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OBJECTIVE

The Mediterranean poses a unique and fascinating challenge to existing Human Rights charters. Conventional approaches to the enforcement of Human Rights often overlook the significance of cultural differences. A new approach is needed to address the tensions between institutional uniformity and cultural diversity.

The Mediterranean Journal of Human Rights is a response to this challenge. An interdisciplinary journal, the journal explores the inter-relationships between Human Rights charters and their cultural and socio-economic contexts. Drawing on a broad academic landscape, the journal aims to stimulate debate on the restructuring of traditional Human Rights charters to reflect economic and cultural reality.

READERSHIP

The Mediterranean Journal of Human Rights is of interest to all those having an academic interest or practical interest in the promotion and protection of human rights in the Mediterranean region. The journal focuses on issues which are the common concern of lawyers, political scientists, economists and sociologists.

FORMAT

Each edition of the Mediterranean Journal of Human Rights is a dossier of information on cross-cultural application of a specific area of Human Rights. *Politics, Law and Religion in the Mediterranean; Women's Rights; Ethnic Groups and Minorities; Environmental Rights; Political Participation and Immigration* are some of the themes that the Review deals with.

Three issues of the journal are published per year. Papers, which may be submitted in any language, are published in English and French, with Abstracts translated into Arabic.

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TOWARDS THE ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL COURT (ICC)

EDITORIAL

SALVO ANDÒ AND SERGIO STANZANI

The reason for publishing the proceedings of the ICC conference, held in Malta on 12 and 13 September 1997, in the fourth issue of the "Mediterranean Journal of Human Rights" is not simply a gesture of courtesy towards the Maltese institutions which, with their spirit of friendship and organizational capabilities, have ensured the success of this conference, conceived by the International Committee "No Peace without Justice" and accomplished with the collaboration of the University of Malta and the Foundation for International Studies.

We believe that these proceedings are actually a very significant scientific contribution to the keen debate that is taking place in political and academic circles on the institution of the ICC, particularly on its institutional identity and the ways in which it will function. These proceedings can therefore become an effective tool for all those who in the coming months, at various levels, will be giving their opinions and taking decisions on which the imminent creation of the ICC will depend.

The Malta conference has been attended by many jurists coming from almost all the countries of the Mediterranean, besides the politicians who, in these last years, have been working hard towards the creation of the International Court. In Malta, therefore, for the first time, a regional conference was held to discuss the Statute of the ICC, tackling technical problems which are still keenly debated within the *ad hoc* preparatory committee of the United Nations which is in charge of drawing up the Statute of the Court. The Maltese conference has projected an almost unanimous will to set up the ICC as soon as possible, but also a desire to give it a good start.

At present, since the age-old resistance of those States who up to now have opposed the institution of the ICC, because they consider it as a danger to the sovereignty of States which has been protected by international law for years, the problem is how to get the widest

approval possible for this new institution. It is important that the biggest number possible of States identify themselves with the activity of the ICC, and support its legal functions, by guaranteeing first of all the execution of the decisions that it will take. It is necessary, therefore, to find a point of agreement between what would be ideal for the protection of human rights and what appears to be politically possible.

Two principal problems have to be overcome, because they can threaten progress, or postpone the creation of the Court *sine die* and suffocate its role. These are the utopia of a Court which could do without the consent of the States concerned, and the *realpolitik* practiced by those who hold that the Court must act only when the States concerned decide that it could. The proper point of mediation between the different needs cannot consist of regulations which would divest the ICC of freedom of movement, rendering it hostage and at the mercy of the most powerful States. This would reduce this revolutionary act to an act of courtesy, to a symbolic act incapable of practical consequences. If this were to happen, if it were to become simply a promise of a revolution, then the creation of the ICC would give rise to dangerous frustrations and would constitute a step backwards in the culture of fundamental rights at the international level.

There are certainly deep-rooted convictions among politicians and jurists which are traditionally at the basis of the two opposing positions on the ICC. There is the idea, which has lately found strength in the many failures encountered by the crusades for human rights, according to which at the international level justice has never been and will never be equal for everyone, and that therefore the international Court, if it is not completely free from the individual States will only be a trap by which the strong States will impose their justice on the weak States. There is the other idea, upheld by some countries which, during the cold war enjoyed the right, through the power of veto, to paralyze even the most generous humanitarian initiatives of the United Nations, according to which a kind of justice which is too equal for all, will legitimate dangerous and growing interference within the boundaries of national sovereignty, and would therefore create great disorder in relations between States.

It seems to us that the message which emerges from the Malta Conference on this point is very clear. No world order can be founded on impunity, because impunity will sooner or later produce feelings of revenge, and will therefore bring political instability. However, no international justice can be established without the cooperation

of the States' institutions, which must necessarily collaborate. The ICC must have a subsidiary role with reference to the States, in the sense that it must constitute a request for supreme justice when the States do not want or cannot administer justice by the machinery they have at their disposal. The great issue at the centre of the debate which we are hosting in this fourth issue of the Mediterranean Journal of Human Rights is the manner in which this "subsidiary character" can be organized in practice, i.e. how the States must strive to interact with the ICC.

INAUGURAL SESSION OF THE CONFERENCE FOR THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT BY THE YEAR 1998

ROGER ELLUL-MICALLEF, RECTOR, UNIVERSITY OF MALTA

Honorable Prime Minister, Distinguished Guests, Participants, Ladies and Gentlemen,

It is a pleasure to have been invited to address this inaugural session. On behalf of the University of Malta, I would like to state that we feel privileged to be associated with such an influential body as "No Peace Without Justice" in its praiseworthy efforts to promote the establishment of a permanent International Criminal Court.

It is tragic to recall that, despite the aspirations and goals which inspired the founders of the United Nations, succeeding generations have not been saved from the scourge of war. Crimes against humanity - despite the Nuremberg and Tokyo Trials - continue to bring untold sorrow and tragedy. It has been estimated that since the end of the Second World War and the establishment of the United Nations, wars and practices condemned at Nuremberg have cost humanity some 20 million lives. The crimes, which were perpetrated during World War II, continue to be repeated. Sadly, we regularly read about or see the human tragedies of the victims of international crimes. Atrocities in the former Yugoslavia, Rwanda and Somalia are contemporary manifestations of this cruel reality.

It is a sad reflection of the divisions resulting from the Cold War, that it has not yet been possible to establish a permanent International Criminal Court in the face of so much human indignity and tragedy. The international understanding that the collapse of the Cold War has brought about represents a major step towards collective sanity and provides a unique opportunity to implement the UN founders' aspirations on the enforcement of International Criminal Law. It is, therefore, with a firm determination that our

University supports the current efforts to establish an International Criminal Court which will enhance the effective prosecution and suppression of international crimes. We hope that this court will have jurisdiction over such crimes, where recourse to national courts may not be available, or are ineffective.

I would like to take this opportunity to recall that our University has, for many years now, been active in the field of the codification and progressive development of international law, particularly its branches which relate to the protection of the common good of mankind.

Possibly, one of the earliest examples of this role predates the setting up of the United Nations. Indeed, it is significant that a graduate of our University, Professor L J Columbus Q.C. who settled in London in the 1930's became a leading authority on humanitarian law at sea. His works - which were translated into over ten major languages - helped to lay the foundations of this important branch of international law.

The doctrine of the Common Heritage of Mankind is now enshrined in the 1982 **UN Convention on the Law of the Sea**. It regulates the exploration and exploitation of the sea-bed resources beyond the limits of national jurisdiction in the interest of humanity as a whole. The idea of inserting it in the Law of the Sea was first proposed in 1967 by Malta. In the formulation of this proposal, a number of members of the University were consulted and involved. Indeed, this input was institutionalized by the convening of an annual academic conference at the University which provided an intellectual contribution to the deliberations of the Third UN Conference on the Law of the Sea.

Another initiative which originated from the University of Malta relates to the need to develop international rules designed to protect the global environment. In 1988, the problem of anthropogenic climate change was brought to the attention of the United Nations General Assembly by the Maltese Government. In its proposals, Malta characterized climate change as "the common concern of mankind" a concept which is enshrined in UN Conventions on climate change and biodiversity. This development seems to be particularly relevant to the theme of this Conference, particularly when discussing the core crimes over which the proposed Court will have jurisdiction. It would see, relevant to note that in its definition of an "international crime", the International Law Commission has included, together with serious breaches of the law on peace, security and the protection of the human being, serious breaches of obligations to protect the

environment. In my view, it may be worthwhile to consider how fundamental environmental conditions which sustain life on earth could be effectively protected by the new mechanisms being proposed.

As we proceed towards a new millenium, we have a duty to provide future generations with a judicial mechanism that will establish, fairly and justly, the guilt of the perpetrators of international crimes and provide for their punishment. The establishment of a permanent International Criminal Court should provide such a mechanism and constitute a solid reaffirmation of our faith in human rights, in the equal rights of men and women, and of nations large or small.

It gives me great pleasure, this morning, on behalf of the Government of Malta, to extend a warm welcome to such a distinguished group of scholars and experts in International Criminal Law. A particular welcome goes to Emma Bonino, European Commissioner for Humanitarian Affairs, who together with No Peace Without Justice, is the driving force behind this international initiative of raising public awareness in the greatest number of countries possible, of the need for a final breakthrough in the creation of an International Criminal Court.

This occassion serves to reaffirm Malta's Euro-Mediterranean vocation. As a small island in the centre of the Mediterranean, with a history as old as that of the Sea, european in character and culture, mediterranean in soul and perspective, Malta is continually interested in promoting collaboration and joint projects between European and Mediterranean societies.

The Euro-Med Conference held in Malta last April was living proof of the contribution that this island can make, as a Switzerland of the Mediterranean, to the promotion of co-operation and joint progress. Today's International Conference, being held in Malta, confirms this commitment. It is all the more noteworthy that this conference is setting forward new themes for international cooperation in legal practice that transcend national boundaries while enshrining modern concepts of human rights and civilized behaviour.

More than half a century has passed since the United Nations were founded. Not surprisingly, one of the original objectives of the United Nations was to establish a permanent International Criminal Court that would pass judgement on those guilty of crimes against humanity. This was understandable, particularly in the wake of the atrocities committed during the Second World War and the experience of the Nuremberg and Tokyo Tribunals. To date, however, the United Nations member States have been unable to agree on the jurisdiction and purpose of such a court, not to mention the difficulties encountered in formulating a Code of International Criminal Law which would be acceptable to the majority of States. The atrocities that have taken place during this decade in several parts of the world, but in particular in the former Yugoslavia and Rwanda, have

highlighted once more, the importance and the urgency of the matter. The end of the Cold War, on the other hand, has helped to smooth down certain obstacles, mostly of a political nature, but camouflaged in a dense legal smoke-screen, which have stood in the way, and often brought the discussions to a stale-mate, in the past. At the last three sessions of the United Nations General Assembly, a new attempt at the establishment of such a court was undertaken. One may recall that the UN General Assembly, during its 51st Session adopted a Resolution deciding to put on the agenda of the 1997/98 Sessions of the Preparatory Committee, the finalising of the Statute of the International Criminal Court and to convene a Diplomatic Conference of Plenipotentiaries establishing the Court in 1998. This is why the initiative of *No Peace without Justice*, at this particular point in time, is most welcome particularly since, as you all know, not all member states of the UN are in favour of the project of the Statute presently being elaborated, let alone in favour of the establishment of the International Criminal Court in 1998.

Since the preparation of a draft statute, way back in 1993, the discussions within the Sixth (legal) Committee of the United Nations have undoubtedly shown that the creation of an International Criminal Court enjoys a broad measure of support among member States. However, the initial discussions also showed that there was deep disagreement on a number of major issues among States. Such issues included the nature and ambit of the court's jurisdiction, the role of the security council, the requirements of consent to the court's jurisdiction and the independence of the procuracy. The Ad Hoc Committee and the Preparatory Committee created by the General Assembly have been extremely useful in articulating these major areas of disagreement, making it easier to focus upon. Some of these issues were addressed in the course of the Conference organised by *No Peace without Justice* held in Paris last June, and I am sure that they will be further debated in this meeting.

Some of the pending issues which I think deserve full attention will now be highlighted.

The premise underlying the draft Statute is that the proposed court would be established via a multilateral convention. This is the recommendation of the International Law Commission. What is perhaps most important, in this context, is that the court would be in a position to command moral authority, internationality, and enforcement powers essential to its functions as a supreme penal body. Can these be satisfactorily achieved within the context of a multilateral convention? Or should the UN Charter be amended to

incorporate the proposed court within the UN? Can this be done without substantial delay and political wrangling? This is one issue which the Preparatory Committee has been occupied with in the past two years and which, it seems, is still unsolved, although the tendency seems to be that the court will not be created through an amendment of the UN Charter. If this is the case, it is imperative that the closest relationship possible be maintained between the court and the UN.

The procuracy is the proposed independent organ of the court that would be responsible for the investigations of complaints brought in accordance with the Statute and for the conduct of prosecutions. It is not permitted to seek or act on instructions from any external source. The procuracy, however, although described as independent, has no power to initiate investigations ex officio, as it cannot bring a complaint which in reality triggers an investigation. Behind this it seems there are concerns for national sovereignty and the belief that International Law has not yet developed to the stage where the international community as a whole is prepared to accept an independent prosecuting body. But, are not the crimes within the jurisdiction of the court of concern to the international community as a whole? The whole idea of establishing such a court is to preserve the interest of the international community to punish crimes against humanity. So, should the interests of the international community be subordinated to national interests? This is another issue which I am certain will form part of your discussions.

A seemingly less controversial issue, but which is of paramount importance, is the question of rules of procedure and evidence. Both the Ad Hoc Committee, as well as the Preparatory Committee, seem to favour the idea that the Statute should incorporate certain "principal rules" leaving to the judges, then, the task of drafting rules of court. I think there is a lot of wisdom behind this approach, provided enough room is left for a flexible mechanism to deal with situations as they arise. In this context, the real question is whether, and/or how far, State parties should be allowed to have a say in the formulation of the rules of evidence without endangering the independence of the court.

As regards evidence, the draft Statute provides that this may be excluded if it is obtained in violation of international human rights standards or by means which cast substantial doubts on its reliability. There should be no reservations when such evidence is obtained in violation of international human right standards but some violations, such as unlawful searches and other invasions of privacy, do not

necessarily affect the reliability of the evidence, although they certainly may hurt an individual directly. In addition, the procuracy may have to rely on evidence which has come into its possession by persons, entities or State authorities over which it has no control whatsoever. Is it therefore wise to retain such a wide exclusionary rule? I am sure this issue will be addressed in the course of this meeting.

As regards the exercise of the court's jurisdiction, the draft Statute limits this in a variety of ways especially in relation to the role of the Security Council, and the restricted method of filing of complaints. This is perhaps one of the most sensitive areas which lies at the core of much of the debate that has been going on. Is the requirement that a decision of the Security Council is necessary for the commencement of prosecutions related to Chapter VII matters under consideration by the Council, not at variance with the basic notions of the independence of the judiciary? The very nature of the duties which the International Criminal Court will be called upon to perform necessitate the absence of anything which may tend to negate transparency of proceedings. How can such transparency be secured if prosecution is made to depend on the decision of the Security Council where transparency is not one of the virtues and where politics is supreme? The International Criminal Court, when it comes into existence, and the Security Council are bodies of a completely different nature, charged with different functions and duties. While the Security Council makes decisions of a complex nature in politically sensitive situations dependent on the power structures and alignments of each situation, a court makes reasoned decisions on the basis only of facts and the applicable law. I am certain that this too is an issue which will keep this gathering occupied in these two days.

In this context, also, another question seems to emerge. It appears, that in any given case, the signing and ratification of the convention by a particular State would only be a first expression of consent. A further declaration of acceptance, with or without reservations, of the jurisdiction of the court is required and it is only States which have expressed such second level of consent in relation to a particular crime that may file a complaint of such a crime. Is this a suitable ground on which to found the jurisdiction of an international court? Should not the court have inherent jurisdiction in relation to all the crimes in its Statute in a way that the ratification of the Statute will imply acceptance of jurisdiction? And what about those States which will not be parties to the convention? How far should these

States be allowed to interfere with the workings of the court?

The preamble to the Statute specifies 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". As a matter of fact, the commentary of the preamble makes it clear that the court is not intended to exclude any existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under any existing arrangements. The relationship between the court and national courts is based on the principle of complementarity. The parameters of this complementarity, however, still seem to be somewhat vague. A precise definition may be needed. For example, would the International Criminal Court, in the absence of clear guidelines and criteria, be competent to decide on the effectiveness or otherwise of national judicial systems? There are other problems in this context which I feel need to be addressed if the frontiers of the court are to be distinctly drawn up.

There are several other issues which have been mentioned before and which the Preparatory Committee in particular has been very ably considering. I shall not dwell at any length on any of them, as I am sure that you are all aware of them. Such issues are trials in absentia, matters of contempt, the financing of the court and the absence from the Statute of the right of the court to freeze assets.

I now come to my conclusion. The international community has waited for half a century to see the dream of an International Criminal Court come true. The draft Statute is only the latest development of a long and chequered journey. It is my belief that now, more than ever before, these efforts are coming to fruition. It is thanks to the sterling work and dedication of the International Law Commission, the Ad Hoc Committee and the Preparatory Committee that we have advanced so far. It is also thanks to the initiatives of organisations like No Peace Without Justice that the discussion on the subject has helped these bodies to focus better on the very difficult and thorny issues. This is one of the reasons why I accepted to co-sponsor this meeting. The other reason is that my Government strongly believes in the need for an International Criminal Court and will continue to support all efforts conducive to a swift and effective conclusion. My Government believes that there cannot be justice without frontiers nor can justice be sacrificed at the altar of national interest.

Once more I welcome you all wishing you every success in your work.

Unless there has been a dramatic development in the last few minutes, Radovan Karadzic and Ratko Mladic, two of the most notorious indicted war criminals, are still free men. If they had been captured, or by some miracle surrendered, my mobile phone or yours would be buzzing by now. So Karadzic and Mladic are still at large, instead of being in The Hague, where a United Nations Security Council ad hoc tribunal is currently trying crimes against humanity in the former Yugoslavia. I strongly believe that the arrogance of men living in impunity breeds contempt for the law among like-minded criminals who consider themselves beyond its reach.

That is why we must keep up the pressure to change the situation in Bosnia, because there can be no real, lasting peace in that tragic country without justice. I am focusing on the cases of Karadzic and Mladic because they are so fresh in our minds. For me personally, I will never forget witnessing the aftermath of Mladic's bloody work in Srebrenica in the summer of 1995. I went to Tuzla when we realised that thousands were missing after the fall of Srebrenica - thousands of men and boys, that is. Mladic's men rounded up the women and children and bussed them away, while herding their menfolk to their deaths. In Tuzla, I saw those dispossessed, bereaved women and children stunned into helpless, disbelieving silence on the tarmac in improvised camps there.

Those women have survived physically - I went to visit them again last year on the anniversary of the fall of Srebrenica. They may look normal to us today, but the scars in their minds and in the fabric of their society will never heal unless the killers are brought to justice.

I hardly need to tell you that Karadzic and Mladic are but two examples of their kind: indicted war criminals who have yet to face a court. Whatever the fate of these two, there is of course a greater principle at stake - the principle of justice being done and being seen to be done in the aftermath of crimes against humanity. Only justice can reinstate the foundations for sustainable, law-abiding societies in which citizens no longer feel tempted to take justice into their own hands with potentially lingering, deadly consequences. Private vendettas solve nothing in the long run.

Recently, we all saw the images of the notorious Khmer Rouge leader Pol Pot at a so-called trial in Cambodia. He looked like a pathetic old man apparently resigned to his fate in a country still struggling with its conflicts. But the world cannot and must not accept that strange event as the last chapter in the story of the man who bears responsibility for the fate of at least a million of his people.

There can be no peace without justice: those of you who know me will have heard me say it before, and I will say it again, and again, until the day when we see the birth of Permanent International Criminal Court. Let us look back for a moment. In 1945, after the horrors of the Second World War in both Europe and Asia, the revulsion over war crimes was expressed in a will and desire for justice that translated into a message which can be summarised as 'Never again'. Military tribunals prosecuted Nazi and Japanese war criminals in a process that helped to pave the way for reconciliation after formal peace.

Those tribunals were eventually dissolved, but they raised hopes for the idea that a Permanent International Criminal Court might succeed them, to deal with crimes against humanity whenever and wherever they might occur. For a while at least, many people started sleeping easier, feeling that the lessons learned had been so powerful that they would in themselves be a deterrent to violations. Many did indeed enjoy peace and prosperity in the Long Boom that followed the Second World War. But peace, the kind of security that most of us in Western Europe tend to take for granted, was far from universal. And the world also had to reckon with the Cold War, as a result of which the permanent court project quietly disappeared from the international agenda, despite the incidence of crimes such as those that occurred in Cambodia.

So why has the idea of a permanent court been revived now? The fact is that we were hoping for a peace dividend after the Cold War, and instead, to the astonishment of many witnessed barbaric atrocities on an unprecedented scale.

The very names of Rwanda and former Yugoslavia now rank alongside Auschwitz as emblems of barbaric horror, but there are others too. When I say witnessed, I mean just that: more people than ever before have been able to see the evidence for themselves, in their homes, thanks to media coverage making available shocking images broadcast on television screens worldwide. The broadcast media today chase those images in a gruesome race to capture prime-time audiences. The intensity and the barbarity of what has happened

has not ceased to horrify us, and no-one today within reach of a radio or TV can claim they did not know it was going on.

In response, the United Nations Security Council bowed to public pressure to set up two ad hoc tribunals - in 1993, to try crimes against humanity in the former Yugoslavia, and in 1994, to try those accused of genocide in Rwanda. This is of course an initiative to be welcomed. We now have a situation in which those coming to trial are facing not the victors in the conflict in question, but tribunals sanctioned by the international community. We know of the difficulties those tribunals are facing in terms of staffing and funding, and indeed in terms of credibility, given that some of the prime suspects are still at large.

And we know that the Rwanda and ex-Yugoslavia tribunals will eventually be dissolved. Despite this, in setting them up, the world community has taken a significant step in demonstrating its will to enforce international law, especially humanitarian law.

But we must think of the future too. We cannot bury our heads in the sand, hoping against hope that there will never be a 'next time', or relying vaguely to the idea that we can always campaign for another ad hoc tribunal if necessary. We know perfectly well that nothing can bring back people who died or disappeared in sinister circumstances in Rwanda, ex-Zaire, ex-Yugoslavia, or in Argentina, El Salvador, Cambodia or Kurdistan. But it is high time that we back the words of our international declarations of respect for human rights with actions. Our joint action in setting up an international court would be in part of a memorial to those that perished in crimes past. The court will of course not be able to try criminals who committed atrocities before it was set up. But let us hope it might contribute to a process of reconciliation among those who survive future conflicts, and, most important, that it would be a deterrent too, contributing to crisis prevention.

As European Commissioner for Humanitarian Affairs, I will of course endeavour to make available emergency aid for victims of complex, violent crises whenever I am called upon to do so. But I have always stressed that such aid can never be a substitute for political solutions to such crises, or better still, conflict prevention. A Permanent Criminal Court is one essential mechanism among those for which the international community should take collective responsibility now. The winds of change are with us, and the prospects for establishing such a court have never been better. Rwanda and the former Yugoslavia provided momentum that we must encourage.

In August, a United Nations Preparatory Committee dedicated to

the international criminal court project made headway on some crucial issues at its fourth session in New York - more of that in a moment. The Committee has been spurred on by the General Assembly's decision to set a specific date for a landmark conference in this whole process. In June and July 1998, there will be a diplomatic conference to finalize the court's statute in Rome. In this regard I take this opportunity to pay a tribute to my own country, Italy, whose Governments over the last several years have shown the strongest commitment for the establishment of the International Criminal Court.

Genocide is of course the crime that would be the court's main concern, but we all know that crimes against humanity take many forms, and the committee is working on defining them. The court would not replace national courts, but would be a last resort in cases in which national courts were unwilling or unable to bring perpetrators to justice. And as for sanctions, these would take the form of appropriate prison sentences. As defenders of human rights, we do not believe the death sentence is appropriate, even for murderers. Killing the killers would in our opinion only serve to reinforce a deadly, vicious circle. Our aim is lasting peace and reconciliation.

The devil is in the detail of procedures leading to an event as momentous as setting up a Permanent International Court, and there is a heavy agenda before that diplomatic conference happens in Rome. At the August meeting of the United Nations Preparatory Committee, the issues examined were complementarity, that is, the relationship between the new court and national courts; as well as trigger mechanisms - who exactly can trigger the Court's jurisdiction, and how? The Committee also discussed principles of criminal procedure, including the rights of suspects, defendants and victims, as well as witness protection measures.

