.

[13] **Infra**.

[14] I have in mind the way in which The International Labor Organization and the UN Economic and Social Council went about creating a Fact-Finding and Conciliation Commission for freedom of association matters, outside the ILO treaty structure. An individual Commission would be formed as required with the consent of the parties in a particular case. See James Nafziger, **The International Labor Organization and Social Change: The Fact-Finding and Conciliation Commission on Freedom of Association**, 2 N.Y.U. J. Int'l L. & Pol. (1969). The debate on the "constitutionality" of these actions is summarized in Frederic R. Kirgis, International Organizations in Their Legal Setting, 303-05 (1st ed., 1977).

[15] *Supra* note, art. 20 (e) and Annex

the peace would, in many instances[16], be hopelessly attenuated.

Hence, there is a need to look elsewhere. Some participants in the process - and I confess to being one of them - have argued that the General Assembly might well be able to exercise its generic powers to create an appropriate tribunal. Article 22 of the Charter empowers the Assembly to "establish such subsidiary organs as it deems necessary for the performance of its functions". One would probably not want an independent court that might be seen as "subsidiary" to the General Assembly. But the International Court of Justice held in its Reparation[17] and Administrative Tribunal[18] Advisory Opinions that the Assembly has wide general powers to act beyond the letter of the Charter when it seeks to give effect to the broad purposes and principles of the organization and generally to make it functional. In the Administrative Tribunal Opinion, the Court held that the Assembly had implied powers to create an Administrative Tribunal to deal with personnel matters, the decisions of the Tribunal being binding on the Assembly. The Assembly's power to act went beyond the letter of Article 22 of the Charter and beyond also any literal reading of its power in Article 101 of the Charter to make staff "regulations" for the Secretariat.

The same basic principles would seem to apply here, where the Assembly could be seen to be acting on behalf of such Purposes of the United Nations[19] as the maintenance of international peace and security[20], solving international problems of an economic, social, cultural or humanitarian character, and promoting respect for human

---

[16] The Security Council managed to find a link to international peace and security in order to pressure Libya over the bombing of Pan Am flight 103. The I.C.J.'s refusal to second-guess the Council, at least at the provisional measures stage, suggests that the Council might be able to go quite a long way even in respect of some of the treaty crimes over which jurisdiction is proposed. See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114.

[17] Reparation for Injuries Suffered in the Service of the United Nations, 949 I.C.J. 174.

[18] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47.

[19] I am here echoing UN Charter, art. 1.

[20] While the Security Council has "primary responsibility" for international peace and security, UN Charter art. 24, the Assembly has a significant role too: see Certain Expenses of the United Nations, 1962 I.C.J. 151 (emphasizing the broad powers of the Assembly when it is acting in support of the basic aims of the organization).

rights.[21] Some of those involved with the Preparatory Committee have suggested to me that the absence of a treaty basis for the I.C.C. would make life difficult for them in terms of domestic compliance, but I am not completely convinced that this is so.[22]

Each state that takes its relationship with such a court seriously will need to ponder carefully the details of giving effect to that relationship under domestic law. The existence of a treaty (and the debate on its ratification) will focus attention on some of those details. But experience with the Security Council's resolutions on Former Yugoslavia and Rwanda suggests that resolutions (albeit in that case clearly "binding" ones) can force attention to domestic application also. Thus, a number of states (probably fewer than should have done so) have found it necessary to adopt domestic legislation to permit cooperation with the Tribunals[23], and some have even entered into bilateral treaty arrangements on certain aspects of the

---

[21] The Assembly's general powers to further the humanitarian and economic and social purposes of the organization put it in an even stronger position than the Security Council in respect of the "treaty offenses", *supra* note.

[22] The I.L.C. asserts, *supra* note, at 46:
Moreover, a treaty accepted by a State pursuant to its constitutional procedures will normally have the force of law within that State - unlike a resolution - and that may be necessary if that State needs to take action *vis-a-vis* individuals within its jurisdiction pursuant to the Statute. This is bad law on its face in respect of the legal systems of, for example, the U.K., New Zealand and Samoa (and of most former British colonies). In the case of the U.S., the self-executing/ non-self-executing gloss on the treaties as law of the land provision in the Constitution makes it certain that legislation would be required over and above any ratification of the Statute. I suspect the end result is the same in the international criminal justice area in many jurisdictions: even with a treaty, statutory action is necessary; in jurisdictions where a ratified treaty would be the law and a sufficient basis for action, the same result could be achieved by legislation giving effect to a UN resolution, that legislation being adopted under the foreign affairs powers of the legislature. Note also that states manage to cooperate with the international organization INTERPOL in spite of its lack of a constituent treaty.

[23] Amnesty International has produced a very useful collection of the statutory efforts of the small number of states that have found it necessary (or seen fit) to legislate to ensure domestic compliance with their obligations under the Charter (and the Security Council's resolutions) to the Tribunals for Former Yugoslavia and Rwanda. Amnesty International, International Criminal Tribunals: Handbook for Government Cooperation, AI Index: IOR 40/07/96 (August 1996).

relationship, such as the transfer of persons[24], or enforcing sentences.[25] The transfer of persons, at least, must amount to an obligation under the United Nations Charter, as interpreted by the Security Council. Yet implementing legislation, and even further treaty commitments[26] have been found necessary. Treaties in the criminal justice area tend to be just as non-self-executing as resolutions! I am not entirely persuaded that the presence or absence of a multilateral treaty basis for the relationship makes much difference to the need to execute the details. The I.L.C. has suggested, as a clincher to its argument for a treaty, that a General Assembly resolution can be easily amended or even revoked, and "that would scarcely be consistent with the concept of a permanent judicial body".[27] True, but overstated. A majority would be needed to change or repeal the resolution and there is no guarantee that such a majority would be found. At the same time, a majority, or even a determined minority, of Members in the General Assembly (in the case of a UN-funded treaty body) or of States Parties (in the case of a party-funded treaty body) could just as effectively gut a treaty body, as they could a body created by resolution, by not funding it adequately. There is no absolute stability. Political commitment is ultimately more important than form. This is not to deny that a treaty will both focus attention on and offer a little more mana to the institutions so created than a "mere" resolution.[28] It may even, I

---

[24] See Kenneth J Harris and Robert Kushen, **Surrender of Fugitives to the War Crime Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution**, 7 Crim. L. F. 561 (1996) (U.S. bilateral agreements with Tribunal).

[25] See Julian J.E. Schutte, **Legal and Practical Implications, from the Perspective of the Host Country, Relating to the Establishment of the International Tribunal for the Former Yugoslavia**, in The Prosecution of International Crimes: A Critical Study of the Tribunal for the Former Yugoslavia 207, 222 (Roger S. Clark and Madeleine Sann ed., 1996) (on Netherlands arrangements); Andre Klip, **Italy and United Nations Conclude Enforcement Agreement**, 13 Int'l Enf. L. Rep. 286 (1997) (Italy agrees to accept no more than 10 prisoners).

[26] In the case of the U.S., an "executive agreement" for constitutional purposes, but clearly a "treaty" in an international law sense.

[27] I.L.C. draft, *supra* note, at 46.

[28] I write this sentence hesitantly. Do the general public, or even the cognoscenti, regard UNICEF and UNHCR less seriously because of their juridical basis in General Assembly resolutions than they regard the Specialized Agencies, each of which has a constituent treaty? Of course, they are all "executive" bodies - perhaps there is some feature of judicial bodies that makes them different.

concede, provide a slightly more solid juridical foundation than a resolution.

Be that as it may, I suspect that a consensus is developing in favor of establishing the Court by a multilateral treaty, along the lines suggested in the International Law Commission's draft. Some of the models in this regard would be the various human rights "treaty committees" such as the Committee on the Elimination of all Forms of Racial Discrimination[29] and the Committee on Human Rights[30], and the recently-formed International Tribunal for the Law of the Sea (*ITLOS*).[31] Such bodies, while "free-standing" in some senses, nevertheless come close to being United Nations organs and there is a financial and bureaucratic nexus.

The hard judgment call with the treaty option is how many ratifications should be necessary to bring it into force: a low number so that the institution may begin functioning forthwith (at some level), or a high number so that it is backed by serious political will? Numbers between 25 and 90 have been mentioned. I tend to favor something at the higher end, on the theory that unless there is a substantial political commitment the Court will be an irrelevance (except perhaps for its ability to generate disputes with non-members).