The next date in our diaries is December 1, 1997 in New York, where that preparatory committee meets again. International cooperation and judicial assistance will occupy one working group. A second group will address the principles of criminal law, penalties, and the list and definition of crimes covered. The meeting will continue until December 12.

We must all be vigilant, we must all play whatever part we can in ensuring a good outcome. We owe it as a tribute to victims of crimes past and present, but above all as a warning to potential felons who watched Karadzic, Mladic and others at work and who might be tempted into copy-cat crimes. They must no longer be able to take

comfort in our impotence to deter them. The message to them must be: Stop! The world will no longer tolerate such nightmares. The countdown to Rome starts here.

SERGIO STANZANI, President, No Peace Without Justice, Italy

Honourable Prime Minister, Commissioner Bonino, Excellencies, Representatives of the Mediterranean Countries, Ladies and Gentlemen, dear Friends. First of all we wish to express our thanks to Malta for its hospitality and to its Prime Minister for his significant presence at the opening ceremony of this conference. We appreciate this occasion and look forward to the discussion on a topic which is, after all, the *raison d'être* of our association: that there can be no peace without justice.

It is from this point of view that my thanks, as President of the Committee of Parliamentarians, Mayors and Citizens "No Peace without Justice", go first of all to the University of Malta and the Foundation for International Studies for their proposal to make Malta one of the hubs of our international campaign having the scope of ensuring that an International Criminal Court may finally be set up in 1998.

Three months ago we met in Paris and launched a world-wide appeal to move towards this objective. A month ago the Preparatory Committee of the United Nations met and some progress was made but again contradictions and ambiguities arose, or rather it became even more clear that although the target is within reach as it has never been before, success is still fragile and it is exposed to serious dangers. In the meantime, from another point of view, these last months have actually brought to the attention of the international political arena the question of the functioning and the effectiveness of the ad hoc courts, especially of the one for the former Yugoslavia. I can even say that it is precisely the question of the effectiveness of the court's work that will determine the outcome of the peace process in Bosnia, as if to give concrete proof and make everyone aware that our assumption that there can be no peace without justice is fundamentally true and not rhetorical.

All this shows how crucial it is that everyone be convinced that there must be no delay in holding the conference which will set up the Court, in the few months which are left before June 1998. Increased awareness is indispensable to overcome the remaining hesitations, fears and resistance, so that a large majority of the

member-states of the UN may come to an agreement at this historic turning-point.

This is the specific meaning of our meeting today, which is in some ways different to the one held in Paris which I have just mentioned. Here the dialogue is between participants with various opinions, although they all have the same will to search for common ground. Here we all meet, men and women of science and law, from neighbouring but very different countries, from all the shores of the Mediterranean, bringing different juridical and political experiences and cultures, to discuss these topics, to understand together what we can say and do together, what roads to choose and suggestions to make in our own countries and circles.

In this context it is quite significant that we are meeting here in this island, whose geography, history, traditions and culture make it the ideal and emblematic place for such a meeting.

Together we must make public opinion in our countries sensitive to the question of the International Criminal Court, that the ICC is not a distant and abstract issue, technically juridical and only within the competence of diplomats, but that it is an issue which is directly relevant to individuals and to peoples. The spread of legal culture and the mobilization of public opinion can and must transform a kind of support which is still too half-hearted and lacks concentration in concrete and convinced action, so that certain objectives and reservations which are still holding back many governments may be enthusiastically overcome.

Here, from Malta, a process can start which, thanks to the contribution of each participant, will strengthen the work of each one of us in his own country and with respect to his government, be a message to the many and diverse public opinions and lay solid foundations for the future steps which our world-wide campaign intends taking.

Actually, as you may know, further meetings are planned, in Montevideo, in Atlanta, New York, New Delhi and Dakar, culminating in a large-scale conference which we hope to organize parallel to the UN conference which will define the Treaty establishing the Court in June 1998 in Rome.

It is to this conference that we dedicate our efforts during these two days' work, in order to obtain the result, desired with and through the transnational radical party, No Peace without Justice, and all those who believe in this battle and who are aware that this result is either reached during 1998 or else could be lost forever. From now I wish to say that I hope to see you all in Rome, to review the progress

achieved and to see whether we will have moved forward, maybe at least one millimetre, but in the right direction.
It is only yesterday that our illustrious friend Cherif Bassiouni, whom many regard as the person who has led the international Community to embark on this new instrument of international law, achieved an important success in Cairo, getting the InterParliamentary Union to adopt unanimously a universal declaration on democracy which binds the institution of the court to the fundamental principles endorsed by this Charter. It is auspicious also for our own work, that I hope will be concluded with the success that it deserves.

FIRST SESSION:

A NEW FRONTIER FOR THE DEFENSE OF HUMAN DIGNITY: FROM THE *AD HOC* TRIBUNALS TO AN INTERNATIONAL CRIMINAL COURT. COMPETENCE AND JURISDICTION OF AN ICC

M CHERIF BASSIOUNI*[1]

I. Introduction[2]

1. In 1989 Trinidad and Tobago proposed the creation of an International Criminal Court (ICC) to the General Assembly of the United Nations to aid in the fight against narcotics trafficking. This proposal revived the UN's work in connection with the establishment of an International Criminal Court. Previously, two special committees of the General Assembly had painstakingly developed

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[2] *See* Report of the Preparatory Committee for the Establishment of an International Criminal Court; UN Doc. A/51/22.

in 1951[3] and 1953[4] draft statutes for a permanent International Criminal Court, but it had been tabled as a result of the "Cold War". The only other UN initiative was in 1980 when a draft statute for the establishment of an international criminal jurisdiction to enforce the *Apartheid* Convention[5] was proposed, but it too was left without follow-up.

2. While there was little hope for the prospects of an ICC between 1989 and 1992, a chain of events was set in motion when the UN Security Council in Resolution 780[6] established a Commission of Experts to investigate violations of international humanitarian law in the Former Yugoslavia.[7] This was the first time since WWII that the international community provided for the investigation of violators of international humanitarian law. In its first Interim

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[3] **Draft Statute for an International Criminal Court** (Annex to the Report of the Committee on International Criminal Jurisdiction, 31 August 1951), 7 **Gaor** Supp. 11, UN Doc. A/2136 (1952). For a history of international efforts to establish an International Criminal Court, *see* **Benjamin Ferencz, an International Criminal Court: A Step Towards World Peace**; A Documentary History and Analysis, Ocean Publications Inc., 1980.

[4] **Revised Draft Statute for an International Criminal Court** (Annex to the Report of the Committee on International Criminal Jurisdiction, 20 August 1953), 9 **Gaor** Supp. 12, UN Doc. A/2645 (1954).

[5] **Draft Statute for the Creation of an International Criminal Jurisdiction to implement the International Convention on the Suppression and Punishment of the Crime of *Apartheid***, 19 January 1980, UN Doc. E/CN.4/1416. The text, developed by this writer, is commented on in M Cherif Bassiouni and Daniel H Derby, *Final Report on the establishment of an international criminal court for the implementation of the Apartheid Convention and other relevant international instruments*, 9 **Hofstra Law Review 523**.

[6] S.C.Res. 780, **UN Scor**, 47th Year, 1992 S.C.Res & Dec. At 36, Para. 2, UN Doc. S/INF/48 (1992).

[7] United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigative Violations of International Humanitarian Law in the Former Yugoslavia. For the Commission's Final Report, *see* Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992) **UN SCOR**, Annex, UN Doc. S/1994/674 (27 May 1994) and the Annexes to the Final Report, UN Doc S/1994/674/Add. 2 (1994). For a description of the Commission's work *see*, M Cherif Bassiouni, **The Commission of Experts established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia**, Occasional Paper No. 2, International Human Rights Law Institute, DePaul University College of Law, 1996.

Report, the Commission of Experts stated that the establishment of an *ad hoc* international criminal tribunal would be "consistent with the direction of its work".[8] Recalling that report, the Security Council in Resolution 808 proceeded to establish the International Criminal Tribunal for the Former Yugoslavia (ICTFY).[9] The Resolution stated that the Security Council:

> *[d] ecide [d]* that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[10]

The Security Council followed the same procedure in 1994 in connection with the events in Rwanda, and established the International Criminal Tribunal for Rwanda (ICTR).[11] The events in Yugoslavia and Rwanda shocked the world out of its complacency and the idea of prosecuting those who committed international crimes acquired a broad based support in world public opinion and in many governments.

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[8] Letter from the Secretary-General to the President of the Security Council, Feb. 9, 1993, UN Doc S/25274 (1993), transmitting *Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992), para. 74.

[9] S.C.Res. 808, **UN Scor**, 48th Year, 3175th mtg. At 1, UN Doc. S/RES/808 (1993). For a Commentary on the International Criminal Tribunal for the Former Yugoslavia, *see* **M. Cherif Bassiouni (with the collaboration of Peter Manikas), the Law of the International Criminal Tribunal for the Former Yugoslavia**, Transnational Publishers Inc. (1996); **Virginia Morris & Michael Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia** (1995).

[10] S.C.Res. 808, *supra. fn. 8*, at para. 1.

[11] On the basis of the precedent of the Former Yugoslavia, the Security Council established a similar Commission of Experts in S.C.Res. 935, **UN Scor**, 49th Year, 3400th mtg. at 1, UN Doc. S/RES/935 (1994). That Commission did not however engage in investigations and lasted only three months. The Security Council subsequently set up a judicial mechanism for Rwanda with ties to the International Criminal Tribunal for the Former Yugoslavia in S.C.Res. 955, **UN Scor**, 49th Year, 345rd mtg. at 1, UN Doc. S/RES/955 (1994). For a Commentary on the International Criminal Tribunal for Rwanda, *see* Larry D. Johnson, **The International Tribunal for Rwanda,** 67 *Revue International De Droit Penal* 211.

3. Largely out of the 1989 initiative of Trinidad and Tobago, and the International Law Commission's (ILC) work on the draft Code of Crimes Against the Peace and Security of Mankind[12], the General Assembly in resolution 47/33 of 25 November 1992 requested that the International Law Commission (ILC) undertake the elaboration of a draft statute for a permanent International Criminal Court. By the time that this draft was produced in 1994, the climate in which it was viewed had changed significantly due in large part to the tragic victimization in the Yugoslav and Rwandan conflicts, and the fact that the Security Council had established in 1993 the International Criminal Tribunal for the Former Yugoslavia[13] and in 1994, the International Criminal Tribunal for Rwanda.[14] In order to guide its work in drafting a statute for the ICC, the ILC looked to international precedents. They are: the Nuremberg[15] and Tokyo[16] tribunal statutes, the 1951[17] and 1953[18] ICC draft statutes, the 1980 draft statute for the creation of an international criminal jurisdiction to enforce the *Apartheid* convention[19], and the 1993 ICTFY Statute[20] and the 1994 ICTR Statute.[21]

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

[13] *See generally* **M. Cherif Bassiouni (with the collaboration of Peter Manikas), the law of the International Criminal Tribunal for the Former Yugoslavia**, *supra. fn. 8.*

[14] *See generally* Larry Johnson, *The International Tribunal for Rwanda, supra.* fn. 10.

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

[16] **International Military Tribunal for the Far East Proclaimed at Tokyo,** 19 January 1946 and *amended* 26 April 1946, T.I.A.S. No. 1589 (*entered into force*, 8 August 1945), **Annex, Charter of the International Military Tribunal for the Far East (Tokyo).**

[17] UN Doc. A/2136 (1952).

[18] UN Doc. A/2645 (1954).

[19] *See* **M. Cherif Bassiouni**, *Draft Statute for an International Criminal Tribunal*, 9 **Nouvelles Études Pénales**, 1993.

[20] *Infra fn.* 8.

[21] *Infra fn.* 10.

4. In 1994, the ILC completed a draft statute for an ICC and recommended to the General Assembly to call a conference of plenipotentiaries "to study the draft statute and to conclude a convention on the establishment of an international criminal court".[22] However, the Sixth Committee of the General Assembly, at the instigation of states reluctant to see the court come into being so rapidly, declined to call a diplomatic conference as the ILC had requested. Instead, the General Assembly established an *Ad Hoc* Committee to review the ILC's 1994 draft statute.[23] According to GA resolution 49/53 of 9 December 1994, the mandate of the *Ad Hoc* Committee was:

> to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.[24]

The General Assembly hoped that the *Ad Hoc* Committee would resolve the differences between states favoring the establishment of an ICC and those who were opposed or reluctant to see this result in the short term. The *Ad Hoc* Committee met for two sessions in 1995, but failed to come to sufficient agreement to call a conference of plenipotentiaries. However, these meetings had the positive effect of allowing states to familiarize themselves with the issues involved in the creation of an International Criminal Court. The educational value produced by the work of the *Ad Hoc* Committee served a beneficial purpose and led to the establishment of a Preparatory Committee in 1996 [hereinafter referred to as the PrepCom]. The mandate of the 1996 PrepCom[25] was explicitly goal-oriented. The 1995 *Ad Hoc* Committee discussed the principal ideas that made the work of the 1996 PrepCom more specific. Consideration of the benefits of the meetings of the 1995 *Ad Hoc* Committee must be tempered, however, with an acknowledgement of the difficulties that

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[22] *See* Report of the International Law Commission on the work of its 46th session, Official Records of the General Assembly, 49th Session, Supplement No. 10 (A/49/10), para. 90.

[23] *See* UN Doc. A/RES/49/53.

[24] UN Doc. A/RES/50/46.

[25] *See infra*.

still hinder elaboration of the draft statute. Proponents of the ICC have had to face something of a constant effort to keep the process moving forward. Due to the unfamiliarity of many with the important topics involved, and the related desire of all parties to cast a court which would be most useful, in their eyes, the process has sometimes seemed to delay meaningful progress. Regarding the number of proposals that have been made by States and the fact that the PrepCom has at times found it difficult to deal with them efficiently, it would probably be unfair to say that a purposeful war of attrition was being waged by opponents of the court, nevertheless the costs that governments had to bear in sending experts from capitals to long meetings in New York was felt by many delegations.

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

> to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries, and [it was] also decide[ed] that the work of the Preparatory Committee should be based on the draft statute prepared by the International Law Commission and should take into account the report of the *Ad Hoc* Committee and written comments submitted by States ... and, as appropriate, contributions of relevant organizations.[26]

As stated above, this mandate had a more specific, goal oriented character and was therefore due progression from the earlier mandate of the *Ad Hoc* Committee. The 1996 PrepCom did not, however, produce a "consolidated" text of a draft statute, and only succeeded in creating a report which compiled various proposals. On the basis of this work, the 1996 PrepCom proposed to the General Assembly to continue its work with an enhanced mandate and meet for another nine weeks in 1997-98 before a diplomatic conference

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[26] UN Doc. A/RES/50/46 at para. 2.

could be held. With all of this in mind, the 1996 PrepCom, in its report to the Sixth Committee stated:

> recognizing that this is a matter for the General Assembly, ... on the basis of its scheme of work, considers that it is realistic to regard the holding of a diplomatic conference of plenipotentiaries in 1998 as feasible.[27]

The weakness of the language in this recommendation is, however troubling. The insistence by some delegations on the inclusion of a footnote in the recommendations of the 1996 PrepCom reserving their positions on its findings and its decision to move towards a diplomatic conference in 1998 necessitates caution. The footnote states that:

> [s]ome delegations expressed reservations on the conclusions of the Preparatory Committee and felt that these conclusions do not prejudge the position of the States in the General Assembly.[28]

The lack of imperative to complete its work by April 1998 in the language of the recommendation to the 1996 PrepCom raises concerns. It raises the prospect that the 1997-98 PrepCom work could delay the convening of the conference in June 1998. The wording of the General Assembly resolution is not sufficiently peremptory to concentrate the minds of delegates to bring the process to end by April 1998. This prospect may offer opponents of the court a method by which to delay the outcome. Nevertheless, the General Assembly's resolution is quite specific.[29] It mandates the 1997-98 PrepCom:

(a) to meet three or four times up to a total of 9 weeks before the diplomatic conference. To organize its work so that it will finalize its work in April of 1998 and so as to allow the widest possible participation of States. The work should be done in the form of open-ended working groups, concentrating on the negotiation of proposals with a view of producing a widely acceptable draft consolidated text

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[27] Report of the Preparatory Committee, *supra* fn. 1, Vol. I at para. 370.

[28] *Ibid.* Vol. I at p. 77, fn. 12.

[29] UN Doc. A/51/627. This resolution was adopted by the UN General Assembly on December 17, 1996.

of a convention, to be submitted to the diplomatic conference. No simultaneous meetings of the Working Groups shall be held. The working groups should be fully transparent and should be by general agreement to secure the universality of the convention. Submission of reports of its debates will not be required. Interpretation and translation services will be available to the working groups.

(b) the subjects to be dealt with by the Preparatory Committee are:
1. List and definition and elements of crimes;
2. Principles of criminal law and penalties;
3. Organization of the court;
4. Procedures;
5. Complementarity and trigger mechanism;
6. Cooperation with states;
7. Establishment of the ICC and relationship with the UN;
8. Final clauses and financial matters;
9. Other matters.

The renewed mandate of the 1997-98 PrepCom is a more positive, goal oriented statement than that of the 1996 PrepCom, and it enhances the prospects for successful progression to the negotiation stage of the process.[30]

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

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[30] *Ibid.*

II. General Observations

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

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

9. It should also be noted that some Member-States, particularly among the less developed countries, may not be represented at the 1997-98 PrepCom, due to their lack of sufficient personnel and due to the costs of attending the PrepCom. The absence of these governments' delegations at the PrepCom is deleterious to the objective of making this effort truly universal. It will also make it more difficult at a later time, to induce these governments to become parties to the Convention establishing the ICC. Thus, some efforts should be made to ensure the participation of these governments through contributions to the special fund which the 1996 resolution for the establishment of an ICC requests the Secretary-General to establish for that purpose.[31]

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[31] Resolution on the establishment of an international criminal court, UN Doc. A/51/627, para. 7.

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

11. The Chair's latest informally proposed schedule was as follows[32]:

Session 1: 10-21 February 1997

Week 1 Opening with a plenary meeting

Working Group 1	**Working Group 2**
Morning Session	Afternoon Session
List and definitions and elements of crimes	Principles of criminal law and penalties

Week 2

Working Group 1	**Working Group**
Morning Session	Afternoon Session
List and definitions and elements of crimes	Principles of criminal law and penalties
	Procedures (if time permits)

Closing session in a plenary meeting.

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

Session 2: 4-15 August 1997

Week 1 Opening with a plenary meeting in Week 1

Working Group 1	Working Group 2
Morning Session	Afternoon Session
Complementarity and trigger mechanisms	Procedures

Week 2

Working Group 1	Working Group 2
Morning Session	Afternoon Session
Complementarity and trigger mechanism Organization of the Court	Procedures

III. Categories of Drafting Issues

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

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

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

(a) Parts involving technical and substantially technical issues

(i) Rules of Procedure and Evidence[33]

13. At the second session of the 1996 PrepCom an informal working group was established. It used a text presented by Australia and the

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[33] *See* Report of the PrepCom, *supra* fn. 1, Vol. I, pp. 47-61, Vol. II pp. 150-234.

Netherlands[34] as a basis for its work. The working group then received a significantly large number of additional proposals and amendments and this caused that part of the text to become unmanageable. A different approach is however needed in 1997-98 because the goal is not to produce a comprehensive code of criminal procedure and evidence with extensive details. Instead, the approach should be to develop in the statute, general principles of procedure and evidence, while an annex could contain more detailed provisions. The annex would expressly have the character of guidelines, and hence not be deemed of the same order as the rest of the Statute. Equally, the Statute could provide that this annex could be amended by the Committee of States-Parties on the recommendation of the ICC. This approach would also open the way for the ICC to develop rules of court to supplement the rules of procedure and evidence on the basis of the ICC's future experience. Since Rules of Court would be subject to the approval of the Committee of States-Parties, there should be no apprehension that the ICC would act with total independence on such a quasi-legislative undertaking. This approach would make the 1997-98 PrepCom's work on this part of the Statute more fruitful.

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

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[34] UN Doc. A/AC.249/L.2.
A meeting was held July 11-13, 1996 at the International Institute of Higher Studies in Criminal Sciences which was attended by 34 experts acting in their individual capacities from 20 countries. These experts were delegates to the '97 PrepCom. The meeting was also attended by NGO observers. Three texts were produced and are referred to hereinafter. The draft text on Rules of Procedure and Evidence was prepared by Australia and presented to the July '96 Siracusa group of experts. On the basis of observations and discussions during that meeting, Australia updated the text and submitted it to the Second Session where an informal working group was established to review it as well as other submissions.

(ii) Organization of the Court[35]

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

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

17. In this context, it is necessary to mention one further issue which has not yet been dealt with by the 1996 PrepCom. This is

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[35] *See* Report of the Preparatory Committee, *supra* fn. 1, Vol. II pp. 7-54.

whether the appeals chamber of the Tribunal will give a single, collegiate judgment, or whether each judge will have the right to give his or her own separate opinion, including dissenting or concurring opinions with the majority. The detrimental consequences of a relatively large number of broadly dissenting opinions is well illustrated by the effect which the appeal decisions in the **Tadic**[36] case before the ICTFY had on the jurisprudence of that Tribunal. The disparity between the various appeal judges' conclusions, and between the arguments which they used to reach those conclusions, did not serve well the development of a coherent jurisprudential basis for the Tribunal. If the jurisprudence of the ICC is to become similarly fractured due to the number and diversity of opinions given by the members of its appeal chamber, this could create difficulties for the development of international criminal law. Alternatively, the argument can be made that a plurality of opinions helps to develop the law of the system. With this in mind, it is proposed that the appeals chamber initially give single, collegiate judgments, but once the Committee of States-Parties is satisfied that the jurisprudence has developed sufficiently, it can decide to allow individual dissenting and concurring opinions. This question should be reviewed by the Committee of States-Parties after the first five years of the ICC's existence.

(iii) General Principles of Criminal Law[37]

18. Progress has been made at the second session of the 1996 PrepCom by the informal working group on this part which relied essentially on a text submitted by Canada.[38] Several other exhaustive proposals have been made by France and Japan, and it is not likely that new proposals of a substantially different nature will be made in 1997-98. That working group will however face some difficult doctrinal legal questions and will need to bridge the gaps between

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[36] **The Prosecutor v. Tadic**, Decision of the Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, 1996.

[37] *See* Report of the Preparatory Committee, *supra* fn. 1, Vol. I pp. 41-47, Vol. II pp. 79-104.

[38] UN Doc. A/AC.249/L.4.
The draft Canadian text was presented at the July Siracusa meeting of experts where it was discussed. Canada then made the appropriate changes based on the Siracusa discussions and submitted the text at the second session.

different legal systems. A balance between legal and diplomatic expertise which will allow progress on that specialized issue will be needed on that working group. Some substantive legal issues pertaining to this part will however depend on the resolution of certain political judgment issues and the working group would have to prepare some alternate bracketed texts. The major issues that are likely to arise are in connection with: (a) recognition of penal judgments; (b) double jeopardy or *non bis in idem*; (c) the mental element for each of the four crimes presently deemed to be within the inherent jurisdiction of the Court; and (d) penalties.

19. As to issues concerning (a) and (b), the relevant textual provisions will depend on political judgment issues concerning "complementarity" and the relationship of the ICC to national criminal jurisdictions, and more particularly whether the ICC will have "primacy" in that relationship. The two issues needing particular attention are: (c) the mental element and (d) penalties. As to (c) the mental element, it seems necessary to develop not only generally applicable provisions, but also specific provisions on the mental element required for each of the crimes within the inherent jurisdiction of the ICC. This is necessitated by the diversity of these crimes and their peculiarities in light of their history and development. Furthermore, as to the four crimes presently contemplated to be within the inherent jurisdiction of the ICC, the particularized mental element as to each of these crimes should also distinguish between what is required for decision-makers and what is required for executors, down to the lowest echelons of the chain of command.

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

21. Because of the highly technical nature of this part, the working group should avoid ambiguous textual language, which may produce acceptable compromise results at the 1997-98 PrepCom but which would, because of their lack of precision, create future difficulties. The more this working group accomplishes, the less burden will fall

on the diplomatic conference which will be more concerned with other issues involving political judgments and may not therefore be adequately prepared to deal with the complicated technical issues presented by this part. Notwithstanding the above, this working group is anticipated to proceed well and to produce a text with bracketed provisions for unresolved questions.