2. Relationship between the Court and the United Nations

Assuming that the Court does not become an "organ" of the United Nations by Charter amendment, some other structural connection would need to be explored. According to the summary of the Preparatory Committee's 1996 proceedings[32], "[a] close relationship between the Court and the United Nations was considered essential and a necessary link to the universality and standing of the Court, though such a relationship should in no way jeopardize the independence of the Court". Many of the participants contemplated

---

[29] Created by the Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 A (XX), UN GAOR, 20th Sess., Supp. No. 21, at 47, UN Doc. A/6014 (1966).

[30] Created by the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1967).

[31] Established at Hamburg in accordance with Annex VI to the United Nations Convention on the Law of the Sea, UN Doc. A/CONF. 62/122 (1982).

[32] *Supra*, at 9

some sort of formal instrument setting out the relationship.[33] There was even talk of preparing such a relationship agreement so that it may be approved at the Diplomatic Conference along with the Statute of the Court[34], but my guess is that it will await the meetings of the States Parties when the treaty is close to coming into effect.

Analogies were made to the Specialized Agency relationships entered into by ECOSOC pursuant to Article 63 of the Charter, and to the relationship between the International Atomic Energy Agency and the General Assembly. The latter, not specifically countenanced by the Charter, was crafted because it was believed that the IAEA did not quite fit the mould of a specialized agency and something analogous, but done by the General Assembly rather than ECOSOC, was needed.[35] Reference was also made to the arrangements (apparently still being negotiated) between the UN and the International Tribunal for the Law of the Sea.[36] Because of the

---

[33] I have not seen a draft of one.

[34] It has also been suggested that Rules of Evidence and Procedure should be approved at the Diplomatic Conference. For a useful draft of such Rules, based on the Former Yugoslavia and Rwanda Rules, see Draft Set of Rules of Procedure and Evidence for the International Criminal Court, Working Paper submitted by Australia and the Netherlands, UN Doc. A/AC. 249/L. 2 (1996).

[35] Creativity abounds when it comes to the General Assembly and relationships. Observer Status was invented for non-members such as the Holy See and Switzerland, and extended to certain liberation movements. Observer Status (ill-defined) has also been extended to a wide range of international governmental organizations and some non-governmental ones, such as the International Committee of the Red Cross. An implied-power-of-the-General Assembly Observer Status for an NGO is presumably more desirable than the "consultative" relationship that NGOs have with ECOSOC under UN Charter, art. 71. A way has even been found to extract a financial contribution not only from the Holy See and Switzerland, but also from Nauru and Tonga, non-members, non-observers who participate in some of the organization's activities. In short, there is ample room for innovation with the I.C.C.

[36] See Draft in Report of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea. Regarding Practical Arrangements for the Establishment of the Tribunal, Vol. I, at 132, UN Doc, LOS/PCN/152 (Vol. I) (1995) ("ITLOS Practical Arrangements"). The IAEA and ITLOS arrangements are examples of the functional implied power of the General Assembly. The States Parties to the Convention on the Law of the Sea recently concluded an Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea, UN Doc. SPLOS/25 (1997), based on the agreements for diplomats and UN officials. A similar Agreement would be needed for the I.C.C.

particular nature of the proposed I.C.C. entity (both judges and prosecutors) none of the models is quite on point. The relationship agreement would not be a place for inclusion of any fundamental details on the working of the Court. It would emphasize the independence of the Court, and would also deal with issues of representation within the United Nations, exchange of information and documentation, and in general questions of cooperation.[37] It will probably also be necessary to ensure that information collected within the UN structure is made available to the Court, where appropriate (for example reports and data bases of Commissions of Inquiry).