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

23. Another danger to be avoided is the implication that statutes of limitation can apply to war crimes, crimes against humanity, and genocide. This is contrary to the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[39], and the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes.[40] Therefore, it must be clear that while the ICC will only deal with crimes which occur after its establishment, it does not imply that such crimes cannot be prosecuted under the theory of universality or other theories by national legal systems or that statutes of limitations can apply to genocide, crimes against humanity and to war crimes. Indeed these are crimes considered to be within the inherent jurisdiction of the ICC, are *jus cogens* and create obligations *erga omnes*.

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

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

(b) Parts involving substantially mixed political and technical issues

(i) Rules of cooperation and mutual legal assistance[41]

24. While this part appears to be essentially technical, and it is, it nonetheless depends on a fundamental political judgment concerning the relationship of the ICC to States-Parties and to other States. If the Court is deemed to have "primacy" over national systems (like the ICTFY[42] and the ICTR[43]), the framework of cooperation will be substantially different than if the ICC is deemed to be the equivalent of any other State engaging in bilateral relations. One of the proposals currently before the PrepCom concerning the relationship between the ICC and States-Parties places the ICC at the same level as any State engaging in bilateral relations with another State concerning interstate cooperation in penal matters and that approach presents serious problems of enforcement for the ICC. It must be emphasized that in order for the ICC to be effective it should have primacy on the basis of the provisions of the Statute.

25. The 1996 PrepCom established an informal working group on this part and considered a text submitted by South Africa and Lesotho.[44] Understandably, this working group did not resolve the political judgment question raised above, which affects the overall structure of this part and it is unlikely that the 1997-98 PrepCom will be able to do so. However, if the drafting continues on the premise that the ICC does not have "primacy" over the national legal systems of the States-Parties, it will make the whole scheme of cooperation only as good as the national laws and practices of each State Party

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[41] *See* Report of the Preparatory Committee, *supra* fn. 1, Vol. I pp. 68-74, Vol. II pp. 245-285.

[42] Article 9 of Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993).

[43] Articles 8 and 9 of the Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994).

[44] UN Doc. A/AC.249/L.5.
The draft of that text was prepared for the July 1996 Siracusa meeting of experts where it was discussed. Thereafter, South Africa made the appropriate changes and the text was presented at the PrepCom's Second Session.

(since the Court would have to go through the procedures of each State Party in accordance with the laws of each State Party). If this approach prevails, it may turn out to be the Achilles Heel of the ICC. Some new and imaginative ideas are therefore necessary in order to avoid the sensitivity expressed by some governments concerning the "primacy" approach which is reflected in the Statutes of the ICTFY[45] and ICTR[46] and yet avoid placing the ICC in a subordinate position to national legal systems. The working group should therefore prepare alternative texts in brackets to allow the Diplomatic Conference to make an easy selection so that the Diplomatic Conference does not have to engage in prolonged drafting that would repeat the discussions of the 1996, and presumably the 1997-98 PrepCom's work and thus delay its conclusion.

(c) Parts involving political judgments

(i) Nature of the ICC[47]

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

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[45] *See* Article 9, Statute of ICTFY which provides for primacy.

[46] *See* Articles 8 & 9, Statute of ICTR which provides for primacy.

[47] Report of the Preparatory Committee, *supra*, fn. 1 Vol. I pp 8-9, Vol. II pp 3-6.

(ii) Naming[48]

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

(iii) Relationship between the ICC and National Jurisdictions[49]

28. The 1995 *Ad Hoc* Committee[50] and 1996 PrepCom[51] selected the term "complementarity" to characterize the nature of the ICC and its relationship to national legal systems. This term is an English transposition of the French term *complementarité*. But to know the origin of that term does not necessarily contribute to the clarification of its meaning, nor the specificity of its import. Some see it as a jurisdiction-sharing concept to be amplified, such as the Maastricht Treaty[52] concept of "subsidiarity" which does not detract from the primacy of the Treaty of the European Union. Others see the term "complementarity" as meaning that the ICC can be seized with a matter only after national jurisdictions have agreed to it or whenever said jurisdictions are unable to act fairly and effectively. Complementarity should not however be interpreted in a way that places the ICC in a subsidiary position to national criminal justice systems. To do so might frustrate the purposes and work of the ICC.

29. There are four core international crimes which are to be the ICC's inherent subject-matter jurisdiction[53]: "aggression"; "genocide"; "crimes against humanity"; and "war crimes". These are crimes that

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[48] *See generally* **M. Cherif Bassiouni**, *Draft Statute International Criminal Tribunal*, 9 & 10 **Nouvelles Études Pénales** (1993).

[49] Report of the Preparatory Committee, *supra* fn. 1 Vol. I pp 36-41, Vol. II pp 55-78.

[50] Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, pp 6-10.

[51] *See* UN Doc. A/51/22.

[52] Treaty of European Union, 1992 O.J.C 191.

[53] *See* Report of the *Ad Hoc* Committee, *supra* fn. 49, and Report of the Preparatory Committee, *supra* fn. 1.

affect or have the potential of affecting the peace and security of humankind, are shocking to universal human conscience, and are deemed part of *jus cogens*. Prosecuting violators of these crimes is therefore as much the separate task of states as it is the collective task of the international community. Such prosecutions and the enforcement of judicial orders and judgments inherent thereto will require the action and cooperation of all States-Parties. Thus, these crimes are best suited to be within the inherent jurisdiction of the ICC, even if national jurisdictions are given, whenever appropriate, the opportunity to act. In this respect, the formula adopted in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTFY)[54] in Articles 9 and 10, constitutes one of the models to draw upon.[55] Quite clearly, the question of primacy of the ICC, and how it is to be exercised, has to be resolved.

30. "Complementarity" is a useful concept to draw upon in determining the relationship of the ICC and national legal institutions, but it is not useful in respect to the relationship between the ICC and the Security Council. Indeed, the Council may refer matters to the ICC, and may be called upon to enforce ICC decisions. Thus, the relationship between the ICC and the Security Council must necessarily be articulated on a different basis than that on which the relationship between the ICC and the national jurisdiction is established. However, this does not exclude a differentiated approach concerning each crime. That differentiated approach should be reflected in the Jurisdictional Triggering Mechanisms.[56]

31. States-parties to the convention establishing an ICC will have to cede some jurisdiction to the ICC, and to give effect to the orders and judgments of the Court. Jurisdictional cession and the recognition of orders and judgments of an international judicial organ by domestic legal orders will depend on national constitutions' limitations and other aspects of national *ordre public*. But this should not be a way by which the work and judgments of the ICC is stifled.

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[54] UN Doc. S/RES/835.

[55] *See generally* **M. Cherif Bassiouni (with the collaboration of Peter Manikas), the Law of the International Criminal Tribunal for the Former Yugoslavia** (1996).

[56] *See infra*.

Furthermore, there should not be any significant disparity in the relationship between the ICC and each and every State-Party. Otherwise, the ICC's judgments and orders will lack uniformity of enforcement and that will effect the fairness and effectiveness of the system as a whole.

32. Some member-states may deem the ICC an extension of their own national judicial systems. Others can characterize it as an alternative judicial body or another forum to which cases can be ceded to or transferred as in the model of the European Convention on Transfer of proceedings in Criminal Matters.[57] Each State-Party will have to accommodate its participation in this new international judicial system in a manner that is more consonant with the requirements of its own national legal system, but without sacrifice to the equal and fair treatment of ICC judgments.

(iv) Definition of the Crimes[58]

33. On the basis of the *Ad Hoc* Committee's Report[59] and the 1996 PrepCom Report[60], the following appears to be the likelihood of the 1997-98 PrepCom's direction.

Aggression - Whether aggression is included, how it is defined, and whether only the Security Council will be able to refer to a situation involving aggression to the ICC is an essentially political judgment question which is so far not entirely resolved.

Irrespective of the policy question about its inclusion as a crime within the ICC's inherent jurisdiction, "aggression" needs to be defined. The 1974 General Assembly consensus resolution[61] can be a basis for the definition, but it is clearly unsatisfactory with respect to providing the necessary elements required by the principles of

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[57] European Convention on the Transfer of Proceedings in Criminal Matters 1972, 73 European Treaty Series. *See* Ekkehart Muller-Rappard, *The European System*, **International Criminal Law**, (M. Cherif Bassiouni ed., 1986).

[58] *See generally* **M. Cherif Bassiouni, a draft International Criminal Code and draft Statute an International Criminal Tribunal** (1987).

[59] Report of the *Ad Hoc* Committee, *supra* fn. 49.

[60] Report of the Preparatory Committee, *supra* fn. 1.

[61] *See Generally* M. Cherif Bassiouni & Benjamin Ferencz, *The Crime against Peace*, **International Criminal Law** (M. Cherif Bassiouni ed., 1986).

legality, and individual as opposed to State responsibility. Thus, this category of crimes will require the greatest attention and work in the formulation of its definition and legal elements. At the First Session of the 1996 PrepCom, a chairman's text was presented with the Bureau's full support, and certain delegations added proposals which appear in a compiled text in the 1996 PrepCom Report.[62]

Genocide - It seems settled that Genocide will be part of the ICC's inherent jurisdiction and that it will be defined as stated in Article 2 of the 1948 Genocide Convention.[63] But that definition nonetheless has several flaws: (i) it does not include social and political groups among those protected; (ii) the genocidal acts protecting a certain group seem to address only an entire homogenous group and do not specifically cover groups within a group (for example, the intellectual elite); (iii) the specific intent requirement makes proof very difficult and it seems geared only to perpetrators who are part of the highest echelons of the decision-making process; (iv) there is no stated intent requirement for perpetrators who carry out superiors' orders that result in or are part of a policy or plan to commit genocide.

Notwithstanding the above, the 1996 PrepCom's discussions revealed a reluctance to alter the terms of Article 2 of the Genocide Convention[64] and it is unlikely to change in 1997. But some language in the Commentary or in some other text could allow the ICC's jurisprudence to fill these legislative gaps in the light of the law and jurisprudence of the ICTFY and ICTR.

Crimes Against Humanity[65] - It also seems settled that this category of international crimes will be part of the ICC's inherent jurisdiction. Its definition is not, however, settled. Article 6(c) of the IMPT[66] and 5(c) IMTFE[67] define that category of crimes as does Article 5 of the ICTFY[68] and Article 3 of the ICTR[69]. All four

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[62] Report of the Preparatory Committee, *supra* fn. 1.

[63] United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1 **UN Gaor** Res. 96 (11 Dec. 1946).

[64] *See* Report of the Preparatory Committee, *supra* fn. 1, p. 17.

[65] *See generally* **M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law** (1992).

[66] 82 U.N.T.S. 279.

[67] T.I.A.S. No. 1589.

[68] UN Doc. S/RES/808 (1993).

[69] UN Doc. S/RES/935 (1994).

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

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

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

War Crimes[70] - The deliberations of the 1995 *Ad Hoc* Committee and the 1996 PrepCom revealed that the ILC's attempted distinction between "serious crimes against the laws and customs of war" and "grave breaches of the Geneva Convention" was not felicitous. The so-called "Law of the Hague" and "Law of Geneva" are in some respects so intertwined that it is neither appropriate nor feasible to make the type of distinction made by the ILC, particularly since that category of crimes is aimed at providing a comprehensive definition on the basis of which combatants may face international criminal prosecution. "War Crimes" must therefore be an appropriate combination of the "Law of Geneva" and the "Law of the Hague" in connection with conflicts of an international character and conflicts of a non-international character. This includes:

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[70] *See generally* **Howard Levie, Terrorism and War Crimes.**

(i) "grave breaches" of the 1949 Conventions and Protocol I[71], as well as violations of Common Article 3 of the 1949 Conventions[72] and Protocol II.[73]

(ii) whether to define the customary law of armed conflicts in some general terms, adding some specifics, or alternatively to make only a general reference to the laws and customs of war with some specifics as in the case of ICTFY[74] Articles 2 & 3. But that approach may violate the principles of legality in many legal systems. Thus, a well-defined provision is more advisable than a general statement purporting to incorporate by reference the customary law of armed conflicts. In either case, that part of the "war crimes" provision will necessarily be more general than the provision dealing with the "Law of Geneva", and thus less responsive to the requirements of legality in some states.

(v) Jurisdictional Triggering Mechanisms for the Four Core Crimes within the Inherent Jurisdiction of the ICC.

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

(a) **Aggression**: The Security Council and a State-Party may refer a situation to the ICC for investigation by the Prosecutor and determination of whether a person may be

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

[72] Common Article 3 to: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), August 12, 1949, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked of Armed Forces at Sea (Geneva Convention No. II), August 12, 1949, 6 UST 3217, 75 UNTS 85; Convention relative to the Treatment of Prisoners of War (Geneva Convention No. III), August 12, 1949, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in the Time of War (Geneva Convention No. IV), August 12, 1949, 6 UST 3516, 75 UNTS 287.

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

[74] UN Doc. S/RES/808.

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

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

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

(d) **War Crimes**: Same as for "Genocide" and "Crimes Against Humanity", but with the added formula that state-parties whose armed forces are part of a UN or regional organization multinational force, or are on a peace-keeping force sanctioned by the Security Council or any other regional organization are first subject to the jurisdiction of the national military justice of that state under whose flag the alleged perpetrator acted. Additionally, if the individual legislation is not part of the policy, a consistent practice of the armed forces to which the accused belonged, the national military justice system would have primacy. The only exception would be wherever the national military justice system of that state is demonstrably unable or unwilling to act. In this case, the Prosecutor can request the Indictment Chamber to act before the ICC.

(vi) Institutional Relations Issues

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

(a) The role of the Committee of States Parties

36. The structure of the 1979 draft statute to enforce the *Apartheid*

Convention[75] envisaged the inclusion of a Committee of State Parties. In article XVIII of the statute, it is referred to as the 'Standing-Committee'.[76] This body had a role in electing officials, determining the annual budget, ensuring compliance with court judgments, and general administrative oversight. The 1992 International Law Commission Report on the creation of an international criminal court draft statute included a similar body. It was left out of the ILC's 1994 draft statute in an attempt to distinguish the ICC statute from that of the *Apartheid* Convention. In the Updated Siracusa Draft[77], Proposed Article 5(e) envisages "a standing Committee of States Parties" as one of the Articles of the ICC. Proposed Article C creates a Standing Committee of States Parties consisting of one member for each of the States Parties, electing officers by a simple majority, and meeting at least two times each year for at least a week each time. Regarding the role of the Committee in the Updated Siracusa Draft:

> Article 4: The Standing Committee shall have the power to perform the functions expressly assigned to it under this Convention, plus any other functions that it determines appropriate in furtherance of the purposes of the Tribunal that are not inconsistent with the Convention, but in no way shall those functions impair the independence and integrity of the Court [Tribunal] as a judicial body.
>
> Article 5: In particular, the Standing Committee may:
>
> a. offer to mediate disputes between States Parties relating to the functions of the Tribunal;
> b. encourage States to accede to the Convention; and
> c. propose to States Parties international instruments to enhance the functions of the Tribunal.

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[75] *Supra* fn. 4.

[76] *Ibid. at* Art. XVIII.

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

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

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

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

(b) The relationship of the ICC to the UN

38. It is far more beneficial to have the ICC as a separate body but part of the UN system, as opposed to a completely unrelated body with a treaty relationship to the UN. Neither the implications of the choice at hand nor the nature of the relationship have been adequately discussed by the 1995 *Ad Hoc* Committee or the 1996 PrepCom. Because this is such a complex issue there is a danger in relegating it to the end of the 1997-98 PrepCom's work. Early discussion with senior UN officials to ascertain the method and means by which either of these options could be implemented is therefore necessary.

(vii) Financing the ICC[78]

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

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[78] *See generally* Daniel Mac Sweeney, Prospects for the financing of an International Criminal Court, Discussion paper of the World Federalist Movement, UN/NGO. *See also infra* Tom Warrick, Organization of the International Criminal Court: Administrative and Financial Implications.

proposals which have been made to bracketed texts which can then be dealt with at the conference of diplomats.

IV. Conclusion

40. A number of delegations have also met regularly during the 1996 PrepCom sessions, and once intersessionally. This group of delegations which is known as the "like-minded states" have been a significant driving force behind the ICC's momentum. Their contributions have been effective and constructive. This group, which has benefitted from the hospitality of the Canadian mission, has been growing in number. At the November meeting of the Sixth Committee, it included: Australia, Austria, Argentina, Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad and Tobago (representing 12 Caricon states), Uruguay and Venezuela. Participation by other delegations is expected to increase in 1997-98.

41. Significant progress has been made since the ILC presented its draft 1994 statute. Non-Governmental Organizations, and particularly the 'NGO Coalition for an ICC'[79] have played an

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[79] NGO Coalition for an ICC participating organizations as of November 1996 are: African Law Students - Young Lawyers Association, All Saints Newman Center, Alterlaw, American Bar Association, Amnesty International, Avocats Sans Frontieres, B'nai B'rith International, Baha'i International Community, Campaign for Tibet, Canadian Network for an International Criminal Court, Carter Center, Center for Civil Human Rights, Center for development of International Law, Center for Reproductive Law and Policy, Center for UN Reform Education, Center for Women's Global Leadership, Coordinating Board of Jewish Organizations, Counselling and Mediation Center, Crusade Against Violence, Drug Free Society, Egyptian Organization for Human Rights, Equality Now, European Law Students Association, European Peace Movement, Evangelical Lutheran Church in America, Federation Internationale des Ligues Droits de l'Hommes, FN-Forbundet/Danish UNA, Global Policy Forum, Guatemala Human Rights Commission/USA, Helsinki Citizens Assembly, Human Rights Internet, Human Rights Watch, Humanitarian Law Center, International Law Association (U.S Branch) Committee on an International Criminal Court, Institute for the study of Genocide, Istituto Superiore Internazionale di Scienze Criminali, Interkeekelyk Vredesberaad, International Bar Association, International Commission of Jurists, International Human Rights Law Group, International Human Rights Law Institute - DePaul

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

University School of Law, International Indian Treaty Council, International League for Human Rights, International Service for Human Rights, International Society for Human Rights, International Society for Traumatic Stress Studies, International Committee for the Convention against Microwave Weapons, Lawyers Committee for Human Rights, Lawyers Committee on Nuclear Policy, League of Human Rights, Legal Aid for Women and Environmental Development, Leo Kuper Foundation, Manobik Unnayan Parishad, Maryknol Society Justice and Peace Office, Medecins Sans Frontieres, Morgan, Lewis & Bockius LLP, No Peace Without Justice (TRP), Nuclear Age Peace Foundation, Nurnberger Menschennrecthszentrum, Ordre des Avocats a la Cour de Paris, Organization for Defending Victims of Violence, Pace Peace Centre, Pace Law School, Parliamentarians for Global Action, Procedural Aspects of International Law Institute, Quaker UN Office, Redress, Robert F. Kennedy Memorial Center for Human Rights, SOS Balkanes, Syracuse University, The People's Decade of Human Rights Education, Transnational Radical Party, United Church Board for World Ministries, United Nations Association, Urban Morgan Institute for Human Rights, War & Peace Foundation, Washington Office on Latin America, World Federalist Movement - Institute for Global Policy, Womens' Environment and Development Organization, World Federalist Association, World Order Models Project, World Organization of Building Officials.

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

ELIGIO RESTA*

I am very grateful, both as a citizen and as a scholar, to this movement which is spreading, because it participates in a trend which is associated with the lay pacifist movement of old. In 1919, right after the end of the First World War, a fine article was published by Hans Keisen, who can certainly not be suspected of being a revolutionary, who said that an infinite task awaits us. This infinite task, if we want peace, is to dismantle the category of sovereignty. This is the whole point: we are laying our hands on an issue which has enormous political implications. And we are in a condition that philosophers call tragically serious; when the new order is just beginning to show, is hazily coming nearer, by hints and clues, and the old order has withered. The old order that has perished is the order of the national states. We have to be aware of this. It is the order that is presupposed also by this international organization. It is the order founded on the structure of the United Nations' Security Council. We have to think it all over if we want to get to the heart of the matter to revoke the category of sovereignty.

Why am I saying this, when I recognize the great merits of the institution of a permanent court? Because the answer that has been given up to now is not a casual answer. Ad hoc courts are the machinery by which the particular nature of a conflict is recognized and admit that an order could neutralize savage powers, and the impossibility, once and for all, of an international law, the impossibility of a rule which could establish the difference to an outlawed sovereignty. We must revoke the sovereignty of the states.

A few minutes ago Cherif Bassiouni rightly spoke on what is internal and what is external in a crime against humanity. In Italy we have recently gone through all this in the dramatic unending trial of Nazi war crimes, the Priebke case. Italy became involved because it was in Italy that one of the crimes had occurred. But to whom does crime belong? Who is the person who commits the crime and who is the victim? Is it only Italy, is it only one part of the

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world, or is it something that has to be brought out of the national borders? This morning the Prime Minister said that after all, the interest of the whole international community in the institution of a permanent court for war crimes lies in the fact that legality against crime must be pursued. This is enough so that the argument that would strike deep down into the reduction, the revocation of the theory of sovereignty, be made legitimate, if there still is a need to make it legitimate, regarding the United Nations.

And I add that we must stress the importance of justice before peace itself, by admitting that there are many wars which are not just karate. We belong to a tradition which has always worked at a paradox, that of having created the right to war. Therefore we intervene, by means of international courts of justice, in tragedies, in dramas which have already happened, but in which there already lies a certain kind of formalization. My problem is that in this way we never succeed to tackle wars which are infinite and which have never been declared. For example, according to UNESCO statistics in the world there are 250 million children who waste their childhood in under-age work. This number would constitute a continent! Isn't this also a war? And when we consider the problem of justice, our point of departure should be concrete numerical data, unassailable, like comparing the annual budget of Goldmansachs which one can read in all the papers, with the state budget of Tanzania. They have the same amount, 250 million, but Goldmansachs distributes it between 23 members and Tanzania shares it out between 22 million inhabitants.

To start again with the undeclared wars means going back to what our president was saying about brotherly law. Dismantling the sovereignty of states means giving back fundamental rights which cannot be enclosed within the limits of the state's frontiers. This is the infinite task of the international court of justice, which must open up the political structure where fundamental rights belong to the individual citizens and not to the states. Here the imagination of the jurist - and here I cannot speak - must be exerted to the full. We must discuss the category of the conflicts, but we must also act on the little things, on the everyday political agenda, resources, funds, competences. One small suggestion - when appointing the members of an international court of justice, we fall back into all the paradoxes of political representation. Because we do not try to draw names from among the competent persons, let's rid the court of the political malady which is against all brotherly rights. Let's give the law all the room it has always tried to obtain, for the technical neutralization

of the political sphere. But at the same time we must admit that in order that the law may be truly different to politics, our starting point must be a clear definition of what is a crime. In this, our exercise will be fundamental: humanity cannot bear frontiers.

IVAN ZVONIMIR CICAK*

1. Editor's note

There comes the time when yesterday's bakers, painters, poets, chimney-sweepers and engineers turn into cold-blooded murderers over night. This is a story about one of them.

A phone rang in the editorial office of *Feral*. Forty-year-old **Miro Bajramović**, mechanical engineer, father of four. Later it will be seen that besides these benign facts, **Miro Bajramović** is, by his own confession, responsible for the death of 86 people, out of which he killed 72 with his own hands. He was a member of Merčep's unit "Autumn Rain" in Gospić, Pakračke Poljane serving a 4 month prison term. Unlike some of his fellow soldiers, who have in the meantime built restaurants and have been awarded medals from the President, Bajramović is rejected and today has nothing except - as he says - a wonderful family.

He wanted to tell his story to the public, a story which certainly in this country is not the only one, but is nevertheless no less horrifying. We spoke with him at several different locations (from Tuesday to Friday). What follows is his complete story.

2. Introduction

My name is **Miro Bajramović** and I am directly responsible for the death of 86 people. I go to bed with his thought, and - if I sleep at all - I wake up with the same thought. I killed 72 people with my own hands, among them nine were women. We made no distinction, asked no questions; they were "Chetniks" and our enemies. The most difficult thing is to ignite a house or kill a man for the first time; but afterwards, everything becomes routine. I know the names and surnames of those I killed.

**President, Croatian-Helsinki Committee for Human Rights.*

I was born on 30 January 1957 in Zenica; I have no memory of my father, and my mother died in 1990. I finished mechanics school in Zenica and moved to Zagreb, where I got a job in Janko Gredelj, in the steam locomotives department at the main railway station.

Later on I got a job in the "Rade Končar" factory, where I was given a chance to further my studies. I graduated from the University for Mechanics. In 1990 I lost my job and soon received an invitation from the Ministry of the Interior.