It should be added that since it seems likely that the I.C.C. will not be, *stricto sensu*, a UN organ, provision will need to be made for periodic meetings of the State Parties and perhaps even for a budget committee to be formed from among them.[38]

3. Financing the Court

On the face of it, the debate has been along the lines of "who pays?". Two broad options are open: to add the ICC to the regular UN budget, where these costs would ultimately be shared according to the normal (rather complex) formula for allocating the expenses of the organization, based essentially on GNP; or to put the cost on the States Parties to the Statute, leaving it to them to work out the precise formula. This latter option would render it likely that a large contributor to the UN budget (such as the United States which contributes 25%) would be responsible for a somewhat

---

[37] 1996 Report, *supra* note, at 10. The ITLOS Draft, in ITLOS Practical Arrangements, *supra* note, also includes arrangements for cooperation in personnel structures and for the issue of a UN laissez-passer to judges and some officials. Some delegations have not been in favor of carrying forward these provisions to the I.C.C.

[38] See **infra** on possible financing. Most parties to the Statute of the I.C.C. will be UN Members. Two non-Members, the Holy See and Switzerland, have been participating actively at the Preparatory Committee, and may well ratify the Statute.

smaller proportion of the I.C.C. one (perhaps nearer 5%).[39]

Neither option is entirely satisfactory and there have been ongoing debates about the funding of the treaty supervisory bodies.[40] When the Covenant on Civil and Political Rights was being drafted, doubts were expressed whether the Human Rights Committee set up under the Convention could be funded from the UN budget, since the Covenant was a separate treaty to which not all members of the UN would become party. Nevertheless, the Covenant ultimately provided for the financing of the Committee's activities from the UN budget.[41] On the other hand, some of the other treaty committees were originally funded in whole[42] or in part[43] by contributions from the States Parties. Dissatisfaction with such arrangements, as a result of the failure of many parties to pay assessed contributions[44], led to amendments being adopted to put all the costs on the UN budget. While these amendments have not yet come into effect, the General Assembly acquiesced in moving the costs to its budget.[45] Putting

---

[39] But not necessarily so: the current arrangement for the International Tribunal for the Law of the Sea is that "[t]he contributions to be made by States Parties shall be based upon the scale of assessments for the regular budget of the United Nations for the corresponding financial year, adjusted to take account of participation in the Convention. This shall be applied provisionally pending the adoption of a scale by the Meeting of States Parties". Decisions on Budgetary Matters, *supra* note, at 1. Some future haggling is expected. The States Parties can presumably cut any deal, consistent with any rules agreed upon in the treaty, on which a majority vote, or better a consensus, can be reached. Reference has been made to the Universal Postal Union formula where states are classified into a few categories with increasing numbers of shares of the cost. No one state ends up with anything like the proportion that the U.S. pays of the UN budget. (The smallest of the Specialized Agencies, the U.P.U. employs fewer than 200 people.)

[40] See Roger S. Clark and Felice Gaer, **The Committee on the Rights of the Child: Who Pays?** 7 N.Y.L.S.J.H.R. 123 (1989).

[41] International Covenant on Civil and Political Rights, arts 35 and 36. See also 1961 Single Convention on Narcotic Drugs, arts 6, 10 and 16, 520 U.N.T.S. 204 (1964) (International Narcotics Control Board charged to UN funds).

[42] Committee Against Torture, created by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, G.A. Res. 39/46, UN GAOR, 39th Sess., Supp. No. 51, at 197, UN Doc. A/39/51 (1985).

[43] Convention on the Elimination of All Forms of Racial Discrimination, *supra* note, art. 8.

[44] The amounts in themselves were quite trivial for each state concerned but in the aggregate they led to a financial crisis over and above the recurring UN crises through non-payment.

the I.C.C. on the UN budget would leave it vulnerable (like the Tribunals for Former Yugoslavia and Rwanda, and the I.C.J.) to the political vagaries of the arcane UN budgetary process, and the risk that large contributors to the UN will not pay up. Leaving it with State Parties subjects it to the vagaries of random meetings of the parties (perhaps three or more years apart) and, if the human rights experience is any guide, to the likelihood that a large number of small contributions will remain unpaid and prove crippling. On balance, and in a world of hard choices, funding from the UN budget, with all its problems, is probably the more secure source!