I met **Tomislav Merčep** in 1991 in the village of Dalj. We fought together from that time on, and went through many things together. Our unit was named "The Autumn Rains" i.e. officially the 1st special unit of MUP. Croatian soldiers knew very well who was in "Autumn Rain" units.

3. Executions in Slano and Gospić

Before going to Pakračke Poljane, somewhere in the autumn of 1991, we were in Gospić. We conquered the military base, headed towards Lovinac, but were ordered to return. It was enough to be a Serb in Gospić to mean that you did not exist anymore. Our unit liquidated some 90 to 100 people in less than a month there. Therefore, it is not true what Vekić said - in an interview published in your newspapers - that 170 people were killed in Gospić; nobody was there at that time performing the liquidation except us.

That story about a doctor from Gospić is also false: he was not killed, he committed suicide. It is also untrue that we burned 50 Serbs in one house. We did kill but never by means of burning.

The role of **Tihomir Oreskovič** - I think he was a good man and it was good working with him. Due to our friendship I would rather not talk about him. The order for Gospić was to perform "ethnic cleansing", so we killed directors of post offices and hospitals, a restaurant owner and many other Serbs. Executions were performed by shooting at point range since we did not have much time. I repeat, orders from the headquarters were to reduce the percentage of Serbs in Gospić.

We went to Slano four times and liquidated 13 persons there, all Serbs. Their centre was in the village of Vukovići, between Slano and Dubrovnik. I killed 8 out of 13. I was together with **Siniša Rimac**, **Miroslav Briševac**, **Miljenko Zadro**, **Igor Mikula** and little **Gordana** (I cannot recall her family name).

4. Pakračka Poljana: "Prisoner Interrogation"

We arrived in Pakračka Poljana on October 6, 1997 after returning from Gospić. In the beginning, the fire station served as our headquarters and prison. At that time a photographer arrived from Zagreb and filmed our location; within a few days, the site was bombed, and so we moved our headquarters to the end of the village and the prison in the school in Medurići, towards Kutina. I must say that it was not our decision that our base be situated in that place; we were ordered to keep the territory around Pakrac safe; later on when **Boljkovac** (then the minister of the Interior) and Merčep arrived on the site, they agreed that the base be placed there (in Pakračke Poljane). Our first action was an assault on a Serb base in Kukunjevac, a village 18 km long, which we fired on for four hours.

We kept prisoners in the school cellar, and when we had more prisoners, we would put them in classrooms. Nights were the worst for them, since it was then that we "interrogated them" ...; this consisted in finding the best way to inflict the greatest pain in order to make them confess and give the most amount of information.

Do you know which is the best way? Burning prisoners with a flame, pour vinegar over their wounds, mostly on genitalia and on the eyes. Then there is that little inductor, field phone, you plug a Serb onto that; it is a direct current which cannot kill, but it is very irritating. You ask him where he comes from, he says from Dvor, and you then dial a number in that place. Or, a five-wire cable would be stuck into a prisoner's rectum and left there for hours so that they could not sit.

Wounds were opened and salt or vinegar scattered over them; we did not let the bleeding stop. The prison commander **Mijo Jolić** forced them to learn on the same day the Croatian anthem; today he possesses just like **Suljić** - restaurants all over Croatia. Why don't I have anything?

When I recall all that torturing, I wonder that they managed to think of all those methods. For example, the most painful is to stick little pins under the nails and to connect it to the three-phase current; nothing remains of a man but ashes. I would never think of that, although I do know of the "Lenz" law. I was doing the interrogation of prisoners, but I never harassed them nor did I enjoy that; but some did, as **Munib Suljić** for example. We only cared about the results he would get, we did not bother with the means he used. After all, we knew that they would all be killed, so it did not matter if we hurt him more today or tomorrow. During torture, people would

confess all they knew, or what they were asked for. We did play at some kind of democratic police in the beginning and would give papers to Serbs to write all they knew, for instance names or locations.

5. Pakračka Poljana: The Execution of Croats

Merčep was the commander of Poljane, I was the subcommander. Merčep knew everything. He did not participate directly in the liquidation, but he read about what we did in our reports, though most of the reports were conducted orally. He knew about each execution, because he was a commander and was a very charismatic person. He told us several times: "Tonight you have to clean all these shits". This meant that all prisoners should be executed. If you did not carry out what was ordered, then you were considered a traitor. We killed both Serbs and Croats in Pakračka Poljana. The village was echoing with screams. People heard cries and whines coming from prisons but were afraid to tell us anything. Everybody knew that if they asked anything at all, they would end up in prison.

Who were these Croats? Well, the most beautiful one was **Marina Nuić**. Then **Aleksandar Antić**, although many incorrectly claimed that he was a Serb. Ten police ID cards were found in his car. He was accused of being a traitor and was executed, **Zvonimir Trusić** gave orders for his execution. Antić told Mikula: "Please, I would like you to kill me". And he did. A bullet from a magnum to his head. He had to dig his own grave before the execution. Suljić, Rimac and Mikula beat him terribly at the Velesajam (the collective centre), it was only when he was brought down that he was really interrogated.

Then there was **Ilija Horvat**, whose only sin was to invite both Croats and Serbs into his home. Then there was an Italian, because there is an Italian village in the vicinity of Poljana. And this Italian, like all Italians, was corrupt. We arrested him and killed him without any discussion. I personally killed him.

Once I stated that every person I had killed died happily. I issued them release forms written on tiny bits of paper and let them go home. Then I waited for them with a sniper. They died with a smile. This Italian stole an automatic rifle, which was kept in the school building and which he sold to the Serbs.

6. Pakračka Poljana: The Execution of Serbs

We did not separate Serb civilians and soldiers from each other. If we found a rifle hidden in his/her house, we considered him/her a

Chetnik. Serbs at the time could not survive, because there is a saying: wherever we trod, the grass does not grow again. As far as I know, more than 50 Serbs were taken to Poljana from Zagreb. The closest of Merčep's associates - Rimac, Suljić, Mikula, Hodak and I were in charge of bringing them to Poljana. We worked in two groups, one was in charge of taking them to Velesajam, and the other of taking them further. I mostly attended arrests, because I am a rhetoric and I tried to be civil in such occasions. I always told prisoners that I was only doing my job. I even have a witness for this - his name is **Stevan Barjanovic** - he can boast that he was the only Serb who survived Pakračka Poljana.

First, we arrested **Miloš Ivošević**, state director of customs. When we came to his office and talked to his secretary, a Croat, she was afraid to tell us his whereabouts. We found him on Rudeska cesta while he was building a house, and he told me: "In the end you Croats will be cleaning our shoes". He was directly responsible for the attack on the Krnjak police station, where 11 of our fellow-soldiers died, so we did not have any mercy towards him. We interrogated him for 4 or 5 days, after which he mentioned the name of Stevan Barjanovic.

I came to Stevan's house on the day of his mother's death. I deeply apologised for the things I was doing. He started off towards Velesajam with his Toyota, and he had a smoked ham in his car. I, acting like an idiot, took this ham from him and took it to the bar "Stela" and gave it to Zvonko Trusić and told him to slice it up for our boys. Later on, in the course of his investigation, Stevan said that I treated him well, but then he asked about his ham. This is how I nearly ended up as a war profiteer, although I never even tasted it.

I cannot call a Serb a gentleman, but I admire him for the fact that in the course of the investigative procedure he held to truth and facts, and in fact he could have said all kinds of things against us. I do not know whether he did it because he was afraid, because at the time we executed a majority of witnesses. Barjanovic maybe is not aware that he is the only Serb who survived Pakračka Poljana. He survived because he was accidentally wounded in prison, and **Dzemal Peleš**, the idiot, took him to the hospital in Kutina, instead of killing him. He became crown witness later and he could have told everything. A fine order coming from the highest authorities was given, and investigative judges did not insist on details.

7. Pakračka Poljana: The Distribution of Money

It is difficult to say how long we held prisoners. This depended on

how long it took us to wear them out. In most cases we held them for 4 to 5 days before we killed them. If they had survived, they would not have been normal. Serbs, who were good and loyal served us by digging graves, we told them that they were digging covers for machine guns. Once, one of the prisoners from Kutina said that this was the 15th or 16th cover that he was digging. He was executed on the spot. It was not up to him to count but to dig.

Self-interest was very popular at the time. Thirty of us went some 50 meters in front of the first tank. We cleaned and executed everyone. After us there were others who called themselves "merčepovci", who stole from the houses and then burnt them. These were **Maderalo** and **Rukavina**. Merčep told us to take everything away from the Serbs, and the money we found should be handed over to Headquarters for purchasing arms. However, Trusić, Merčep and Rukavina, who was called Pop and **Nedeljko Posavec**, divided the money amongst themselves. How do I know that? A day before the murder of **Pavo Mlinarić**, Posavec and Rukavina shot at each other because they did not split the money equally. Posavec was removed from the unit, however the money was not taken away from him, and it was not merely a question of 1000 or 100000 DM, but much more.

I could not say that mass executions were carried out in Pakračka Poljana. Those were mostly groups of 7 to 10 people. It actually depended on how many people were in the prison at the time. Sometimes we executed people in their homes, and then blew up the house. There were no bodies left. There were many houses like this, mostly in the village of Bujavica.

We were thinking along these lines at the time; kill the children of a Serb because they survive at -20 degrees below zero. I did not have any feelings at the time towards Serbs as being human beings like us, that they are somebody's father, brothers, children. No, we did not kill children, except for Suljić who killed little **Aleksandra Zec**. I saved 10 children with my own hands in Vocin. I would not be able to look into my little daughter's eyes if I had killed children.

According to my estimate, there were 280 people all together killed in Poljana, including 10 women. Besides Marina Nuić, there was a **Nada** from the village of Kusonja who was infiltrated among us. There was also a very old lady in whose house they found a sniper. Besides this old lady, all women were raped and then killed. That is the truth.

It is my firm belief that if it had not been for the Zec family, nothing would have been known about Pakračka Poljana. It was the

main key and the main reason why the unit has been looked at from this angle, and there were many Pakračka Poljanas in Croatia.

8. The Murder of the Zec Family

There is only one thing that I cannot understand - why do they make the Zec family seem charismatic? It is a well known thing that **Mihajlo Zec** worked for the other side, for the Serbs, although he belonged to the CDU party and tried to help the Croatian army. The fact is that while we were holding our positions in Dobrovac near Lipik we found out that **Milorad Zec**, Mihajlo's brother, was returning home every night from Subotska to sleep there. We even waited for him one night in his house in Dobrovac.

We can talk about the way we conducted the interrogation of our prisoners - but there are no secrets here - we beat and physically abused prisoners in any way possible in order to extort their confession. That is when he confessed for whom and what his brother did.

When I came to Zagreb, I issued an order for Mihajlo Zec's arrest. Merčep gave me this order. Mihajlo Zec was worth more to us alive then dead. However, Munib Suljić, intoxicated and drugged out, joined on his own initiative, the group which was supposed to arrest Mihajlo Zec. I told Siniša Rimac that only in case of resisting the arrest should Mihajlo Zec be executed. He tried to escape, Rimac let him go, although it is very hard for me to understand how a 19 year old man like him could not stop Zec. Well, maybe it was just a question of the moment, and then he shot him.

Then suddenly Munib Suljić appeared driving a blue van, without licence plates, because our arrests around Zagreb were carried out by vehicles without licence plates and in uniforms without insignias, to pick up little Aleksandra and Mrs Zec. He first took them to the Panorama hotel, then to Sljeme and then he killed them there.

A few days ago Suljić's statement issuing a denial that he had never confessed the crime was published in "Nacional". It is true that upon his arrest, Suljić told everything, confessed everything, and then took the police officers to Sljeme and showed the location of their graves. Then he confessed that he himself did the killings. The most tragic thing was that he threatened Nebojša Hodak-Čena, Igor Mikula, Siniša Rimac and little **Snježana Zivković** from Gospić, and he even forced Mikula to fire 20 bullets at little Aleksandra and Mrs Zec. This was in order for him to be sure, and then he forced them to bury the bodies.

This is the mere reason why they were involved in this affair. Rimac publicly admitted in the course of the investigation: I killed Mihajlo Zec, but do not accuse me of other things. That is the truth. Today they make Mihajlo Zec look like a hero and tales are told that he died in vain. If it were up to me, if I were the one to publish some newspaper, I would write more about Marina Nuić, because she is the one that really died in vain.

9. Murder of Marina Nuić

Who killed Marina Nuić? By name and surname? Igor Mikula. He was following orders which were issued by Džemal Peleša, the former doorman in the Zagreb Transportation Services. There were certain improvisations concerning the attempts to assassinate Tomislav Merčep, who was at the time at the Rebro hospital. She was raped 19 times by Munib Suljić and executed. She did not say a word. She only said: "let them kill me at once". I can show you her grave. Her parents still do not know where she was buried. The place is called Janja Lipa and is situated near Pakračka Poljana.

However, let us see the reasons why she was killed. Branko Šarić Kosa, Mikula and I think Rimac and Čeno guarded Merčep at the hospital, you know, stood in front of his door, because Merčep was visited by more than 200 people daily. Then information leaked out that Merčep was supposed to get a pen from Marina Nuić and that that pen would kill him.

Marina came with the Rijeka brigade and she was, my God, only 5 days with us. One night she called me, and invited me for a drink, my witness is **Franjo Nemet**, in the one liquor store called "Domovina", and it was one of the places where we drank. We met there that night. She had beautiful hair that night, straight falling on her back, mahogany colour. Merčep was wounded in Lovska a few days earlier. The troops from Rijeka failed to protect us, and we found ourselves surrounded by enemy troops. People from Čazma were slaughtered there. She looked at me for a very long time and said: "When will this war end, and what is still ahead of us?"

I told her like this: "Marina, there is only tomorrow for us and nothing else, and the day will come". She was later arrested. I did not know that this would happen. They put her in our detention centre in Medurić. She was a woman and she was beaten there severely.

I would like to contact Marina's parents, because I am a father

too, and I would like to know everything about my child. Marina came to our unit together with 200 people from Rijeka, because at the time we had many problems with a shortage of men. There were many soldiers at the time in Zagreb, but they mostly waged war drinking at the bar.

When it came to the point to go into the field to fight, few of them actually came. We were rather well-known at the time, that we were mostly engaged in clearing the territory and that we fought direct battles with Chetniks, that we confronted tanks at a distance of 50 meters and that we simply did not fool around. We started off towards Lovska. Thirty-two of us fell into a trap. However we counted on 500 people from Rijeka, who were 500 meters behind us, and if one of them had fired only one shot, we would have been able to get out of it. However, when they heard that we had lost our first tank, they turned around and ran away. We somehow managed to get out of there and found people from Rijeka some 8 kilometres behind us. They threw away their arms and we made them leave for Rijeka the following morning. We did not need soldiers like that. However, I chose among all of them some 10 people who deserved to stay. That is how Marina stayed and today I feel sorry for not letting her go. She was so innocent, she did not know how to cry, she only wept.

Her execution was not ordered by her name or surname, but it was merely said that the prison should be cleansed, and that meant that prisoners should be executed, among them Marina.

10. Giving Orders

I would like to issue a denial of the statement made by Ivan Vekić in the last *Feral*. He lied, he knew everything. I can tell him how many orders our unit received from him. He would say "I demand that you do this, this and this". We never returned without completing the order, and these were mostly executions. It was his order that Miloš Ivošević should be killed, and because of him we had to kill the last living Serb from Poljane, Stevan Brajanovic.

It is not the case, as Vekić stated, that there was a separate Merčep and Mika unit. *Mika Cvitanović* took over the unit after Merčep dissolved it on January 30, 1992 and after the unit became a part of the First National Guard Brigade. This is when Mika made some sort of insignia which indicated that this was both Merčep's and Mika's brigade. This made Merčep very angry. Our unit was called "Autumn Rain". I repeat, Ivan Vekić knew everything.

11. The Investigative Procedure

I was in prison from 2 January to 30 April of 1992. It was the saddest moment for me when Croatia was recognised on January 15 and I was in the Remetinec prison. We were released when Šeks became public prosecutor, but we were released in two groups. Mikula, Hodak, Snježana Živkovic, Suljić and Rimac remained for forty days longer in prison because of the Zec case.

The first month in prison they behaved rudely towards us. Nobody could touch us, because if there would have been some physical misconduct, I think there would no longer be a police station in Dordićeva Street. Merčep had a lot of influence in this, as he was the one that organised our defence, as well as Ivan Vekić, who is now going public with all sorts of nonsense. At that time he was on our side. Maybe I have already said this, but Justice *Jovanović* and Justice *Horvatinović* were very co-operative and they did not ask for any details.

12. The Motives for being a Witness

I was silent about this for a long time, expecting that someone in this country would remember that I exist. My children eat just like Merčep's do, yet he has two houses in Zagreb, two apartments and a house on Brać, and he came from Vukovar without a Kuna (a dime) in his pocket. Then, *Stipe Spajić*, Manderalo ... how did they earn all that they now possess? Let them tell me how I should earn something as well. I am ready to dig and I will dig, I do not find this disgraceful. I expect that Tudman will invite me personally after all this and that he will ask me why all this was necessary. I will tell him: "Only for my children". I am only looking for a job and that my family have a roof over their head.

I am a big believer. I have on my finger a rosary-ring from Medjugorje. God forgives everything to a certain limit. I think I have been punished enough up to now for what I did. My lifelong dream would be satisfied if my children have their subsistence ensured, because I know very well what will happen to me after this story, but I would like somebody to take care of my children. I really do have a beautiful marriage and a beautiful family, two small children. My wife knows about everything I did since this was the only way that we could live together.

I did not feel any sense of relief after telling you my story. I am afraid of my unit. These are experienced professionals who do not miss. And I know that the Hague is unavoidable as well.

GAVIN RUXTON*

1. The ad hoc Tribunals are important stepping stones

My purpose today, as a representative of their Prosecutor, is to set the work of the two ad hoc Tribunals, the ICTY and the ICTR, in the context of the progress being made towards the creation of a permanent international criminal court. I have chosen the image of these Tribunals as stepping stones because I think it is an appropriate one, given the torrent of violence that has poured across the planet twice this century in world wars, and more recently has engulfed particular areas in the form of savage and bitter regional conflicts. The Tribunals are indeed important stepping stones. As we balance on them, somewhat precariously, we can still see, on the bank behind us, the outlines of the Nuremberg and Tokyo structures, and we can still hear the echoes of the founders of the United Nations pledging to prevent future wars. Perhaps we can also see around us a number of shining post-war conventions developing the laws of war and human rights. But when we look forward the view is less clear: we may be starting to see the outline of the other bank, but the picture is still rather hazy, and we cannot be sure, if we jump from our stepping stones, whether we will make it safely to the other side, or whether the torrent will suck us down or sweep us backwards.

The Tribunals are important for two reasons: they reassert the principle that justice is an essential part of the peace process; and they make their contribution in the most direct way - by sending the guilty to prison after a full and public examination of their guilt. The Tribunals embody the expressed will of the international community that atrocities on the scale and of the calculated cruelty shown in the former Yugoslavia and Rwanda will not be tolerated by civilised nations, in the name of politics or religion or military expansion, or whatever other motive may have led to their commission. The very creation of the ICTY and the ICTR is therefore a step of enormous significance for the development of international humanitarian law.

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2. The ad hoc Tribunals have made significant progress

The Tribunals are very practical bodies. They are not perfect creations, and they have each had their difficulties, but they are now fully-functioning criminal justice systems, and have demonstrated to a very considerable extent that they are capable of conducting their own investigations, securing arrests, holding fair trials, and dispensing a satisfactory standard of justice. These are no mean achievements for any new legal system.

Already, important judicial decisions are emerging, which will serve to develop international criminal law. The judges have ruled on a range of important issues including: jurisdiction; the meaning of international and internal armed conflict; the scope of Grave Breaches of the Geneva Conventions and the broad application of common article 3; the powers of the Tribunal to compel evidence, the treatment of sexual offences; the protection of sensitive information and the treatment of vulnerable witnesses. The Trial Chambers have dealt with a host of motions on various courtroom issues, and the Judges have revised and refined the rules of procedure and evidence.

All this means that the two ad hoc Tribunals have developed a considerable amount of practical experience and operational expertise in both the investigation and prosecution of serious violations of international humanitarian law. Those of us involved in the daily work of the Tribunals believe that we have a collective insight into the problems which arise in practice, many of which are unforeseen and cannot readily be anticipated in the preparatory committees. We therefore hope to be able to pass on some of our experiences in a constructive way.

We certainly do not pretend to have answers to all of the questions raised by the enormously complex task of fashioning a full-functioning international criminal court. Nor do the staff of the Tribunals express any single or official view on these issues. Nevertheless, there are perhaps a number of broad points on which we would all generally agree, and although the Tribunals have appeared relatively late in the ICC process, these points bear stressing even now.

3. The ad hoc Tribunals are practical enforcement mechanisms

The Tribunals apply a body of law which has been much developed

since the Second World War, but which has mostly lain dormant on the bookshelves. The Tribunals take this set of rules and principles, add to them a framework of procedure and evidence, and set about the business of gathering the proof and enforcing the law. If the Tribunals are not effective enforcement mechanisms, they are empty shells: without the ability to collect evidence they cannot produce indictments; unless they have prisoners to try, they can bring no-one to justice; and without cases in their courtrooms they cannot contribute to the development of jurisprudence. So it is essential that the ICC be an effective institution.

The points I wish to select today for emphasis all relate to the concept of the ICC as an authoritative and effective enforcement mechanism, and I hope that any caveats I express will help decision-makers avoid what seem to me to be a number of dangers. Designing the ICC on paper is essentially creating a model, an abstract representation of the real world. As economists know, at one extreme models can be gross oversimplifications of reality, while at the other end of the spectrum models can be extremely elaborate constructions of complex systems. For legislators in criminal law there is a constant tension between, on the one hand, the need for clarity and simplicity, and, on the other the need for completeness and the avoidance of ambiguity. This dilemma is particularly acute if the rules cannot be easily amended or developed by the court. In her address to the ICC prepcom last month, Judge McDonald of the ICTY argued for a statute of principle rather than detail. But whatever degree of codification is adopted, it is important to get the basic framework of the model right, and to make choices when compromise would lead to confusion.

4. Investigations and prosecutions are in reality complex matters

In the draft statute there seem to me to be several oversimplifications. First, there is an assumption that a case proceeds in a predictable fashion from beginning to end, and that the accused (a single suspect) is known from the outset. In fact, investigations often begin when there are many potential suspects, or where the identity of the suspects are not known, or where their involvement is not clearly understood. When dealing with the kind of crimes within the jurisdiction of the Tribunals, a case involving a single suspect or accused is rare. Even if investigations begin by targeting particular individuals, the decision as to who will be indicted is

usually taken towards the end of the process. As the investigation proceeds, its focus may change, and the availability of witnesses can alter dramatically. Witnesses move around and are to be found all over the world, so that investigators may have to go to many different countries to gather evidence. Any working model of the Prosecutor's work, therefore, should assume uncertainty at the outset, poorly defined and understood crimes, and no clear idea about who is responsible. A good Prosecutor, setting about an investigation, will start from the position that he or she knows nothing about the facts, and can take nothing for granted.

So the Prosecutor of the ICC will most likely be faced with cases involving many potential or actual accused. Cases involving multiple accused have their own special problems, particularly in the international forum. It is likely the accused will not all be arrested together. That means that they may not be tried together, or depending on the trigger mechanisms, even that investigations against all of them may not be possible simultaneously despite an obvious overlap in the subject matter of the inquiry. Or again the identity of the accused may be known but they may be at liberty, either with their whereabouts known or unknown. There may be no "custodial state" or there may be several "custodial states". The proposed trigger mechanisms are already complicated, and may involve the consent of several states. Whatever formula is finally agreed upon, it should be workable where there are multiple accused.

Real cases can be complex in other respects. Criminal conduct can be categorised in different ways. Often prosecutors cannot be sure of a conviction of one crime rather than another. Different crimes comprise different elements requiring separate proof. Because of the uncertainty of proving all the elements of a given crime, cautious Tribunal prosecutors will produce indictments containing alternative, or sometimes cumulative, charges. For example, failure to prove the requisite intent in a genocide charge may nonetheless leave open the possibility of a conviction for crimes against humanity. To deal effectively with situations referred to the Tribunal, the Prosecutor needs to have a package of crimes available in all cases. It would be an affront to justice in the example just given for an accused acquitted of genocide to walk free from the court despite having been proved to have committed crimes against humanity. Yet, in the draft statute, Article 21 apparently rests jurisdiction on the acceptance by states of particular crimes. It may be that states bringing complaints will make sensible choices in this respect, but

again an overly simple assumption seems to underly the statute - that cases conveniently will involve single crimes.

All of this goes to jurisdiction. And jurisdiction governs investigation as it does prosecution. If the court has no jurisdiction to try the crime, the Prosecutor has no justification for investigating it. But many matters arise in the course of investigations pointing to the commission of crimes which are not the subject of the initial inquiry, but are often closely related to it. Are investigators to ignore those matters? It seems to me that those problems could be avoided by requiring states which accept the court's jurisdiction at least to accept groupings of related crimes.

5. The Prosecutor must exercise wide discretion

The complexity of investigations and prosecution at the international level means that, however an investigation has been set in motion, very quickly the Prosecutor will be called upon to exercise discretion. It therefore seems to me that the extent of the Prosecutor's discretion should be clearly articulated at the outset. It appears to be widely accepted that the Prosecutor must be independent. However, discussions of the Prosecutor's independence tend to be limited to the question of the right to initiate investigations, and the right to take operational decisions without taking instructions. But in practice the Prosecutor acting on a complaint from a state cannot be expected to refer back to the state every time the investigation takes a new turn raising jurisdiction questions. That kind of state involvement does begin to threaten the independence of the Prosecutor.

By contrast, the jurisdiction of the ad hoc tribunals is relatively simple and comprehensive. The Prosecutor has almost complete freedom to act within the limits of each Tribunal's jurisdiction, and is free to exercise a great deal of discretion in relation to the acts and persons investigated, and the crimes charged. Political influence is thus eliminated, and the independence of the Prosecutor guaranteed. There is no suggestion of the Prosecutor acting as the agent of any state.

6. The Co-operation of states cannot be assumed

Another simple, and perhaps more dangerous assumption is that states, particularly states where the crimes were committed, will accept the court's jurisdiction, allow complaints to be made, and

permit investigations to be carried out on their territory. The experience of the ad hoc Tribunals is often quite the opposite. Even under intense international pressure, states have not always been willing to recognise the legitimacy of the Tribunal or to co-operate with its Prosecutor. Even so, it may be possible to prove the commission of crimes within those states by relying on witnesses who have fled abroad and relying for evidence on the presence of the international community on the ground in the territory in question. If crimes of the gravity of crimes against humanity have been perpetrated by the organs of a state, and if high officials of that state are the subject of a complaint to the international court, it looks distinctly odd to a prosecutor's eye to have the very jurisdiction of the court predicated effectively on its acceptance by the accused. The ICC model should be carefully examined to ensure that the court cannot be thwarted by the non co-operation of states sympathetic to the accused.

It is easy to lose sight of the investigative role of the Prosecutor, and to overlook the stark fact that, in order to do justice in a criminal case, a court must have full access to the facts in issue. When those possessing evidence do not co-operate, and where in consequence proof is not forthcoming but is withheld, any court commanding authority must have the ability to compel the production of evidence and the attendance of witnesses. In the ad hoc Tribunals our experience in this regard has been salutary, with the greatest reluctance being demonstrated by some states to accept any power on the part of an International Tribunal to employ compulsory measures. Even if states accept the binding nature of requests under Chapter VII of the United Nations Charter, some will fight long and hard to control the method of compliance and to protect what they perceive to be their national interest and their sovereignty. In my view the freedom to investigate crime is so central to the functioning of the Prosecutor (and ultimately the court) that it should be addressed at some length in the statute itself. It is unrealistic within the timescale of prosecutions already underway to expect the court itself to build up the necessary jurisprudence. We know that in achieving co-operation of states, so much depends upon establishing trust and working relations with their authorities that a heavy-handed approach by the Prosecutor at the outset would be counter-productive. For me, this is a core issue that should be tackled head-on in the ICC statute. And if it is a sensitive issue on which agreement may be fragile, states should be reminded that if they do not clarify the relationship between the powers of the court

and the powers of states, they will inevitably find the court doing so later.

7. A permanent court must have authority

An international criminal Tribunal must have standing and authority. The status accorded to the ad hoc tribunals rests firstly on their being subsidiary organs of the Security Council. Their orders and requests are thus binding upon member states. States also recognise that the ICTY and ICTR deal with the most serious crimes known to humankind, which national systems are ill-equipped to tackle. States therefore accept that the tribunals have concurrent jurisdiction with their national courts, but have primacy over them. We have exercised that primacy on a number of occasions, and in each tribunal. Interestingly, we have not experienced any resistance from the states concerned, as might perhaps have been expected. We have also decided to exercise our primacy with restraint, and only in cases where we ourselves intend to prosecute. We will therefore resist any attempt to turn the ad hoc tribunals into criminal appeal courts for the former Yugoslavia or Rwanda. The tribunals were not intended to play that role.

I hope that the precedents set by the relationships established by the ad hoc Tribunals will make it easier for states to "bite the bullet" on the question of powers. If the international community can make this decision, and if states can bring themselves to respect the authority of an international court, all other issues will pale into insignificance. From our daily experiences, in which we are continuously testing the limits of state co-operation, it seems to me that we still have some considerable way to go to overcome the nervousness of states about the idea of a powerful international body which might one day examine their own actions.

This question of powers extends beyond a Tribunal's ability to gather evidence, and into the area of crimes against the administration of justice, none of which feature among the list of principal crimes over which the Tribunals have jurisdiction. The Prosecutor and the Chambers must be able to protect witnesses and victims, many of whom testify at considerable personal risk. Those who interfere with witnesses must be dealt with, as must those who obstruct the course of investigations. Accused who have access to information about the witnesses against them must now be allowed to silence those witnesses. Similarly the court must know the extent of its powers to deal with contempt and offences against the course

of justice, and must be able to take effective action. The existence and limits of those powers are being explored now by the ad hoc Tribunals. Some may be inherent in any court, but others are properly for legislation. If the court itself cannot exercise these powers, it must at the very least have guaranteed access to other institutions which can.

8. A strong institution must be designed

In creating the ICC, partial solutions, however attractive as drafting compromises, will only store up practical problems later. In the statute, the relationship between the Court and the United Nations is left somewhat hanging. But if the court is to attract staff, it will have to be able to offer them careers. Our experience in the ad hoc Tribunals demonstrates that experienced professionals may be attracted for only relatively short periods before they are asked to take the very brave step of severing connections permanently with their previous jobs. The nature of the new organisation therefore has to be very clear to professional staff thinking of making a medium or long term commitment. (People like to know where their pensions will come from). Our experience has also shown that it cannot be assumed, at least in a UN context, that the secondment of gratis personnel will provide an easy way of augmenting staffing complements. Whatever solution is adopted, the financing of the permanent Tribunal must be solid and settled in advance. Our experience of delayed and short-term budgets has resulted in uncertainty, and a constantly distracting burden of fund-raising being placed on the Prosecutor.

The proposed model for the permanent court also seems to make the worrying assumption that the institution might have a part-time character: that it might have a core staff, but would in a sense be created and put on the shelf for states to reach down when required. In my view this notion is very suspect. It takes some 18 months to create a functioning Tribunal capable of effective investigations. So many time-lags are inherent in the start-up process, particularly in recruiting staff, such as suitable interpreters and translators, that it is simply not realistic to expect a "shelf company" to swing into action at a moment's notice. Creating a permanent court must mean more than having a skeleton crew engaged in building up and knocking down a succession of ad hoc tribunals in the same premises. Experience in the ICTY and ICTR shows beyond any doubt that establishing and maintaining a working

tribunal is a full-time job for the whole institution. A core staff might be a solution if no complaints or references were made to the court at the outset, but I would imagine that once seized of its first matter, a large staff would be needed from then onwards on a permanent basis.

Ladies and Gentlemen, those of us working in the ICTY and the ICTR understand the magnitude of the task involved in creating a permanent International Criminal Tribunal. Although they have a lot left to do, the ad hoc Tribunals have shown that international criminal justice can be made to work, and they are gathering momentum. I hope that we will see the establishment of a strong ICC in the coming years, and I hope also that the ad hoc tribunals will be regarded as instrumental in achieving that goal. To return to my original image, the more our stepping stones are allowed to grow into little islands, the easier becomes our leap ahead to the mainland, to reach the permanent court whose creation we support as a substantial contribution to the lasting peace and security of the world.

MUHAMED SACIRBEY*

I am not here to speak to you so much as an expert. I do have my law degree but long since it has become invaded by fungus from lack of practice. I am here to speak to you because the Tribunal and the idea and promotion of the International Criminal Court is most relevant for Bosnia and Herzegovina. That relevance translates itself into certain lessons which I would like to share with you. Rather than being general, I would prefer to focus on the following two points: the politicisation of the tribunals (i.e. the former Yugoslavia and Rwanda Tribunals) and the implications for the proposed International Criminal Court.

The creation of the International Criminal Tribunal for the former Yugoslavia in itself was a response to the immediate political pressure. There was the belief that the international community was not so willing to confront acts of genocide, war crimes and even aggression. And the best substitute to offer to the world, at least in terms of rhetoric, was to promise that the perpetrators would be brought to justice. And we kept hearing this being repeated at the United Nations Security Council debates, when people said, "We can't do too much to stop what's going on, but we will bring the perpetrators to justice". At some point in time in the summer of 1992, when some of the crimes were actually hidden from world view, the camps that were not being publicised (even though most countries, as well as UN officials knew about them) came to light because of the work of certain newspaper reporters and media. And right before the London Conference, a resolution was passed which effectively put this promise in some form of general writing. Frankly, it is my belief that many who passed this resolution and supported it really did not have the intention of seeing the resolution realised.

The continual acts of war crimes, genocide and of course, the war in Bosnia and Herzegovina, maintained the pressure for the creation

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of the Tribunal. A commission was established under guidance of Cherif Bassiouni, and it probably did not expect Professor Bassiouni to be so dedicated and a-political about his work. And finally there were a few other Ambassadors in the United Nations and private officials amongst whom I would include Ambassador Albright, Ambassador Arabi from Egypt and Ambassador Diego Aria from Venezuela as being untiring promoters for the establishment of the Tribunal.

Maybe it is necessary, to some extent, to politicise the concept of the Tribunal, because of course, most of the acts committed in the name of ethnicity or in the name of some political cause which would be brought before the Tribunal or the future International Criminal Court are in fact political events. Maybe it is necessary to politicise and to view the Tribunal for the former Yugoslavia as a catalyst, but unfortunately I think that the tribunals, particularly those of Bosnia and former Yugoslavia, are being overly politicised.

I will now elaborate on a couple of these points, starting from the statute of the Tribunal. First of all, if one were to look at the work which has been accomplished by the judges and others since their selection, one will see that many of the initial statutes that were adopted by the Security Council had to be altered, if one can use that word, in order to accommodate the work of the Tribunal. Ideas like trials in absentia were politicised; ultimately, there was a general decision not to have them. And of course the most politicised aspect of the Tribunal has been the lack of enforcement, which is fundamental if justice is to be served.

The selection of the prosecutor, demonstrated how politicised the event was. Professor Bassiouni was considered to be one of the best candidates to take over the work. The reasons were many. Beside his knowledge and professionalism, there was a continuity, given that much of the work had already been done. I think many countries did not support his nomination because he was too diligent and in a few occasions I also heard that it was because he was a Muslim. I think that type of unfortunate reasoning still exists in many minds including those willing to develop the International Criminal Court. The election of the judges (maybe appropriately so) was reviewed by the Security Council. Judges who did not pass muster of the Security Council could not have been voted upon by the General Assembly. However, one wonders what coincidence brought about the situation, at least in the initial selection of judges, that there were only two women, when taking into consideration that so many of the crimes committed were specifically directed at women. In addition, by

coincidence or otherwise, although there were members elected from Muslim countries, actually not one member of the Tribunal happened to be a Muslim or at least of Muslim background.

In terms of the work of the Tribunal, I must say that I do have confidence in the work of the prosecutor and the judges and in their independence. However, we do have to look at the process not only of arrest but the process of investigation. Most of the evidence is in the hands of the most powerful countries, and some may have reason to deliver only particular evidence as a means of bringing about political pressure, or to avoid being judged for having omitted to do something more in the past. The speed by which the Tribunal works is also politicised. Finally, we have the double edged sword of seconded employees to the Tribunal. Whether we like it or not, there seems to be a necessary element of making sure that the Tribunal has enough people to do the work but on the other hand of course, the independence of those who are seconded could always be questioned. What is interesting to note, which in my opinion is far from being a coincidence, is that in the case of what happened in Bosnia, not one citizen of Serbia Montenegro has been indicted, and we all know Arkan and Seselj as Serbian citizens, who in the minds of all should have been indicted. However, in Vukovar they were. One cannot help but ask the question "What's the difference, is there something AT play"? Unfortunately there is. When Vukovar occurred, Croatia was still a part of the former Yugoslavia. When most of the crimes occurred in Bosnia-Herzegovina they occurred after Bosnia was recognised as an independent country. Therefore to indict people, particularly officials from Serbia, would mean to admit that there was in fact an aggression against Bosnia-Herzegovina by a neighbouring state, and that the international community had an obligation to respond to this aggression. We fought for years in the Security Council to have the word 'aggression' used. The word 'aggression' was never used except in acts of aggression and specifically I was told (and hence this should be no secret) that the international community, in fact, did not want to imply any obligation on its part to confront aggression. Of course, the word aggression and the word genocide were used in General Assembly resolutions, but as far as most were concerned, that was irrelevant. I hope this is not the type of legacy that the International Criminal Court will in fact find itself adopting. There is also a perception here, that we need to keep people like President Slobodan Milosevic of the new Yugoslavia and others in the Belgrade regime, somehow free from these trials of the Tribunal, so that they can be worked with,

manipulated or they can do their own manipulation toward some political goals.

Another point I would like to raise concerns finance, which unfortunately always risks being politically controlled. This should not happen with the Tribunal. Recently, the Croatian government offered to hand over to the Tribunal seven or eight indicted people as long as the Tribunal would agree to bring them to trial within three months. Both Zagreb and the Tribunal know that unfortunately the condition cannot be met. Zagreb looks like it is making an honest offer, and the Tribunal is being undermined in its ability to respond.

Politicisation of arrest may be the biggest problem here. "There is a selective, perhaps even a racist approach here." People leading SFOR i.e. the NATO forces in Bosnia, would say things publicly like, "I cannot justify the arrest of a mass murderer in Bosnia". The only reason to justify that type of act would be to admit that a Bosnian is somehow less human than an American. I can assure you that if the crime had something to do with the perpetrators in America, as frequently is the case, there would be a response by American forces no matter what the risk might be. Of course, now we are also being told that the risks include rocking the boat - let us not rock the political boat. So, once again, justice takes a back seat. There was unfortunately a massive mistake by Edmond Snuffy Smith, the original American commander of the NATO troops in Bosnia, who effectively relied upon the expedient policy of: "Don't touch us and we won't touch you". This amounts to a protection contract normally entered into between Mafia gangs and storekeepers in small cities. There has been no realisation that the old approach (i.e. don't arrest the war criminals, avoid them at all cost) has been counter productive. It is counter productive for the essential objectives of maintaining the real peace, and most importantly from an international perspective, it is counterproductive for the exit-strategy of NATO from Bosnia and Herzegovina.

But even now, as the process of arrest seems at least to have taken one step forward, the choice of those who will be arrested is a very clear political message. They have gone after a mild-level group. Why? Because mainly they think that the low-level may not send enough of a message and going up to the highest level would mean a decisive step. An absolute decisive step is not considered necessary this time because we hope to send them a message by going after the mid-level.

Now we also see the politicisation of this issue even with

institutions like the OSCE. The Serbians are demanding that promises be kept, that those going to vote would not be arrested if they are on some sort of list; so they can actually go to vote in an official voting box and be immune from arrest. I think the exercise of democracy would not dictate such an arrangement.

There is certainly now an appearance of being subjected to political influences at the Tribunal even though I believe most of the key people are not. Belgrade continues to send the message that only Serbs are being indicted. Croatia says that the numbers indicate that substantial numbers of Croatians have been indicted, and we have therefore come down not to an issue of who is really guilty or responsible, but to an issue of what are the numbers. Even the Bosnians have been politicised by being told that only the Bosnians were fully cooperative with the Tribunal: there are actually more Muslims before the Tribunal than any other ethnic group. Obviously this would tend to turn many against the Tribunal. Succinctly put, we must make sure that the Tribunal and the International Criminal Court do not allow themselves to be subjected to political expediency. Instead justice must be perceived as politically indispensable.

One final point I would like to make concerns the idea of establishing a Truth Commission for the former Yugoslavia. If the idea of this Truth Commission is that each side would write its own version of history, then there will be no criteria for testing the reliability of the evidence of these facts. I am afraid, this would be a substitute for justice. More importantly, there would be a substitute for the independent Fact Finding Commission that was to be established under the Dayton agreement which was agreed to by Milosevic at Dayton. However, this is the only part of the agreement that he did not sign in Paris. He refused only this one provision; he signed everything else in Paris. I think the biggest obstacle of this idea is that as its starting point it assumes that there are sides involved, ethnic sides. It does not consider it as an ideological issue, and it does not understand that in this context the ideology of separatism, fascism, even illegality would in fact gain a platform through this Truth Commission to continue to promote these perverse ideas. This is not South Africa. The ideology of apartheid has not been defeated in Bosnia. In fact, it still continues to survive under the very terms of the Dayton agreement. I would hope that the idea of a Truth and Reconciliation Commission in Bosnia and Herzegovina can take the later concerns into consideration and that it can be developed into something that can be very helpful in our country.

So, in conclusion, I would ask the Conference here, as a final

step, to take a definitive position on the issue of how a proposed Truth Commission might act in this situation. Of course, this is another *ad hoc* Tribunal if you would, another *ad hoc* court, which I think can confuse the situation rather than help under the current circumstances.

RENATE KICKER*

1. The international system is a dynamic one. It can be compared with a mosaic where the single pieces - actors, institutions - form the picture. The single pieces may move and change their shape and in doing so the whole mosaic moves like a mobile thing and the picture gets a different appearance. The project of an International Criminal Court (ICC) is a new piece within that mosaic that has to fit into the system as it stands now but must also be equipped to move and change.

2. International law has developed from a *ius gentium*, that means the law of peoples, to a law between sovereign states. In this context responsibility for international wrongful acts is primarily an obligation of states. The draft articles of a code on State Responsibility having been provisionally adopted by the International Law Commission (ILC) contain a distinction between crimes and international delicts. In this text (Art. 19) an international crime is defined as the breach of an international obligation so essential for the protection of the fundamental interests of the international community that its breach is recognized as a crime. These interests are identified *inter alia* as the maintenance of international peace and security, the safeguarding of the right of self-determination of peoples as well as the human being and the preservation of the human environment. This catalogue is convincing especially as it is drafted as an open one. Only the "criminalization" of state behaviour is in itself problematic because "punishment" as a consequence of a crime committed by a state cannot be implemented.

3. In fact individuals are acting on behalf of the states, and since the Nuremberg Trials, the principle of individual responsibility and punishment for crimes under international law is settled and has been reaffirmed in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The latter have

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been created by the Security Council under chapter VII of the UN Charter, and, as regards to their jurisdiction, are mainly related to serious violations of international humanitarian law and situations of international war respectively national civil war.

4. It is time for a permanent treaty-based International Criminal Court (ICC) to be established to enforce individual criminal responsibility under international law. The Draft Statute prepared by the ILC, which is now under consideration by the Preparatory Committee (PrepCom), gives the court jurisdiction with respect to four crimes enumerated in Art. 20 a-d, as well as treaty-related crimes (Art. 20 e). The PrepCom's working group on the definition of crimes produced detailed definitions on the core crimes which are "genocide", "crimes against humanity", "war crimes" and "aggression". It recommended that the texts defining genocide and crimes against humanity be included in the draft consolidated text of the proposed court's statute. The texts on war crimes and aggression are not consolidated so far; there is still no agreement whether to include the crime of aggression at all in the text. The working group also considered crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs and psychotropic substances without prejudice to a final decision on their inclusion in the statute.

5. There is another draft adopted by the ILC which is relevant to an international criminal jurisdiction. Already in 1947, in the light of the principle *nullum crimen sine lege* the ILC was requested to formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and its Judgement and to prepare a draft Code of offences against the peace and security of mankind. The first version prepared in 1991 comprised a list of 12 categories of crimes; these have been reduced by the ILC to five in 1996. Four of them are identical to the four core crimes now contained in the draft statute of the ICC. The draft Code on offences entailing individual criminal responsibility and punishment extends its scope of application only to crimes against United Nations and associated personnel. Other crimes included before such as mass violations of human rights, international terrorism, illicit traffic in narcotic drugs are now deleted or included under war crimes, such as, for example, the wilful and severe damage of the environment. The considerable reduction of the categories of crimes, and, as a consequence, the scope of the Code itself was made to reach consensus and support

by Governments for adoption. Proposals are now being made to integrate the Code of Crimes against the Peace and Security of Mankind into the Statute of an International Criminal Court.

6. To summarize there are three drafts prepared by the ILC being now under consideration and each defining crimes under international law. The catalogue of crimes within the draft code on state responsibility is the most modern and extended one. For the time being it only seems that a majority of states will not identify them as crimes but as "international wrongful acts of a serious nature" or "exceptionally serious wrongful acts" to avoid the penal implication of the term "crime". The list of crimes under the two drafts regarding individual criminal responsibility have been reduced to core crimes which are closely related to international or national war situations. The inclusion of crimes committed during peacetime would be indispensable.

7. A too narrow context to war-related violations of international law would hinder an ICC to move within the mosaic as described above and to be open for future or even given requirements. Therefore its jurisdiction has to be formulated in more general terms which would allow for a dynamic interpretation by the court itself as well as by State Parties. That means it should be made clear in the statute that the setting up of an International Criminal Court is a means to pursue the main aims and functions of the international community. If justice is one of these fundamental values as well as goals there are three areas of application of an international criminal jurisdiction: crimes touching upon the general functions of the international community itself; crimes touching upon the inherent rights of states as well as individuals, and crimes touching upon the function of the United Nations and associated personnel.

8. The article defining the jurisdiction of an ICC could therefore be drafted as follows: "The court has jurisdiction in accordance with the statute as regards actions being gross infringements of universally accepted standards of human behaviour that violate the general principles of international law recognized by the community of nations with respect to the following categories of crimes:

a) any crime resulting in the violation of any of the fundamental values and goals to be pursued by the international community;

b) any crime resulting in the violation of any of the accepted rights of state parties, peoples, groups of individuals or individuals;
c) any crime intended to jeopardize the United Nations position and the application of its role by its personnel.

9. The method of accepting the jurisdiction of the court should be regulated as *forum prorogatum*. When a situation is referred to the court it should be up to the court to determine whether it fell within the courts jurisdiction and within its capabilities to try. The court must begin with clear and precise definitions of the grave crimes to come under its jurisdiction. Specified definition of these crimes should not be given in the statute of the court now but be developed by its case law. A standing Committee of State Parties as foreseen in the updated Siracusa Draft would then be an appropriate organ to support the elaboration of a Code containing a well defined catalogue of crimes entailing individual criminal responsibility under international law. The statute should contain provisions for a review mechanism to enable State Parties to agree on such a Code which should be open for further expansion. That means also that the draft code of offences against the peace and security of mankind should not be adopted as it stands now but be adapted in view of the practice of the ICC.

10. Such a concept may be criticised as neglecting the principle *nullum crimen sine lege*. The deficit of the Nuremberg Trials should be overcome by defining the offences over which the proposed court will have jurisdiction. But as such definitions are so difficult to find and to agree upon, the project of an ICC would be hindered and delayed if the statute itself should contain offence definitions. It is accepted under international criminal law that it is not necessarily required that the offence be proscribed by a pre-existing statute, only by pre-existing law and that a tribunal can determine the content of relevant international law.

11. The conclusion is that the idea of an international community ought to be reinforced and the basic principles of international law as they stand now be identified. In 1945 the primary goal of the United Nations was to re-establish and guarantee peace and security in the sense of war prevention. This purely negative peace-concept has changed to a positive one which contains, among others, the protection of human rights and the environment, self-determination

of peoples and sustainable development. The principles of territorial sovereignty and non-intervention in internal matters have a different meaning today as international co-operation and dependency question borders as well as the exclusive national jurisdiction regarding the well established principles of international law. The latter have to be identified on the basis of mutual consent.

ANTONIO FIUMEFREDDO*

The history of man often records the "interference" of a stronger group with a weaker one, of a people with another, of a coalition of nations against other nations.

This has always been a violent kind of interference, often brought about by wars, and therefore it has not been possible to give it some kind of codification.