Someone was kind enough to suggest at the PrepCom that "the Court should be open to voluntary contributions by States, organizations or even interested individuals and corporations".[46] It is always possible that some generous benefactor, governmental or non-governmental, will come bearing an endowment. As far as I know, the I.C.J. has not recently passed the hat around in order to keep afloat[47], but the Commission of Experts on Former Yugoslavia survived only by

---

[45] G.A. Res. 47/111, UN GAOR, 47th Sess., Supp. No. 49, Vol. I, at 192, UN Doc. A/47/49 (1993). In demonstration of the insertia principle in foreign affairs, only about twenty States have deposited their instruments accepting the amendments to the two conventions. Functionally, the General Assembly resolution has had the same effect as the requisite number of ratifications would have.

[46] 1996 Report of Preparatory Committee, Vol. I, *supra* note, at 10. It has also been suggested that confiscated criminal proceeds might be available. It seems unlikely that drug offenses and money laundering (which might provide some forfeitures) will be within the Court's jurisdiction. Funds confiscated from genocidists and war criminals ought surely to go to victim compensation rather than to administration.

[47] The Peace Palace, its quaint premises in the Hague, were built early in the century with the largesse of the Scottish/American industrialist, Andrew Carnegie. Such capital investment is obviously a problem for a fledgling institution. The premises for ITLOS are being supplied by the German Government, UN Doc. LOS/OCN/52, Vol. I, at 155-57. The long-suffering Dutch balked at providing free premises for the Tribunal for Former Yugoslavia which eventually had to rent from an insurance company. The Netherlands must, nevertheless, be considerably out of pocket from the Yugoslavian enterprise. See Schutte, *supra* note. At the time of writing, the Yugoslav Tribunal has only one courtroom available, so that the two current trials are being alternated on a two weeks on/two weeks off basis. Through a generous gift of the British Government of about $U.S.500,000, the Tribunal will soon have an additional "Interim" Courtroom available which will ease things even though "this new facility will also offer reduced amenities: less computerisation and no public access". (Closed circuit television will be available.) 19 Bulletin of the International Tribunal for Former Yugoslavia, 4 August 1997, p.l.

doing that.[48] The Tribunals for Rwanda and Former Yugoslavia have had to rely for much of the investigations on what the documents call *gratis personnel*, people lent by governments and on somebody else's payroll. It has also accepted various gifts of office stuff, such as computers. It is mainly the governments of the North who are able to afford to do this and there have been rumblings from the South about the extent to which "too many" of such personnel, no matter how competent, distort the process. What does it all to do the perceptions, and even the reality, of the "exclusively international character" of the staff?[49] Who is the piper, and whose is the tune? Ah, if only I could choose where the Government spends my taxes!

Similar questions arise in respect of letting the tab for particular investigations be picked up by "States initiating cases, interested States or even the Security Council (if it had referred a matter to the Court)".[50] Whose impartial prosecution is it?[51]

Personally, I think that, interesting as such funding issues are, much of the debate is shadowboxing. The crunch question is this: What is an International Criminal Court worth to the international community, both absolutely and compared with other ways to spend

---

[48] See M. Cherif Bassiouni, **The Commission of Experts Established pursuant to Security Council Resolution 789: Investigating Violations of International Humanitarian Law in the Former Yugoslavia**, in The Prosecution of International Crimes 61, 68 - 71 (Roger S. Clark and Madeleine Sann ed., 1996).

[49] The language comes from UN Charter, art. 100.

[50] 1996 Preparatory Committee Report, Vol. I, *supra* note, at 10. The Security Council might, in such cases, attribute the costs to the peacekeeping budget, funded so that the larger economies pay a larger share, or as was done, in part, with Former Yugoslavia and Rwanda, apply them to the regular budget. The latter caused some dissension among developing countries.