Even contemporary history, as well as recent events, has experienced and recognized the right to interference in a region as a prerogative of leader States in order to re-establish a situation after the violation of the world economic and political order.

The events which happened as late as the Gulf War have actually witnessed the application of the right to military intervention, and therefore also political intervention, which was decided upon in order to solve an evidently dangerous situation for the balance of world power politics.[1]

This century has also experienced the so-called **humanitarian intervention.**

It is clear that the expression "humanitarian intervention" must be understood, or rather matched, with the more easily perceptible exigencies of the international balance of power, and especially with the resistance of some geopolitical prejudices. In spite of this it has been possible to actually carry out campaigns whose only aim were humanitarian, for the re-establishment of peace and justice as necessary conditions, although not always sufficient, for re-establishing the minimum conditions for the respect of personal dignity.

The more recent interventions of multinational forces under the aegis of the UN in Africa, the Middle East and in the Balkans must be considered in this framework.

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[1] "The Democracy of Non-Governmental Organizations, Publisher Amnesty International, 1995.

Humanitarian intervention, unlike military intervention, may not have had a proper codification but it has anyway adopted certain procedures which, although lacking the abstract character which is typical of a formal set of rules, nonetheless make it possible to follow the sequence of decisions.

The difficulties facing codification were obviously due to knots of resistance and international objective mechanisms, and it has therefore been difficult to define, for example the status of "aggressor" and distinguish it from that of "victim", and consequently prepare and foresee automatic intervention by the international community.

In this century, however, thanks to the spread of humanism, both of the socialist and liberal kind, but also thanks to the setting up of international movements, such as the non-governmental associations which have appeared on the international scene, a universal awareness has developed, and a capacity to react indignantly in proportion to the horrors created by man himself.

The century of Auschwitz and Hiroshima[2] has also been the century of Nuremberg, in the same manner that the killings in ex-Yugoslavia and Rwanda have seen the setting-up of ad hoc International Courts.

Humanity is nowadays very much conscious of its potential for genocide and of the planet's terrible potential self-destruction, but it has also developed a global concept of human life, aided by the exceptional progress in technological development and by the, as yet still ambiguous, hints at what has been hazily called "electronic democracy" (the Electronic Townhall)[3] or "continuous democracy"[4], conditioned by the so-called *mutation cathodique*[5], cathodic mutation.

The need is increasingly being felt to set up norms allowing the intervention of man in all those cases where the abnormal violation of the rules of common and civil coexistence risks upsetting the acquired levels of peaceful and civil living.

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[2] "900. *I tempi della storia*", C. Pavone, Donzelli Editore, 1997.

[3] I refer to the electoral programme of Ross Perot, a candidate for the Reform Party at the American presidential elections and at the "Contract" of Newt Gingrich.

[4] "*Tecnopolitica. La democrazia e le nuove ideologie della comunicazione*", Stefano Rodotà, Sagittari Laterza, 1997.

[5] "*Communication, télévision et démocratie*", P. Lecomte, Presses Universitaires de Lyon, 1993.

Obviously no one harbours the utopian elimination of the germs of war, since these last fifty years of peace have not succeeded in sparing a number of deaths equal to those of the second world war in innumerable local conflicts.

The process of historic maturity has allowed us to evaluate the limits and defects of those "provisional" solutions, like Nuremberg, Tokyo and the ad hoc courts, which have seemed to be a kind of justice **organized** by the victors, almost a well-prepared epilogue to the war, so that the decision has been taken to set up a Permanent International Court, which will be constituted by the launching of a preliminary set of substantial and procedural rules, perhaps still minimal but universal.

United Nations' resolution number 51/207[6] gave official recognition to what the French aptly called *droit d'ingérence*, the right to intervene in all those occasions where basic human rights are in danger.

A Preparatory Committee is working on the first draft of a memorandum for the International Judicial Institution, while the Conference of plenipotentiaries will be held during 1998, which is the date set for the constitution of the Permanent International Court.

Actually this is an authentic revolutionary process, since it introduces a radically new way of understanding international relations, whereby the old relational models are abandoned and preference is given to the recognition of the **interdependence of human rights**[7] and to what jurists call the "global society".[8]

Certainly it is understandable that there should be a juridical

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[6] Ref. to Resolution A Res 51/207 of the UN dated 17.12.1997 for the "Institution of an International Criminal Court" which refers to UN resolutions 47/33 of the 25.11.1992, 48/31 of the 9.12.1993, 49/53 of the 9.12.1994, and 50/46 of the 11.12.1995. A series of pronouncements of the General Assembly which bear witness to the UN's commitment and which goes back to the founding act itself of the United Nations, in San Francisco, which was interrupted during the years of the cold war and revived in the Nineties.

[7] "*Le relazioni internazionali nell'era dell'interdipendenza e dei diritti umani*", Antonio Papisca and Marco Mascia, Cedam, 1997.

[8] "*Globalism versus Realism*: International Relations Third Debate", by R. Mughroori and B. Ramberg, but also J. W. Burton in "World Society" and M. Shaw in "Global Society and International Relations: Sociological Concepts and Political Perspectives".

and political debate on the definition of the limits of the Court's competence, which in the meantime has been restrained to the repression of the crimes of genocide, crimes of war and crimes against humanity. In the same way one understands that considerable and imaginable difficulties crop up during the codification of the conditions of procedure of the Court, of the role and activation of penal action by the Prosecution, and also of the enforceability of the Court's judgements.[9] And yet, what really matters is that we are witnessing the first success of the law which is moving beyond the obsolete powers of the State[10] towards a new global institutional order.

The coordination of interdependent economic and financial policies cannot be carried out without organizing an Institution of Justice which can provide the international community, through the guarantees of a set of rules, with the certainty of a true peace, by stating that there can be no peace without justice, and where the right to judicial intervention will, in time be replaced by a right which will no longer be seen as interference but will be recognized as a legal system of norms and sanctions, universally established and effective.

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[9] See Giulio Illuminati in "*Gazzetta Giuridica*", n. 26/97, Giuffré Editore.

[10] Idem, footnote 1.

SECOND SESSION:

FOR AN EFFECTIVE INTERNATIONAL LAW: FROM THE PREPARATORY COMMITTEE TO THE DIPLOMATIC CONFERENCE FOR THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT - THE COMMITMENT OF THE INTERNATIONAL COMMUNITY

CARMEL A AGIUS* AND DAVID ATTARD**[1]

Mr Chairman, Distinguished Participants,

It is a great pleasure and honour for me to have been invited to speak at this Conference which has managed to assemble such distinguished personalities, many of whom have long been involved in the movement supporting the creation of a Permanent International Criminal Court. In our view the importance of this meeting is further enhanced by its timing. The efforts to create an International Criminal Court are at a crucial stage, as witnessed by the current debates within and outside the Preparatory Committee. It is our hope that the deliberations of this Conference will assist in facilitating the achievement of widespread State support for the establishment of an International Criminal Court.

The quest for international justice through the setting up of a permanent International Criminal Court is a challenge that has faced the international community for a long time. The crimes of dictators, torturers or death squads are usually committed because the perpetrators rely on impunity. They know that there is little chance of their prosecution within their territory. It was a sad reflection of the state of world affairs throughout the Cold War, that the

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[1] The contents of this paper reflect the personal views of the authors.

Nuremberg experience was left dormant for so long. This procrastination has led to a great loss of human lives and much human tragedy. Our generation now faces a unique test which it cannot afford to fail, if we are to save succeeding generations from the scourge of crimes against humanity and other crimes which cause untold sorrow to humankind.

It may be useful to recall that the idea of an International Criminal Court was first proposed to member States by the UN General Assembly in the early 50's when it appointed the Committee on International Criminal Jurisdiction.[2] The divisions of the Cold War were largely responsible for the lack of widespread support for the setting up of the Court. Indeed, decades after Nuremberg, the enforcement of the international criminal responsibility of individuals has had to be left to national courts[3] or to ad hoc tribunals.[4]

The demise of the Cold War has provided the international community with a rare opportunity to enhance the implementation of international justice. It has the possibility of establishing an International Criminal Court which the very founding fathers of the UN considered to be an essential element in the quest to achieve world wide respect for fundamental human rights.

It is ironic that it was the atrocities in the former Yugoslavia, and Rwanda that largely fuelled the renewed interest in establishing the International Criminal Court. Naturally, much valuable work has been undertaken by the International Law Commission particularly through its revised draft statute for the Court, and other projects such as the Code of Offences against the Peace and Security of Mankind which has incorporated much of the principles established in the Nuremberg process. Furthermore, customary international law relating to individual criminal responsibility has developed and been affirmed in relation to genocide, grave breaches of the 1949 Geneva Conventions (and the1977 Protocols). and apartheid. Indeed, the 1948 Genocide Convention[5] and the 1973

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[2] See Q. Wright. 4 A.J.I.L. (1951) pp. 60 *et seq*.

[3] War crimes committed in the Second World War have been prosecuted in the Courts of Israel, France and most recently Italy.

[4] For example, the Nuremberg and Tokyo, more recently the Yugoslav and Rwanda Tribunals.

[5] Article 6.

Apartheid Convention[6] even contain contingent provisions referring to an "international penal tribunal".

It is possible to consider the work of the UN General Assembly and in particular its latest resolution on the establishment of an International Criminal Court[7] as the consolidation of these legal developments. The work of the UN General Assembly has been largely undertaken by its Ad Hoc Committee on the Establishment of an International Criminal Court and the Preparatory Committee established by Resolution 50/46 of 11 December, 1995. It is hoped that the culmination of this work will be the convening of a Diplomatic Conference of Plenipotentiaries in 1998 to finalise and adopt a Convention on the Establishment of an International Criminal Court.

The proposed judicial body would represent the embodiment of the fundamental principles of International Criminal Law, and hold individuals personally responsible for violations of the said law; particularly in cases where States are unwilling or unable to prosecute. In other words, the jurisdiction granted to the International Court of Justice has to be a reflection of the need to achieve an effective balance between, on the one hand the respect for the sovereignty of States; and on the other hand, the need to ensure that International Criminal Law is respected.

It is submitted that the ILC Draft Statute is a valuable proposal which could ensure that the Court is able to administer justice fairly and effectively. There are, however, areas where considerable thought is required to ensure that the effectiveness of the Court is strengthened and consolidated. In this respect, it may be pertinent to comment on the number of issues raised by the Draft Statute. Of paramount importance is the mechanism for instigating prosecutions which should be as independent as possible.[8]

One has to ask whether the complaint process as envisaged by the ILC text is satisfactory in the light of historical experience. Should the power to raise complaints be restricted to State parties[9] and the Security Council?[10] Should not any State, International

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[6] Article V.
[7] Resolutions 51/207.
[8] Article 12.
[9] Article 25.
[10] Article 23 and 26.

Organisation, or individual be granted direct access to the complaint mechanism? Should the prosecutor not be allowed the power to investigate and prosecute on an *ex officio* basis?

The establishment of the Court is to "enhance the effective prosecution and suppression of crimes of international concern". It is well recognised that these crimes interest the international community as a whole. In the words of the Barcelona Traction (Second Phase) Judgment (1970), States have an obligation *erga omnes* not to perpetuate such crimes as aggression and genocide.[11] It would, therefore, seem reasonable to suggest that under customary international law, all States have a legal interest in their protection.[12] Clearly, therefore, the position under customary law supports the idea that the obligations of States in this field go beyond any treaty or contractual bonds. The time many also be ripe for granting the individual - particularly the victim - direct access to the Prosecutor. Allowing the process to be restricted to State parties may increase the risk of "conspiracies of silence" which are not uncommon even amongst States.

The right of referral granted to the Security Council is a realistic manifestation of international politics. It is of course a positive step. Nevertheless, the history of the Security Council's performance in the Cold War period, and its voting structure, would suggest that this recourse should not be overestimated. Whilst its availability is praiseworthy, its reliability as a "collective system of referral" may be limited in periods of crisis in international relations. Admittedly, the co-habitation between the UN's foremost political body and the future Court is no easy task. The discussions at the recent meeting of the Preparatory Committee bear witness to this challenge. In the ultimate analysis, however, the Court's long-term credibility could depend on this relationship. It may be worth recalling the sensitiveness faced by the International Court of Justice in the 1992 Case "Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie (Libya vs United States). This crucial issue will be examined further shortly in relation to the crime of aggression.

Another area which deserves close attention relates to the

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[11] Para 34.

[12] Para 33 vide also the Addressing Opinion in the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) p. 23.

jurisdictional basis of the International Criminal Court. Whilst the list of proposed crimes that fall within the jurisdiction of the Court is commendable[13], it may be pertinent to ask whether the list should be an exhaustive one. There are a number of considerations which should be borne in mind when considering this issue. Certain crimes have long defied generally accepted definitions. An example in this respect is the crime of aggression. The Nuremberg Charter refers to "crimes against peace"; the UN General Assembly resorted to a political definition of aggression. The difficulties of arriving at a widely accepted legal definition of aggression remain. In this respect, the "filtering" mechanism proposed in Article 23 further complicates the problem. Clearly, the role of the Security Council, particularly in its capacity as the ultimate guardian of international peace and security as provided in Chapter VII of the Charter, has primary importance in questions relating to acts of aggression. However, the formula found in Article 23 would seem to suggest that the judicial process as proposed will largely rely on the political interpretations of acts of aggression.

The Court should have clear and comprehensive definitions of the crimes which fall under its jurisdiction. Given the immense problems which this desirable goal presents, the Court should be given the power to ensure that it does not lack jurisdiction in the face of technical and restrictive arguments. It is submitted that the Court should be granted jurisdiction in the event that the crime is of "international concern", even if such a crime is not covered by the provisions of Article 20. The reference to crimes established under particular treaties is useful and desirable.[14] It not only concerns the jurisdictional web of the Court, but consolidates further the internationalisation of the said crimes which range from the unlawful seizure of aircraft, to hostage taking, to unlawful acts against the safety of navigation.[15]

Another important factor to be taken into account, when considering the exhaustive nature of the list of crimes in Article 20, is the risk that lack of jurisdiction may occur with respect to crimes which are currently unknown. Sadly, the heinous side of the human intellect is often far more creative than the legal draftsman.

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[13] Article 20.

[14] Article 20 (c).

[15] Vide Annex.

Atrocities should not escape the jurisdiction of the Court because the drafters of the Statute failed to foresee such eventualities. The Court should be allowed the right to exercise reasonable discretion in such cases. Furthermore it should be made clear that crimes against humanity fall within the Court's jurisdiction if committed in peace or in war.

The "exhaustive" nature of Article 20 should also be seen in the light of another deficiency relating to the Court's jurisdiction. The automatic jurisdiction of the Court is too restrictive. The resort to this process in the case of genocide[16] is an important step forward. Of concern, however, is the position with respect to other crimes. In such cases, the Draft Statute grants the State party the option to select the crimes over which they would recognise the jurisdiction of the Court. This option would seem to greatly weaken the effectiveness of the Court. Would it not be reasonable to suggest that with respect to "crimes of international concern" (at the very least those enlisted in Article 20), the Court should be empowered to claim jurisdiction even if a State does not agree? Moreover, the jurisdiction of the Court is further restricted as in all crimes other than genocide both the "Custodial State"" and the State where the crime has been committed, have to accept its jurisdiction. It may not be unusual if one of these very States would have an interest in ensuring that the Court is rendered powerless to act. It may therefore, be advisable for the Court to be given jurisdiction on the basis that the alleged offender is in the custody of any State party. In such cases, the Court would be able to try the said offender without the risk of having its work vetoed.

There are, of course, many other issues that deserve our further consideration. The Court's findings, the Court's site, protection of victims and witnesses, collection of evidence, and standards of prosecution, are just some of the questions which loom around the creation of the International Criminal Court. The limited time available does not permit us to dwell upon these vital matters. It is hoped that the deliberations of our Conference will shed light on these areas. In this respect, we welcome the work of the Preparatory Committee and are encouraged by the steady - if slow - progress it is making. It is our view that if the goal of convening a diplomatic

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[16] Articles 21-22.

conference of plenipotentiaries in 1998 is to be achieved, considerable work has still to be undertaken. It has to be noted that if the ensuing Convention is to be effective it has to be widely accepted. Our challenge is to provide the diplomatic conference with a draft statute which balances political realities with legal firmness, fairness and justice.

GIOVANNI CONSO*

Once the first inevitable difficulties had been overcome, it was hoped that the International Court of the Hague would achieve results without much difficulties. On the contrary, few cases were concluded, in spite of the efforts made by the institution.

One gets the impression that something is wrong, putting a halt to the good intentions and neutralizing most of the good formulas that had been devised. True committed support by the international community is lacking, because of the eternal contradictions and jealousies of the individual States, the divergent perspectives which are always so hard to reconcile. It is not only a question of the Court not being preconstituted, which limits its charisma and reduces its juridical power, nor is it the fault of the disadvantages created by an immense number of episodes and subjects that have to be followed (this circumstance in itself should rather lead to an even higher number of concrete inquiries). The issue implies other profiles that are both intrinsic to the case and successive to it. The destiny of the whole institution itself is at risk, the hopes placed in it, the prospects for its future. Everything is actually linked to this elementary but problematic axiom with two sides: in order to function, a judicial organ must be in a position to examine the cases that are within its competence and to pass the judgements which bring them to a conclusion.

In this regard there is a first problem, which is in my opinion crucial, even though it is perhaps impossible to solve because of the culture that prevails in the Western world, connected with values which are rooted in firm traditions. I refer to the problem of judgement in absentia, since I am convinced that, as long as we are internationally bound to the noble principle according to which, if the defendant is not present, proceedings cannot be instituted, significantly concrete attempts to prosecute a war criminal will remain an illusion, even as far as concerns the importance of the

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role played by the individuals brought to trial, whether they are many or few: these will usually be minor members of the team, acting on orders from above.

The precedents of Versailles, Nuremberg and Tokyo may be very interesting from the historical and cultural point of view, so long as we bear in mind that these situations are very different to the ones which the Court of the Hague is asked to consider.

One instance consists of a war which has been clearly won by one or more States which are the litigant parties: the losers responsible for the crimes are brought to trial by the victors, who are moreover occupying the losers' territory, and who are therefore free to dispose of the territory and of the main culprits. On the other hand, the Court is not composed by the victors but by third parties who are not involved in the conflict, and it examines criminal episodes which are imputed to this or that force in the lawsuit, and remains outside the territories involved. How could it enter the said territories to execute the convicting sentence, or as a cautionary measure, the orders for provisional arrest?

If everyone were in agreement, including the competent local authorities, strictly-speaking there would be no need for an international court, in the form of a strong jurisdiction which would be, at least in theory, in a position to impose its decision even on reluctant parties. Actually, if the state in question would have authorities in a position to hold a credible trial, if at the end of the conflict a democratic and pacifist government would have been installed, then it would be worthwhile to assign to it the task of judging.

But what if this does not happen? Who will hand over the arrested persons? And, even before that, who will effect precautionary arrest, which is indispensable to ensure, before the execution of the eventual final sentence of conviction, side-stepping the paralyzing question of judgement in absentia? What powers can the general power of attorney and the Court of The Hague count on? And then, even if they did find these powers, there remains the not insignificant risk of unleashing new tensions among the followers of the arrested person, that could even lead to a fresh outbreak of war immediately after peace has been established. The more recent dramatic events in the territories of Serbia and Bosnia, which have left us holding our breath, causing widespread indignation accompanied by a bitter feeling of impotence, are clear evidence of how serious and decisive the problem is.

YORAM DINSTEIN*

Instead of making a formal presentation, I would like to address a number of issues that have arisen in the course of the discussion today. Let me start with credentials: I have been in favour of the establishment of an International Criminal Court for the last thirty years: indeed, for the last twenty-five years in collaboration with our distinguished Chairman.

We have been talking about an International Criminal Court when nobody wanted to hear the words, when the idea appeared absurd and bizarre, like a UFO. It is precisely for that reason that I am not obsessed by the deadline of 1998, which is totally artificial. The International Criminal Court has absolutely nothing to do with the Universal Declaration of Human Rights (adopted in 1948), which does not relate to crimes against peace, to war crimes, to crimes against humanity, or for that matter even to genocide.

Furthermore, the genuine deadline has been missed. The genuine deadline should have been 1996, i.e. the 50th anniversary of the Nuremberg judgement. The next appropriate date is perhaps 1999, the centenary of the First Hague Peace Conference. The Hague Conventions at least have some connection, however nebulous, to war crimes. But I, for one, will not be appalled even if the projected convention will enter into force, say, in the year 2005. We meet in Malta, which triggered UNCLOS III, the cradle of the Law of the Sea Convention signed at Montego Bay in 1982. It took many years to reach Montego Bay, and even then, it turned out that the sense of finality was premature. Only recently, the Law of The Sea Convention was amended by a new Protocol meeting the needs of the most important maritime power, the US. Signatories in 1982 might have done the international community some service had they waited longer and avoided the need for an amending Protocol. What is occasionally forgotten is that an international conference which ends with a vote of two-thirds majority in favour of a treaty is like a wedding ceremony. It is very easy to say "I do", but what really

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* *Professor of International Law, President of Tel Aviv University, Israel.*

counts is what happens later. We know how many marriages end in divorce!

The question is how many States will ratify a convention establishing an International Criminal Court and, even more importantly what will happen after the entry of the convention into force. Will actual cases be submitted to the Court? This is the crux of the issue. Hence, it is essential to make sure that the text will be acceptable to as many nations as possible. Ending a conference with a convention that will be acceptable to Italy, Malta, Sweden and Iceland, and perhaps five other countries, will prove a fiasco. We must have the consent of the United States, Britain, France, Germany, Russia, and even China. That may take a while, in as much as we are not close to the target yet.

I believe that for the successful operation of an International Criminal Tribunal - like the prototype at Nuremberg - what is required is a complete victory in the field against an aggressor. It was only because of the total victory of the Allies in World War II that the Nuremberg Tribunal succeeded so famously. When there is total victory, you have the run of the land, and several things happen. First of all, you gain all the archives of the other side: you have all the documents and are in a position to collate written evidence. Secondly, all the witnesses who are still alive are in your custody. It is no accident that there exist forty-two volumes of documents and testimonies at Nuremberg. If nobody can argue with Nuremberg today, it is owing to these forty-two volumes. In a sense, the documents are more important than the judgement.

At present, we have two *ad hoc* International Tribunals relating to Rwanda and Yugoslavia. I happen to believe that there are greater chances for success in the case of the Rwanda Tribunal, simply because in Rwanda there has been total victory in the field and you can get hold of most of the major war criminals. In Yugoslavia, we do not know that the major war criminals will necessarily ever be tried.

In the absence of total victory, a crucial question arises: do you prefer the administration of justice or would you rather have reconciliation between the combating parties (which are still there)? It is very easy to say "we want justice at all costs". It is also nice to say that there is no peace without justice. With all due respect to this phrase, I would argue that, equally, there is no justice without peace. I do not believe in the maxim of the Emperor Ferdinand I of the Holy Roman Empire: *Fiat justitia et pereat mundus*. Are we all ready to die in the name of justice? I can assure you that in the

former Yugoslavia, as elsewhere, people would rather have peace first and then justice.

Let me add a few other comments. First, I fully endorse the view that no criminal trials should be held *in absentia*. Such trials serve no purpose and can even be counter-productive if the accused is never apprehended.

Secondly, about crimes against humanity. Let me point out that, under the Nuremberg Charter (in which crimes against humanity were defined for the first time), these crimes had a nexus to war. It is only in subsequent years that crimes against humanity have been contemplated as conceivably existing irrespective of war. But it must be recalled that, whatever their temporal scope, crimes against humanity, must be committed against a civilian population: any civilian population (including your own civilian population, as distinct from the enemy civilian population), but only civilian population and not civilian individuals as such. In other words, the whole philosophy underlying crimes against humanity is completely different from the fundamental concept in which the Universal Declaration of Human Rights is embedded. The Universal Declaration is largely designed to protect every single individual everywhere. Crimes against humanity are only relevant to group protection.

Thirdly, both the Yugoslav and the Rwanda Statutes are conspicuous in that they cover crimes against humanity and numerous other crimes, yet - unlike the Nuremberg or the Tokyo Charter - they do not refer to crimes against peace. This is a *lacuna*, possibly due to the fact that, in recent years, while nobody has denied the validity of war crimes and crimes against humanity, many doubts have been expressed with respect to crimes against peace. I do not share these doubts. In a book that I have written on the subject of "War, Aggression and Self-Defence", I have endeavoured to show that crimes against peace are as significant today as ever. Yet, if in 1991 the Americans would have marched to Baghdad and captured Saddam Hussein, they would have faced a major dilemma whether or not to proceed with an indictment relating to crimes against peace.

I am glad that the Draft Statute of the International Criminal Court reinvigorates the idea of crimes against peace, but I completely disagree with the definition offered by the drafters. For one thing, they treat all cases of aggression as crimes against peace, and this is inconsistent with the Nuremberg-Tokyo definition, which is limited to wars of aggression. We have to be guided by the definition of aggression, formulated by the UN General Assembly in 1974. It is

clear from that definition that aggression can be manifested by an isolated act, which does not lead to full-fledged hostilities. A mere incident, in which fire is opened across an international frontier, can constitute an act of aggression. Nevertheless, this should not qualify as a crime against peace. The notion that the International Criminal Court would acquire jurisdiction over what may be a trifle is, in my opinion, totally untenable.

Another question is whether the Security Council must first determine that an act of aggression has occurred. This is not a realistic proposition. How many times in over half a century has the Security Council determined that aggression (or a breach of the peace, or even a threat to the peace) has occurred? The number of cases is ridiculously low. Thus, on the one hand, the projected jurisdiction of the International Criminal Court is broad enough in substance to encompass every act of aggression (however minute) and, on the other hand, it is narrow enough on grounds of procedure to be confined to the exceedingly rare instances in which the Security Council can issue a binding resolution. I think that it would be better to limit the substantive extent of crimes against peace covered in the definition, yet to unlink these crimes from any action taken by the Security Council.

Fourthly, there are many new issues raised in the Yugoslav and Rwanda Statutes concerning crimes committed during civil wars (non-international armed conflicts). This is a completely novel notion that is attractive but must be studied in depth. After all, we have not noticed, over recent decades, an overeagerness to bring to trial before an international penal tribunal the perpetrators of ordinary war crimes and crimes against humanity (let alone crimes against peace) in international conflicts. Is there any empirical evidence that States are ready and willing to entrust international tribunals with trials of criminals in internal conflicts raging within their territories?

This brings me to the fifth and last point of the primacy of international over national tribunals. In my opinion, the issue is easy to resolve in favour of such primacy, provided that we are not talking about a State's own criminals. Differently put, if you take the former Yugoslavia as an illustration, the real question is which State is requested to recognize the primacy of the Hague Tribunal. If we are talking about a country like Germany, of course it would be willing - in fact, enthusiastic - to hand over to the Hague Tribunal any person in detention within its boundaries who allegedly committed crimes in the former Yugoslavia. From a German

perspective, in all likelihood, this would be a case of being relieved of an unwelcome headache. Conversely, if we are talking about Serbia, and you tell the Serbs that a Serbian national should be handed for trial at The Hague, you will probably hear completely different music.

To conclude, the potential success of a permanent International Criminal Court is fully contingent on delicate negotiations now in progress being crowned with success. My view is that if the process would require a delay of a couple of years, this is a small price to pay. Especially bearing in mind that in the years ahead the Yugoslav and hopefully also the Rwanda Tribunal will deliver judgements that may authoritatively shed light on a number of issues currently unresolved. The real question is not whether a convention establishing an International Criminal Court will be finalized in 1998. It is whether, either in 1998 or shortly thereafter, a workable compromise is found to ensure the successful operation of a Court which all of us here would like to materialize.

FLAVIA LATTANZI*

Under the Geneva Conventions, as has already been pointed out, States have committed themselves to certain obligations which compel them to exercise criminal jurisdiction over persons responsible for, or suspected of crimes (against genocide, apartheid, torture, etc.). According to some, these obligations relate only to states connected with such criminal cases. The Geneva Convention for war crimes establishes the criterion of universal jurisdiction which carries with it the duty to search - because it is useless establishing the principle of universal jurisdiction unless one carries out a search. And we have seen that in France, where the persons who planned and incited the massacres in Rwanda took refuge, the French judges refused to exercise their jurisdiction. In the absence of a link (or of a strong link, as there actually was a sort of link), the Court had been put into action by a woman of Rwandese origin married to a Frenchman and holding French citizenship.

Therefore, by these conventional systems States have committed themselves to regulations of compulsory competence. And yet States do not even bother to set up substantial and procedural legislation that would allow the exercise of this criminal jurisdiction, they simply refuse. Even Italy, which is considered as one of the most favourable countries towards the need for the repression of the *delicta juris gentium*, even Italy limited its action to the issue of an order of execution. Consequently, regarding conformity to the law within the Geneva framework, for example, but even to the other laws without specific regulations, no judge of a criminal court will apply those regulations without a precise rule which would give him jurisdictional competence. And Italy has not established these regulations.

As a consequence we can see that the internal systems which should work do not work, not because they are not capable of working, and on this I draw your attention to the fact that the internal systems, internal systems of repression, are the most suitable because we must bear in mind that the International Criminal Court will not

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* *Professor of International Law, Italy.*

have coercive machinery at its disposal. Unfortunately these remain only in the hands of States, and therefore the States' criminal justice will remain the most suitable, in this respect, to reach this objective.

But the political will is not there, States do not establish legislation which would allow the judges to adjudicate and therefore it is not the judges' fault, but of the governments which do nothing in favour of the adoption of detailed legislation conforming to the international convention. And therefore the way which seems to be the best one, that which has raised many hopes, and I would also say many illusions, is the institution of an International Criminal Court.

I was saying, before, that a lot of progress has certainly been made, if one remembers the early days, when the problem first appeared, - in the first World War, then it was frozen up to 1990, 1991, when it was revived. But we must not have any illusions.

The mobilization that has brought us here, that there is no peace without justice, is certainly the primary motivation and cannot be held back. We must move forward, and not only in view of the diplomatic conference, but also for the meetings of the Preparatory Committee. We must remain mobilized during the Diplomatic Conference because many knots will not be untied by the Preparatory Committee and will be taken back to the Diplomatic Conference. Even then, the next mobilization will be necessary for the Statute, because it will also be possible to achieve the adoption of a Statute at the Diplomatic Conference.

One must act so that not any Statute will be adopted but a certain Statute which will solve problems already mentioned here. Another mobilization will be needed so that the Statute will become operative, because there is the danger that then it will remain on paper and that it may even be used only by the Security Council as an *ad hoc* Court, and this would be a big failure.

One of the major unsolved problems is the interference of the Security Council in the workings of the Court, and I will here limit myself to point out that the issue of aggression is certainly a very delicate problem, considering the competence that the UN Charter attributes to the Security Council. We must always bear in mind that the International Criminal Court, as it has been conceived, and as States want to establish it, is a Court set up not to judge governments but to judge individual persons. Therefore, the competence of the Security Council, which, is not called upon to judge just anyone, because we know that according to Chapter VII the Security Council is not a judge of governments, relates to the re-establishment and maintenance peace, and this is the reason for

which, the two *ad hoc* courts do not examine crimes against peace, because the Security Council should act, in this respect, in an impartial manner.

The other unsolved problem, already referred to is the issue of rationed material competence, particularly the problem of the so-called inherent jurisdiction. This would mean that either the International Criminal Court will be **automatically** competent to prosecute a suspected criminal, or that it will have to be set in motion. And if it is to be set in motion, by whom? This means that the International Criminal Court would prosecute a suspected criminal only if its competence is accepted by one of the states connected with the particular crime. This is the project of the Commission for International Law, and this is still the fundamental problem which is being debated in the Preparatory Committees.

However the biggest problem, and with this I will conclude, is the one of complementarity of the jurisdiction of the International Criminal Court with reference to state jurisdictions. It is naturally obvious that the court's jurisdiction is not expected to be an exclusive jurisdiction, not even for the *delicta iuris gentium*, nor for the massive, systematic type of *delicta iuris gentium*, but the International Criminal Court is expected to operate in a subsidiary relationship to state jurisdictions. Here, therefore, the problem of necessary mobilization comes up again, so that state jurisdictions may continue to function and so that they can be provided with the legislation that we were speaking of: both substantial and procedural. The main problem is knowing when the Court will intervene, and this is the issue being discussed by the Preparatory Committees and on which there is no agreement. When the state involved in a crime, either from the territorial point of view or because its organs are involved, does not carry out its duty the reason for this may be varied: either because it does not want to, or because it is not capable, or due to the collapse of the system. The collapse of the system in Rwanda, and especially in Somalia, perhaps even in the former Yugoslavia were situations which, from this point of view, were easily recognizable. But there are situations where the system has not collapsed at all, where it is even quite strong, and in these cases totalitarian regimes are very powerful and everything works very well from the point of view of the organization of the state, and serious crimes are committed against humanity.

Well, this is the knot that remains to be untied, the one about the complementarity of the Court's jurisdiction in relation to the one about the collaboration between the States and the Court. This

collaboration, it must be stressed, is necessary at all levels, for example in the collection of proof and the search and capture of the suspect. One must here mention also the major problem of the execution of the sentence which brings us back to a structural reason on how international law is exercised and its relationship to internal rights. The direct applicability of the judgement within the states' systems does not exist, it is not even provided for in the Statute of the International Criminal Court, just as it is not provided for in the two statutes of the two *ad hoc* courts, in spite of the fact that it is an authoritative decision, and could have been provided for. Consequently states will actually end up by providing for procedures for the recognition of the judgements of the International Criminal Court, and this naturally constitutes a big risk.

One last observation concerns the issue of judgement by default. This problem is not defined in the same terms as for a state's system. It is rather a problem of *in absentia* than a default in the strict sense of the term, because sometimes, and the possibility is absolutely not pleasant, this hypothesis, the absence of the accused, may depend not so much on the accused himself but on the state, and especially so in cases of crimes against humanity in times of peace. But which state, which government has any interest in handing over an indicted person? Therefore, the problem is always the consent of the states and the true operationability of the consent of the states.

GIUSEPPE DI FEDERICO*

Let me first thank very warmly the organizers of this important Conference for having invited me. Even more for having listed my name among the keynote speakers, though I am not so sure to be able to strike the proper keys or notes in my speech. I say this with cause because while I can be considered, with due indulgence, an expert in the area of comparative judicial systems at the national level by no means can I be considered such with reference to international courts of justice.

In doing my homework for this Conference I got very much entangled with the relevant literature and the debates held so far in the attempt to define the conditions under which a much hoped for international court of criminal justice could properly and effectively function: the scope of its jurisdiction, the definition of the internationally relevant crimes, court procedure, ways to ensure both that the court be independent and that it appears to be such (the protection of independence in both of its aspects being at the international level an even more crucial element of legitimization than at the national level). Those issues and others have already been dealt with by other speakers this morning. Furthermore some of the interventions we heard this morning and this afternoon - above all that of professor Bassiouni - have convinced me that it would be better to set aside what I had prepared and instead say a few words - within the time limit of ten minutes set for us by the president of our panel - on criminal initiative, meaning by this, both the investigation of the internationally relevant crimes and the prosecution in court of persons charged with having committed them.

In the morning session professor Bassiouni reminded us that since the end of World War II there have been as many as 200 conflicts and over one hundred and seventy million casualties, that the accountability mechanisms for such a staggering amount of victims have been few and feeble. These figures, as impressive as they are

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as an indicator of the dimensions of the possible caseload of an effective international court of criminal justice, are certainly not the only ones to be taken into account. As already remarked by other speakers, such a court could not be properly called a court of justice if it were not directed to effectively try the many crimes against humanity that are committed not only in the context of an armed conflict but also by the no less cruel repressive policies that dictatorial regimes often apply on a large scale.

The reports given so far have concentrated their attention on the characteristics and functions of the international court. Far less attention has been devoted to prosecution, though we all know that the prosecutor is the gatekeeper of criminal justice, that the judge is basically a passive agent and that without the effective functioning of prosecution criminal courts remain ineffective. Professor Bassiouni was kind enough to send me his report to the UN on the investigations conducted in former Yugoslavia on the crimes against humanity that have been committed there.

Such a report not only underlines the magnitude of the horrifying crimes that have been committed - vividly portrayed this morning also by Mr Cicak - but also the enormous difficulties encountered in conducting investigations and the staggering costs that they entail both in terms of human and financial resources. But the cost of investigations - as insurmountable as that may be - is not the only impediment to effective investigations on the international plane. Actually the conduct of accurate, effective investigations (conducted directly or supervised by the international prosecutor) pose a far more immediate challenge to national sovereignty than the activity of a remote court. If we take into account on the one hand those two difficulties and on the other the magnitude of the potential caseload, the need to define accurate strategies intended to protect and support a credible role of the international court of criminal justice becomes evident at least on two different accounts.

In the first place the need to carefully define and drastically circumscribe (at least initially) the crimes for which the court is competent. In the second place the need to define carefully and in a transparent way the priorities in conducting investigations and promoting criminal action to avoid possible suspicions or accusations, recurrent even at the national level in several democratic countries, that prosecution might be influenced by political considerations or that it may operate differently with regard to "strong" or "weak" countries. Obviously priorities cannot be left to the case by case definition of the prosecutor. They must be stated in general terms

by a politically accountable international agency (the Security Council? the UN General assembly?) or included in the treaties that establish the international court. This is not to say that the prosecutor should be given or accept binding directives on single cases. Whenever there is or there might be a disproportion between the resources available on the one hand, cases to be investigated and criminal initiatives to be taken on the other, the definition of priorities in general terms far from being detrimental to the independence of the prosecutor tends to reinforce it by lessening the level of discretion placed in his hands (the relation between prosecutorial independence and accountability is a very much debated issue even at the national level; so much so that it was one of the issues proposed for discussion at the last UN Congress on the Prevention of Crime).

Most of the preceding speakers have so far stressed the many difficulties that are to be faced for the establishment and proper working of an international court of criminal justice. I am afraid I have added more substance to their worries. Like them I do hope that they be overcome.

The Hon Emma Bonino with her usual determination has urged that the International Criminal Court be established within the next year. I fully share her motivations but at the same time I share also the worries expressed by her long standing companion of many political initiatives, Marco Pannella, who in his speech warned us that the real difficulties will arise after the Court is established.

ELI NATHAN*

With more than fifty years after the end of the Second World War, with the unspeakable international crimes committed against civilian populations culminating in the holocaust and the annihilation of 6 million Jews, followed by the Judgment of the International Military Tribunal at Nuremberg, the international community is now embarking on the bold and noble project of establishing a permanent treaty-based international Criminal Court.

Large-scale atrocities committed in an ever-increasing number of States demand that such jurisdiction will ensure that the perpetrators of these crimes be brought to justice and any further occurrence be adequately deterred.

In our view such a jurisdiction should rest on a consensual treaty-basis providing for the establishment of an independent tribunal dealing with the most heinous crimes of international concern and intended, in the language of the preamble to the Statute of the ICC, "to be complementary to national criminal justice systems in cases where such trial procedures may not be available or not be effective".

To be effective, such jurisdiction should be objective, impartial, independent, free from political pressure or influence of any kind, and accepted by a large element of the international community.

Turning now to the issue of the jurisdiction of the ICC under Article 20 of the Draft Statute, two matters are here involved:

a) the categories of crimes which should be subject to the jurisdiction of the Court;

b) the proper definition of the crimes to be included.

There is at this stage general agreement that the crime of genocide, crimes against humanity and war crimes in the broader sense of this term, namely both serious violations of the laws and customs applicable in armed conflict and grave breaches of the Four Geneva Conventions of 12 August 1949 should be included.

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There are differences of opinion as to whether the crime of aggression should be included, whether jurisdiction in respect of grave breaches of the Four Geneva Conventions should be extended so as to include Additional Protocols I and II of 1977 to these Conventions, and whether the jurisdiction of the Court should cover also what had been termed "Treaty crimes".

There is no question that the crime of genocide should be subject to the jurisdiction of the ICC. In our view, the definition of the crime should follow the principles enshrined in the Genocide Convention of 1948, which have been defined by the International Court of Justice in its Advisory Opinion of 1951 as representing rules of customary international law recognized as binding upon States without any conventional obligation.

The inclusion of the crime of aggression poses difficulties.

As we are dealing here with criminal offences, the principle of legality requires that the crime in question should be capable of a sufficiently precise definition to be included in a criminal statute and should have been so defined.

The definition of the crime of aggression is at this stage fraught with great difficulties and a generally accepted definition is so far wanting.

The Charter of the International Military Tribunal of Nuremberg referred to aggression within the specific context of planning or waging a war of aggression [Article 6 (a)], the definition does not include participation in aggressive acts short of war, and the relationship between State and individual responsibility would require further clarification.

The definition contained in the Annex to General Assembly Resolution 3314 of 1974 was intended for the guidance of the Security Council when determining, in accordance with Article 39 of the Charter, the existence of an act of aggression. The definition refers to an act of aggression committed by a State against a State and is not concerned with acts of aggression committed by individuals though attributable to a State.

The definition recently included in Article 16 of the Draft Code of Crimes against the Peace and Security of Mankind bears witness to the serious difficulties encountered in formulating a suitable definition for the crime of aggression. This Article actually defines the term "aggression" by the very term which itself requires definition in providing that an individual who is an active party to aggression committed by a State shall be responsible for a crime of aggression. The question as to what is the meaning of the term "aggression"

remains open. The crime of aggression to which individual responsibility is attached must be directly related to the international crime itself. So long as the components of the crime have not been precisely defined, the crime itself will not be ripe for inclusion in the Statute of the ICC.

To overcome these difficulties the assistance of the United Nations Security Council has been enlisted. However, the involvement of the Council under its powers under Article 39 of the Charter in the judicial process of the Court, may introduce difficult problems into the relationship between the ICC and the Council, may adversely affect the independence of the Court, tamper with the right to due process of the accused in his trial by the Court and may introduce political matters into the judicial process of the Court.

Insofar as crimes against humanity are concerned, it is our view that no nexus between the commission of such crimes and War Crimes or other crimes within the jurisdiction of the Court should be required.

Nonetheless, care should be taken that the definition of the crime will be such as to prevent that the Court will be abused for political purposes and will not be turned into an instrument for the lodging of trivial or frivolous complaints. The fact that the criminal act in question belongs to a category of crimes subject to the jurisdiction of the Court does not imply the automatic exercise of the jurisdiction of the Court in respect to that particular criminal act.

It would be necessary to provide that not only the nature of the crime itself be of a heinous nature, but also that the specific criminal act itself should have been committed as part of a widespread or systematic attack on a large scale against any civilian population.

There has been general agreement that War Crimes should be subject to the jurisdiction of the Court.

Such jurisdiction should also extend to crimes committed in an armed conflict not of an international character at least within the purview of Common Article 3 of the Four Geneva Conventions of 1949, taking also into account that some of the most abhorrent atrocities were committed within the context of internal armed strife, and the commission of these atrocities will often have the most serious international repercussions.

Article 3 of the Statute of the International Tribunal for Rwanda may here be usefully referred to.

However, the fact that an act constitutes a war crime under customary international law does not necessarily qualify the act for the exercise of jurisdiction by the ICC. Such outcome would be

overburdening the Court with a multitude of individual complaints which in many cases may relate to trivial matters or may be motivated by political considerations.

What we have said in regard to crimes against humanity in this context applies with equal force to war crimes, and the relevant provisions of the chapeaux to Articles 18 and 20 of the Draft Code of Crimes against the Peace and Security of Mankind may here be usefully referred to.

Consideration should also be given in regard to the inclusion in the jurisdiction of the Court of acts in violation of instruments which have not as yet been generally accepted or adhered to, and their having crystallised into rules of customary international law is still in doubt.

In this context we refer here in particular to Additional Protocols I and II to the 1949 Geneva Conventions.

In order to encourage the wide acceptance of the jurisdiction of the Court we would propose that any definition be based on those acts which have been defined as grave breaches in customary law or in conventions which undoubtedly embody customary law.

As for crimes pursuant to Treaties, it should be noted that five of the Treaties mentioned in the Annex to the Statute of the ICC were concluded for the purpose of combating international terrorism. The crimes in question are of serious international concern and of sufficient gravity to qualify for inclusion in the Statute, and it may be assumed that in regard to many of the criminal acts in question national jurisdictions may either not be available or may be unwilling or ineffective to cope with them.

Insofar as the exercise of the jurisdiction of the ICC is concerned, this should conform to the concept of complementarity, in other words, the ICC will not be competent to investigate or try a case where national jurisdictions are available or effective and are willing and able to act.

As opposed to the Statutes of the former Yugoslavia and Rwanda, the ICC is not, under the Draft Statute, given primacy over national Courts, and it is not intended to have the Courts replaced by the jurisdiction of the ICC as long as these Courts are willing and able to act.

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.

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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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?

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[66] See Bassiouni, *supra* note.

THIRD SESSION:

THE ORGANIZATION OF THE COURT. THE INTERNATIONAL CAMPAIGN IN SUPPORT OF AN ICC

ADAMA DIENG*

The International Commission of Jurists (ICJ) welcomes that some progress has been made during the August 1997 session of the UN Preparatory Committee on the Establishment of an International Criminal Court. Although consensus has emerged on some issues, the ICJ is concerned that many of the politically-sensitive questions, such as the role of the UN Security Council, remain contentious and unresolved.

Several provisions were reviewed during this session. Most of the language in the Court's Draft Statute remained between brackets. Several options and alternatives to each article were considered, but very few issues were finalised or resolved. The ICJ said:

"Victims of genocide, war crimes and crimes against humanity throughout the world anxiously await the establishment of this permanent International Criminal Court to eradicate the impunity granted to the perpetrators of such crimes. They would like to see that an effective, independent, and just court be established soon".

During this session, the United States of America and France continued to argue in favour of a greater role for the UN Security Council. Singapore proposed a compromise formula which was accepted by smaller States. Britain, China and Russia, were open to considering the Singapore proposal.

Although the ICJ favours that the future Court be triggered through the prosecutor, by various bodies, including States and the

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* *Secretary-General, International Commission of Jurists.*

UN Security Council, it fears that the independence and credibility of the Court will greatly diminish if strong connections are established between the Court and the Security Council.

The ICJ is also disturbed that some States continue to be reluctant to grant the court inherent (automatic) jurisdiction over all the above-mentioned core crimes.

Some States claim that national courts should have concurrent jurisdiction over such crimes. These States fail to acknowledge, however, that it is the failure of national legal systems to bring to justice the perpetrators of grave breaches of humanitarian law and gross violations of human rights that makes the creation of an International Criminal Court imperative.

Many States are persistent in their refusal to allow the prosecutor to act upon his/her own initiative. They would like the court to be triggered only by States or by the Security Council. Denying the prosecutor the ability to act upon initiative prevents him/her from responding to the request of victims. States, after all, hesitate to displease each other. Those States which are protected by a Permanent Member of the UN Security Council will have additional immunity.

Also disturbing is that discussions are delayed by focusing on detailed procedural questions. The ICJ fears that this is a delaying tactic. The ICJ said:

"Delegations should focus their efforts at this stage on creating sufficiently precise general rules, but allow flexibility for more detailed rules to be developed by the judges as required by the circumstances".

The ICJ attended the Preparatory Committee's meeting at the UN Head-Quarters in New York. The Preparatory Committee met from 4 to 15 August 1997. This was the third session of the Committee since its establishment and the ICJ has attended all of the previous sessions. Since 1991, the ICJ has been advocating the establishment of a permanent International Criminal Court to eliminate impunity. The ICJ welcomed that the UN General Assembly has established in 1995 this Preparatory Committee with a mandate "... to draft texts of a convention for an international conference of plenipotentiaries". The Committee bases its work on a draft Statute that was finalised by the UN International Law Commission in 1994. The Preparatory Committee, which was preceded by an ad hoc Committee, will meet twice in New York in December 1997 and in March/April 1998 before the Conference of Plenipotentiaries is held in June 1998.

For a successful diplomatic Conference to be convened as scheduled, delegates need to pursue more rigorous negotiations to reconcile legal systems and ensure the creation of an effective court.

Non-Governmental Organisations (NGOs) observe the work of the Preparatory Committee. The NGO Coalition for an International Criminal Court brings together hundreds of oganisations from all regions of the World. The Coalition aims at fostering awareness and support for the Court among a wide range of civil society organisations. During the sessions, the Coalition assists its members in co-ordinating their lobbying efforts with governments and disseminates information concerning the establishment of the Court. The ICJ is a member of the Coalition's Steering Committee.

MUSTAPHA MEHEDI*

Thankyou Mr Chairman.

Allow me first of all, on behalf of the UNESCO chair for teaching, research and education in human rights established at the University of Oran in Algeria, to express my profound gratitude to the organisers who did me the honour of inviting me to participate in these distinguished proceedings. May I assure them of our support for the campaign so that the diplomatic conference of the plenipotentiaries for the establishment of the court be convocated in 1998, as well as for the mandate of the preliminary committee required to finalise the statute of the court to ensure that all be set for the immediate arrest and submission to justice of persons pursued and accused of crimes against humanity, war crimes and genocide by ad hoc tribunals.