[51] The U.S. makes the case for some cost-shifting to individual states which initiate a complaint or are otherwise especially interested, as follows:
The initiation of a case triggers a potentially very costly and complex investigative process, and often relieves a country of burdens of investigating or prosecuting itself. The kinds of cases contemplated for the court often will involve large-scale situations, which the Prosecutor would presumably then be obligated to investigate and try. In such cases, action of one or a few States could have very significant financial consequences for all. Even a single case, if particularly complex, could be very costly.
Comments from States, UN Doc. A/AC.244/1/Add. 2, at 24 (1995) (U.S.). The Comment adds, very reasonably, that "Some formula could be found which is fair to States without adequate financial means".

the money?[52] How is it that the budget for the United States military is about U.S. $244 billion a year and the regular budget[53] of the United Nations is about one billion U.S. dollars? (The U.N.'s regular budget is about the same in fact as the budget for my mid-sized State University, or, if you prefer for the New York City Sanitation Department).[54] The regular budget supports about 10,000 personnel, soon to be reduced to 9,000[55], the same size as the bloated bureaucracy of a city of a few hundred thousand. Of the U.N.'s billion, about $10,000,000 was spent last year for the International Court of Justice[56] and $30,249,500 by the Tribunal for Former Yugoslavia.[57] Bear in mind, again, that the I.C.J. does not include a

---

[52] The Secretary-General made a preliminary foray into the question of cost, in response to the I.L.C. Draft, *supra* note. His Report was presented to the Ad Hoc Committee which preceded the present Preparatory Committee as Provisional Estimates of the Staffing, Structure and Costs of the Establishment and Operation of an International Criminal Court, Report of the Secretary-General, UN Doc, A/AC.244/L.2 (1995) (hereinafter "Provisional Estimates"). After an excellent survey of the permutations and combinations, the Report concluded that there was "such a large number of unknown variables that the Secretary-General does not find it possible to develop a realistic set of assumptions on the basis of which estimates could be prepared". *Id.*, at 14. Two hardy souls have tried, very creatively, to come up with some numbers, using particularly the experience of Former Yugoslavia and Rwanda, Thomas S. Warrick, **Organization of the International Criminal Court: Administrative and Financial Issues**, in 13 Nouvelles Etudes Penales, *supra* note, at 37; Daniel Mac Sweeney, Prospects for the Financing of an International Criminal Court, World Federalist Movement/Institute for Global Policy Discussion Paper (1996).

[53] The peacekeeping budget, minuscule until the 1990s and now contracting again, is separate. The Specialized Agencies have their own budgets. The operative budget for the High Commissioner for Refugees, who cares for several million people, is obtained by sophisticated begging. Many programs within the organization are supported by "extra-budgetary resources", provided at the whim of donors.

[54] At the risk of overskill, one might note that the UN regular budget is half the purchase price of one of the B-2 stealth bombers that seem to be allergic to water, Tim Weiner, **The $2 Billion Stealth Bomber Can't Go Out in the Rain**, New York Times, 23 August 1997, p. 5.

[55] Report of the Secretary-General, Renewing the United Nations: A Programme for Reform, at 6, UN Doc. A/51/950 (1997). Not much danger of domineering World Government from this lot!

[56] Less than two million dollars was spent by the Division on Crime Prevention and Criminal Justice in Vienna for developing criminal justice policy and technical assistance worldwide.

prosecutorial staff, prison guards or services for victims![58] The Yugoslav Tribunal (which does) is believed to have requested a budget of $64 million for 1997 which would include 200 additional posts, most of them investigators. The Secretary-General has recommended a budget of $49,983,100 for that Tribunal which would allow only fifty additional posts.[59] This sum apparently includes a significant amount for assigning defense counsel - a crucial feature if justice is both to be done and to be seen to be done. One commentator has suggested an initial budget for the I.C.C., based substantially on the Former Yugoslavia experience, of about $60,000,000.[60]

There is, of course, a moral. Running a criminal justice system that prosecutes significant numbers of alleged offenders[61] costs money.[62] High profile cases are especially expensive.[63] The cases to

---

[57] Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Since 1991, Report of the Secretary-General, UN Doc. A/C.5/51/50 (1997). The Tribunal for Rwanda, recovering from some organizational embarrassments, was expected to cost $22,002,500 for the six month period, 1 July - 31 December 1997, UN Doc. A/C.5/51/L. 80 (1997).

[58] The Secretary-General has pointed out, Provisional Estimates, *supra* note, at 12, that:

Preparations for trial would include securing the attendance of all witnesses, ensuring that witness-protection measures are in place, ensuring that sufficient witnesses are available to give evidence before the Trial Chamber as the trial progresses and ensuring that witnesses are adequately provided for in terms of accommodation and meals and loss of income.

In a number of the proposals before the Preparatory Committee, the Witnesses and Victims protection function would be in the hands of the Registry (as in the case of the Former Yugoslavia and Rwanda Tribunals) rather than the Prosecutor, but the costs would be just as real. See, e.g., 1966 Report of the Preparatory Committee, Vol. II, *supra* note, at 204 - 06.

[59] UN Doc. A/C.5/51/30 Rev. 1 (1997).

[60] Warrick, *supra* note, at 104. His further suggestion to spread the cost at the rate of $1,000,000 apiece among a posited 60 initial parties to the Statute is totally impractical in a world where the poorest Members of the UN contribute about $100,000 each in dues. Some have difficulty finding **that** in a total governmental budget which in some cases is below $100,000,000 a year.

[61] Or even one that does not: Whitewater Special Prosecutor Starr's enquiry into the Clintons is said to have cost $30,000,000 - enough to keep the Yugoslav Tribunal afloat (just) for another year. See Michael Isikoff and Howard Fineman, **A Starr-crossed Probe?**, Newsweek, 7 July 1997, p. 31. Which has the greater social utility? On another front, the F.B.I. at one stage had 700 agents working on the TWA 800 crash. The National Transportation Safety Board, soon to become the

come before the I.C.C. will be high profile by definition. There are not likely to be substantial savings for the Court from guilty pleas or plea bargaining.[64] Although the Tribunal for Former Yugoslavia has had one guilty plea[65], the nature of the offenses (and of the accused) make it unlikely that this will become the norm it is in many common law systems.

There is no need to belabour the point: Does the international community have the will to make a serious allocation of resources here? Do not forget that the provision of resources to the Tribunals for Former Yugoslavia and Rwanda has been decidedly hand to mouth. Money is doled out grudgingly in uncertain six-monthly increments that must make the Prosecutor's staff feel that

---

last serious investigator of that incident, will spend $27 million on its efforts, or half its annual budget. Of course it may not turn up anything criminal! Mark Hosenball and Matt Bai, **What Really Happened? The FBI prepares to close its books on TWA 800**, Newsweek, 21 July 1997, p. 36.

[62] In 1995, the U.S. federal government spent $16,223,000,000 on criminal justice (including investigations, prosecution, representation, judges and prisons). It budgeted $21,950,000,000 for this year. Table 1.11, Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Analytical Perspectives, Fiscal Year 1997. State and local expenditures country-wide are probably four or five times the federal total.

[63] It is said that the prosecution and defense of the Oklahoma City bomb accused, McVeigh and Nichols, will cost taxpayers about $50,000,000. This far exceeds the estimated $9,000,000 for prosecution and $10,000,000 for defense in the OJ Trial. See Maurice Ossley, **Oklahoma Bomb Trials Expected to Cost $50 Million**, Chicago Tribune, 18 February 1997, p. 1. See also Comments by U.S., UN Doc. A/AC. 244/1/Add.2 (1995):

[I]t took a massive, highly expert forensic effort of well over a year, and at times employing more than 1,000 persons, to collect and examine all the debris from the mid-air bombing of Pan Am 103 - an effort that ultimately proved critical in solving the case.

[64] A proposal that an accused be permitted to plead guilty led to some puzzled comments by civil and Islamic lawyers. 1966 Report of the Preparatory Committee, Vol. II, at 170, and 173 - 74 (abbreviated trial after guilty plea, proposal by Argentina and Canada). Even some common lawyers professed in the debates to be offended by the possibilities of plea bargaining, an even more mindboggling prospect to some civil lawyers than the guilty plea itself!

[65] Prosecutor v. Erdemovic, Case Nos. IT-95-18 and IT-96-22-T, discussed in Faiza Patel King and Anne-Marie La Rosa, **The Jurisprudence of the Yugoslavia Tribunal: 1994 - 1996**, 8 Europ. J. Int'l L. 123, 172 - 77 (1997).

it is lurching from financial crisis to financial crisis. The way the Commission of Experts Investigating Violations in Former Yugoslavia was treated suggested that someone was wielding a fiscal sandbag.[66]

I leave you with this thought: Will the I.C.C. be any different?

---

[66] See Bassiouni, *supra* note.