The preliminary committee having the task of concluding a convention for the creation of an international criminal court must be congratulated and encouraged. The Armenian, Bosnian, Kurdish, Cambodgian genocides are not the only ones: massacres have been carried out elsewhere by fundamentalist terrorist groups, particularly in my country of origin, Algeria. It seems that one cannot combat terrorism with white gloves, and with the Universal Declaration of Human Rights (on which the statute of the international Criminal Court is based) in hand. These issues, are regularly brought up by numerous politicians and militants for human rights in Algeria. If you allow me to talk about my country, since it was referred to yesterday, I would like to mention the escalation of horror which is engaged into by, on the one hand, muslim extremist groups and, on the other hand, forces of repression: on both sides, passion and hatred have reached barbaric proportions.

As you all know, Algeria is living a conflict where the settlement of dues, rivalry, and divergences follow one another and where one is called upon to take sides at the mercy of one's own life. Let us however express what a number of these democrats and militants

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for human rights think. They refrain from denouncing the violence of either side and recognise the necessity for pluralism, tolerance and dialogue as upheld by educators in human rights. These terrorist groups have executed men and women who were carriers of culture, members of the clergy, muslim or non-muslim, young and old, their throats slit. They also killed religious persons of denominations other than Islam, most notably the Archbishop of Algiers and the six monks. This constitutes the best example, the best proof of religious intolerance.

Nevertheless, human rights are indivisible; in the face of particularly despicable manifestations of Islamist terrorism, the Algerian authorities have sometimes responded with reprisals. Politicians from both sides are usually of equal ferocity. In a country where the culture of human rights and democracy is absent, the discourse pertaining to justice, peace and human rights, as vehicles for a democratic conscience, is greeted with scepticism similar to a camouflaged defensive of one or the other side.

Hence the inevitable contradiction between the exigencies of justice and the impunity of these horrendous crimes. Consequently, for the massacre of populations, not victims of civil war but rather victims of wars waged against civilians, the fact that the authors of such crimes remain unpunished is unacceptable. An international criminal court must therefore be created.

Indeed, since human rights are indivisible and universal, the centrality of man may not be conceived without a centralised mechanism of constraints. The international criminal court has however remained the poor child of international public law. I also share the opinion expressed yesterday that creating an international criminal court is not sufficient. It is necessary for an awareness-raising campaign on the culture of human values to accompany this institution. It is with this in mind, Mr Chairman, that upon our own initiative, the UNESCO chair for teaching, research and education of human rights, democracy and peace, in partnership with the national observatory of human rights, UNESCO and the University of Oran was created. This chair has been created so as to contribute to the enhanced promotion of human rights in Algeria, in the Maghreb countries, in the Arab world and in Africa, according to principles of multilaterality and interdisciplinarity recommended by UNESCO. This teaching and research unit stems from the realisation that one of the greatest weaknesses of human rights resides in lack of knowledge, not to say ignorance, upheld by individuals towards it, and attempts to remedy the situation. It

provides for the training of specialists, researchers, and teachers, as well as professionals, members of the police corps and the military and lawyers directly concerned by problems of the state of law on a day to day basis. The chair will also provide consultancy services and expertise in matters related to human rights to international institutions, the United Nations and UNESCO. One of its experts, has just been nominated member of the sub-committee of the United Nations against racial discrimination and the protection of ethnic minorities.

It is surprising that the issue of the establishment of the international criminal court was not raised by the inter-sessional group on impunity during the 49th session of the sub-committee. To mark our participation in the campaign on the establishment of the international criminal court, I would like to suggest placing on the draft agenda of the 50th session of the sub-committee, the aim of raising the awareness of experts hoping for a resolution by the end of the proceedings of this sub-committee. In addition, so as to promote a universal approach based on the comparativity between doctrinary viewpoints pertaining to different legal cultures, the UNESCO chair has undertaken the translation from Russian into Arabic and from Russian into French of a publication devoted to the topic currently under discussion in this room. This work, written by the Rector of the Free University of Moscow, and his colleague, both of whom belong to a generation of lawyers of the ex-USSR, develops interesting viewpoints at the heart of the democratic transition, familiar to their country and to the rest of the world affected by bipolarisation of previous times.

As regards my comments relating to the international criminal court, there is no doubt that the questions linked to the material codification, i.e. the code of international crime and the code of international procedure, i.e. the statute of the international criminal court, are intimately related. In principle they are to be implemented at the same time, but due to the specificities of the normative process in international law, their actions might not be entirely synchronised. The codified texts have little chance of covering all aspects of the issue at hand; if one refers to the draft code of 1991 this excluded the subjects of international crime, both moral persons and States, whereas procedural law is first and foremost a law of action. The codification of procedural matters is related in that the condemnation for international crimes must go through the International Criminal Court which, from the start must represent a force which is sufficiently independent of the States which participate in the case.

In this way, States will no longer have the means at their disposal to avoid material norms. Naturally, the conventional resolution of problems relating to procedure, which at the moment are the only possibility, represents a little less than half the solution to the problems posed by material rights. It is for this purpose that in the projection of a judicial mechanism with all its elements of suing and accusation, various factors must be taken into consideration so as to create a trustworthy, effective and durable institution. Firstly, the factor relating to the State's involvement. It is on its own will that will depend the necessity of creating either a mechanism which will function according to the wish of the participating actors within the State, or an international criminal court which will act independently of the wishes of the guilty party. It is obvious that the first of the two models is today more plausible than the second in the establishment of this court. The second necessitates a radical restructuring of the system of contemporary international relations at a time when this restructuring has become mature.

To this effect, I would like to raise a matter which has not been raised up to now, a matter relating to the international criminal court which is supposed to be a body reporting to the Security Council and therefore dependant on the Security Council. In order to remain independent, the rules governing the Security Council, a political body safeguarding international security and peace, are not applicable in terms of its current composition. By virtue of the democratisation of United Nations institutions, I question the right of Russia to the veto, when the country is not the entity it once was. I am rather preoccupied by this matter which risks seeing the above-mentioned body dependent on a force which might not necessarily be democratic. Amongst the recommendations which I might put forward on this independence, is one which calls upon the Security Council to provide an example by opening itself democratically.

Thus to conclude, I would say, that in conformity with the Resolution of the General Assembly of the United Nations of 1989 declaring the period from 1990 to 1999 as the decade of international law of the United Nations, that the principal aim of the decade is progress respecting the principles of international law, the promotion of the progressive development of international law and its codification. The creation of the international criminal court, in general terms and in particular relating to the drafting of the statute of the international criminal court by the international law commission can provide an important contribution in the achievement of the principal objectives of the decade.

WILLIAM PACE*

I first want to express my appreciation to our hosts, the University, the Institute, NPWJ, and the government of Malta. HG Wells in one of his famous remarks commented that the history of civilization is a race between education and disaster. It is in this context that conferences like this one are so important - which bring together experts and leaders of civil society, academia, government and media to appraise and assist in the historic process now proceeding to establish a permanent world tribunal holding individuals responsible for violations of the most heinous crimes against humankind.

If we - progressive members of the above-mentioned sectors - succeed in our quest to have the ICC statute adopted in Rome during the next year, the ICC will be the last major international organization established during the twentieth century - the most war-ridden and bloody century in all history.

I must say I speak today under two hats - as Convenor of the international NGO Coalition for the Establishment of an International Criminal Court (CICC), and as Executive Director of the World Federalist Movement (WFM) - Institute for Global Policy, a small international movement begun in 1947 to promote peace and democratic rule of law in international affairs.

The Coalition was begun in early 1995. WFM had been asked by Amnesty to convene a meeting of NGOs at the UN in New York to discuss the upcoming UN meetings to discuss the draft ICC statute prepared by the International Law Commission. At the conclusion of that meeting, attended by some thirty NGOs, it was agreed to form a coalition for which WFM was asked to serve as the secretariat and I as convenor.

The major international NGOs did not want to organize a new formal or legal entity, requiring the adoption of statutes and by-laws, creation of a legal governing board, etc., in part because the representatives believed it could take years to secure their organizations' governing boards approval to participate. WFM has

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been very honored to have this role and responsibility. We have an informal Steering Committee, on which NPWJ serves, consisting of the most active members of the Coalition who have representation at the UN Headquarters where the ICC negotiations have taken place. The Steering Committee assures that WFM has the guidance and support of its members in carrying out its mandate.

To belong to the Coalition, an NGO must request membership and support, in principle, the establishment of an independent, fair and effective ICC. The Coalition itself does not take positions, a requirement that Human Rights Watch and others insisted upon at the beginning, one which allows groups to be able to join without lengthy internal consultations, and which allows the maximum independence of the Coalition's members and working groups.

Because this policy is confusing to some, especially academicians who are not expert on the workings of NGOs and intergovernmental bodies, I want to mention two other reasons why the CICC does not take positions as a coalition.

First, as a corollary to their independence, NGOs often simply do not have the same positions on all issues. In a matter so complicated with legal, technical, and political considerations, differences in opinions cannot be avoided. For example, NGOs from civil and common law backgrounds could be expected to disagree on the best formulation for merging the two legal systems into a fair and harmonious new world legal system.

Second, by remaining "neutral" the Coalition gives those governments and UN officers the greatest ability to argue for the **principles** supporting the participation of non-state experts in this historic process and negotiation. If the Coalition itself took positions against and campaigned in opposition to those of a particular government or governments, it would be very difficult to oppose those government's efforts to exclude the NGOs from the negotiating process. Thus, by remaining "neutral", the Coalition actually increases the political space and strengthens the capacity of all NGOs to argue their positions.

Our members, however, do take strong positions on many issues. And our members often join in "sign-on" statements on particular issues.

The Coalition now comprises literally hundreds of NGOs from all regions of the world and sectors of society. Relatively small groups like mine benefit enormously from being associated with leaders like Adama Dieng of the ICJ who join us in our common efforts at the negotiations. NGOs like the ICJ have expertise and focus on the

key issues which often serve as the basis for the positions of progressive governments. I can say with some confidence, that perhaps until very recently, virtually no government or NGO, except WFM on behalf of the Coalition, had anyone working on the ICC full time. Indeed, many government's legal advisors are so overloaded with a multiplicity of commitments, they truly appreciate the comprehensive, non-nationalistic, expert papers prepared by NGOs.

Without the in-depth treatment of issues by non-state experts, including academicians, the basis of reasoning and debate in the negotiations would be substantially narrowed.

One of the main purposes and roles of the Coalition is to foster and disseminate these expert documents and position papers, providing NGOs and governments alike, with not only the up-to date information on developments, but access to the best thinking on issues.

Throughout the last two years of negotiation, the Coalition organizes meetings with national and regional delegations to the ICC preparatory committees (prepcoms). The Coalition meets in advance to discuss how to conduct the meetings, discussing what are the most important issues to raise with a government, and often orchestrating our presentations and questions to achieve maximum logic and effect.

Supplementing the general meetings of the Coalition, which include between 50-100 NGOs, are meetings of the working groups and caucuses, such as the women's caucus, the caucus of NGOs working on victims issues, and the religious groups working group. Further, the Coalition has helped form national networks, such as the ones in Canada, the USA and Italy. Since our initial meeting, CICC members have approached the ICC process as one with multiple stages: from the ad hoc discussions of the International Law Commission draft Statute to formal Preparatory Committee meetings (prepcoms), from the prepcoms to the treaty conference, from the treaty conference to ratification, and finally organization of the Court.

The Coalition, recognizing the importance and inter-linkages between the ad hoc tribunals (ICTY-ICTR) has strongly supported those processes and efforts to integrate the expertise, best aspects of the tribunals, their statutes and jurisprudence into the ICC negotiations and drafting.

The Coalition, with the support of its members, foundations, private individuals, and progressive governments also reaches out to involve experts from the least developed countries and to form national and regional networks throughout the world.

And the Coalition, in addition to holding briefings for the international press at the UN during each prepcom, is now attempting to develop a more comprehensive international strategy for promotion of awareness of this historic negotiation amongst the world press and media, targeting key national capitals.

The statement by one important government delegation representative, that the NGO Coalition was the "largest and most powerful delegation" in the negotiations is surely an overstatement, but that we are a major "player" in the process cannot be denied. Our attendance and consultative offerings are taken seriously. The NGO involvement in the ICC negotiations is building upon the recent practice of NGOs becoming involved in international intergovernmental negotiations from the beginning, literally from the adoption of procedural resolutions, following closely every step and paragraph of the 'drafting' process. It is important to note that the CICC and NGOs are not seeking a negotiating role, but a consultative role at the negotiations.

NGOs now monitor and compare the public statements of governments in national capitals with their statements at the negotiations. As a result of the formal decision by governments taken in plenary in February 1997 to allow NGOs to attend not only the plenaries but also the working groups, NGOs are able to follow the vicissitudes of the international negotiating process much more intimately than in the past. Of course, NGOs are excluded from many of the closed informal meetings between governments. But, the days of total exclusion from international treaty processes, wherein NGOs could only stand outside like expectant fathers waiting to hear what has been delivered by governments, is past.

Academicians at this conference should know that the ICC process is much further along than you can ascertain from the official documents. With all due respect, the negotiations are far beyond theoretical, academic stage now. Intellectual and idealistic "shoulds and whys" are irrelevant, replaced by the hard "cans" and "hows" of political engineering.

In this respect, the Coalition is often working closely with the largest of the negotiating blocs, the so-called "like-minded" group of countries which represents officially some 38 nations, but some, like Trinidad and Tobago, itself represents 13 **caricom** (caribbean) countries. The Coalition, through its members, is deeply involved in discussing different proposals and strategies with the progressive governments.

We will be in Rome, attending and lobbying the governments

throughout the treaty meeting. NGOs do not really represent but reflect the broad sectors and voices of global civil society. Whether the world community will successfully negotiate the establishment of this new world court will largely be determined by whether the leaders of the world's governments are listening only to those voices of nationalism and self-interest, or to those voices calling for the replacement of the rule of brute force with the rule of just law. We represent these latter voices.

SALVO ANDÒ*

Within the context of the debate on the competence and the functioning of the International Criminal Court, the problems of its organization have not been as yet tackled adequately. This is understandable for many reasons.

a) Although it is agreed that setting up an International Criminal Court is of little use unless it is given the necessary means to function, it is however evident that the question of its means - which and how many - is conditioned by the procedural model chosen, and most of all by the quality and quantity of the crimes which will fall within its competence. To date the problems to be solved in this field are many.

b) There is another reason for the little attention that has up to now been given to the organizational problems.

The ICC's jurisdiction is of the complementary type: that is a jurisdiction which has the aim of making up for the lacunae of the national jurisdictions, when these are not in a position to function, or are prevented from functioning, or do not guarantee a serene and impartial form of justice. At the present stage of the debate the most relevant question appears to be how to work out the complementarity between the two jurisdictions.

The project of a Statute drawn up by the ILC, which has undergone amendments on many points by the Preparatory Committee, has wisely opted for compromise solutions. The only point on which it seems that there cannot be significant adaptations is the one concerning the so-called consensual principle. The "founder" States must accept the jurisdiction of the ICC for the various crimes committed if the ICC is to function. And the States - by accepting such jurisdiction - must cooperate with the International Court. The "founder" States must therefore guarantee by all means the proper functioning of the apparata with which the ICC will be endowed, considering that there will be an ad hoc Committee, the Committee of States Parties, which will make it possible for them to be constantly

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aware of its needs and difficulties. Therefore the organizational problems, as problems of the ICC, will also be the problems of the "founder" States.

c) The problems of organization cannot be tackled and solved on paper, which means that the provisions of the Statute will not be enough to solve the practical problems of the running of the ICC. It will therefore be necessary to consider the type of collaboration that the ICC will receive from the States who will from time to time be involved in its activities and also the difficulties encountered in the different territories, for example for the arrest of persons responsible for the crimes against which proceedings are instituted and for the collection of evidence.

From this point of view it is worthwhile to reflect on the experiences of the two ad hoc Courts which have been active for some time now.

What is the use, for instance, of allotting substantial budgets if one is then not in a position to spend, or to guarantee legal assistance to defendants if in a given place there are no lawyers in a position to defend, as in the case of Arusha?

On the organizational level, then, besides the responsibility of the States, the Security Council of the UN will also have a significant responsibility to guarantee the proper functioning of the ICC.

With respect to the ICC, the Security Council does not have the role of promoter as it had for the two ad hoc Courts, but it exerts very significant powers which influence the proper functioning of the ICC.

Suffice it so say that:

a) It is the Security Council which has to declare that an armed aggression has taken place. The Court in fact cannot consider individual acts of aggression without the previous verification by the Council of acts of armed aggression.

b) It is up to the Security Council to start legal proceedings (for crimes related to the situations provided for under article 39 of the UN Charter).

c) It is the Security Council which, according to the provisions of article 23 of the Draft Statute, can debar the Court from considering various crimes of aggression, in cases where these are connected with a situation with which the former is dealing within the framework of Chapter VII.

And then, in cases of conflict between States and the ICC, such as when it is being determined whether a State's jurisdiction is willing and able to proceed against persons responsible for international

crimes, the Security Council is not obliged to stay neutral. If a State is not in a position to guarantee the proper functioning of justice, it is the duty of the Security Council to intervene, precisely to guarantee peace. The refusal or the inability to proceed against such serious crimes, and the contextual refusal to allow the ICC to start proceedings (in the case where the States have signed the Treaty setting up the ICC) do not represent normal situations of denied justice. But they show up a grave institutional crisis. And in cases where not even the ICC can operate, due to the limits of its jurisdiction, then humanitarian or perhaps even military intervention will be necessary.

All in all, if the States having the duty to collaborate with the ICC refuse to do so, or if they assume attitudes which obstruct or defy investigations approved by the ICC or the decisions taken, these actions do not constitute subversive acts against the jurisdiction of an International Court, whereby the Security Council would have instruments to intervene. This means that in today's world there will be an ever stronger link between a given system of international legality and the maintenance of peace. Whoever moves out of international legality, also vis-à-vis the respect of human rights, will be effectively endangering the peace. The move from the protection of crimes against humanity, perpetrated during war or in peacetime, to the protection from the most serious violations of human rights, is at last becoming closer.

One must have faith in the positive mechanisms which should mark the future of international relations. Today the best Statute possible for the ICC is the one which will be accepted by the largest number of States. Having an operational ICC will mean that, besides the right to military and humanitarian intervention, we will also have the right to judicial intervention.

It is all a matter of eroding further in this field some unjustified prerogatives of the sovereignty of the States. It is also a question of spreading, by means of the punishments meted out to the individuals responsible for horrendous crimes, a stronger culture of legality in the international community, one which is not limited to declarations of principle, but which is entrusted mainly to the rules of a fair trial and to the sanctions inflicted by such a trial. The resistance encountered up to now by the attempts to set up the ICC cannot all be explained away as hostility to these principles.

Many people are afraid that the ICC's jurisdiction will not be the same to all; others fear that it is too equal.

Those who are afraid that the power of the stronger States might

take over that of the Court would like to see it written down in the Statute that the Court has priority over national jurisdictions.

On the contrary, those States who have up to now enjoyed the power of establishing the rules of war and peace and the right to declare, through the use of the right to veto in the Security Council, what is right and what is not, are afraid that the activity of a truly neutral juridical organ, which applies the laws and judges according to justice, might create a new international order based on a community of truly equal States. And hence from this point of view the competence of the Court should be reduced. The Court in this instance, must enjoy few powers, and specific ones, only those powers which are conceded by the States.

It is important to take into account both types of resistance in order to succeed in the setting up of the Court in the short term. Flexible solutions are needed, those that can allow the establishment of procedures which will widen the powers of the Court, according to a trend which requires States to increase their ethical duties and decrease arrogant and unjustified displays of national sovereignty.

EVA FALCAO*

Forum Justica e Libertades is a Portuguese, non-governmental organization (a civil rights' association) whose main statutory objectives are the defence of fundamental rights, civil rights and liberties.

In order to fulfill these goals several activities are held that range from education, information and media intervention (we recently edited a "Guide of the citizen's rights) to legal aid, that can assume effective support during criminal (and sometimes civil) procedures.

Amongst our main concerns are the issues connected to the defence of human dignity in all its implications; therefore we feel very honoured and wish to thank the organisers for the invitation to participate at this Conference.

It is truly with great satisfaction that we have been accompanying the evolution of the United Nations' positions, as well as those from several governments, NGO's and other institutions towards the establishment of a permanent International Criminal Court.

In fact, we believe this permanent court to be of the outmost importance:

1) It is clearly a court for the 21st century: we are talking about the protection of the deepest and most precious values of mankind condemning crimes such as genocide, serious violations of humanitarian law, crimes against humanity, aggression and others[1] which is profoundly related to our strongest beliefs and feelings;

2) A permanent International Criminal Court will be, in our opinion, quicker, cheaper and more effective than the *ad hoc* tribunals;

a) Quicker since it will work permanently: channels of communication will be created, with updated information; staff will be more prepared not only technically but also and especially in

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[1] Crimes defined or made punishable by treaties.

what concerns material conditions (security, lodgement, etc.); nowadays it takes at least one year for an *ad hoc* tribunal to be set up; there must be political will, then a location must be found, prepared people must be hired ... in this process and during this time, information, evidence, testimonies could be lost. **A prompt justice is a better justice.**

b) At the same time, if one has to repeat this settlement process every time there is a conflict that requires international criminal justice intervention, one will be unnecessarily and repeatedly spending money (for instance when renting buildings and hiring personnel).

c) It will also be more effective: it will play a dissuading role, since there will be a very serious pressure on judging and punishing the above mentioned crimes whenever States are incapable or unwilling to do so.

When governments or individuals know that policies and acts will be justified at an international forum, additional elements contribute to their decision-making process.

Besides, staff will create and develop a very specific type of law - international criminal law, enriched by other experiences and decisions, in a continuous flood of interpretations and case-law. However, this only happens with the appropriate amount of work; **a court that is scarcely used cannot make a mark.**

In this area, we have a lot to learn and gain from the experience and good work of the existing permanent courts (European Court of Human Rights, UN International Court);

2d) In a relatively short period of time the European Court of Human Rights has established substantial jurisprudence. The Human Rights Committee and even the Inter-American Court of Human Rights are influenced by the European Court decisions, their value being also present in a number of cases related to the American Convention of Human Rights (1969), most of all, and because the European Convention is considered the most highly developed scheme of international human rights protection, the European Court has great potential in building up a "law of human rights". **That role could in future belong to an International Criminal Court.**

3. The establishment of an International Criminal Court will oblige countries to a serious commitment, since they will all contribute to it financially and materially (location, human resources).

4. And finally, it will constantly produce judicial and social information: it will draw people's attention to its work and to the

problems it deals with; it will certainly lead the way into a more serious condemnation of the "core crimes".

Consequently, the international community will be more attentive and demanding in what relates to international criminal justice, peace itself does not calm our conscience any longer. It is now time for the international law, for the defence of fundamental rights and the Universal Declaration of Human Rights.

As a final word, as an NGO preparing ourselves to transmit (and receive) information whenever asked and needed, we are open and looking forward to a tighter cooperation with the International Criminal Court always respecting, of course, the independence and sovereignty of its magistrates and the secrecy of the matters discussed.

WILLIAM A SCHABAS*

The creation of an International Criminal Court, long a distant dream of human rights activists and criminal law scholars, now finally seems inexorable. Although there have been occasional and isolated murmurings of difficulty, there is now virtually no doubt that a major diplomatic conference will take place in Rome in June, 1998, and that it will conclude with the adoption of an international treaty, the statute of the permanent international criminal court. There are a few more hurdles: the October meeting of the Sixth Committee of the General Assembly will provide a chance to take the pulse of Member States; and there are still a few remaining sessions of the Preparatory Committee, at which some outstanding issues will be debated. It is, of course, naive to expect that the PrepCom sessions will resolve some of the truly fundamental issues that divide States, of which the most important currently seems to be the "trigger mechanism". Understandably, States are nervous about how cases may be brought before the Court. After resisting the whole concept for more than forty years, how can there be any surprise that many States - particularly the major powers - will want to make sure they retain a degree of control over the Court's docket, mainly so as to make sure that their names do not appear on it.

Ultimately, this and similar issues must reach the floor of the diplomatic conference, where compromise solutions will be hammered out in informal negotiations and then, if consensus is impossible, the matter put to a vote. Consensus on everything may, indeed, prove impossible. This should be no surprise, nor should an instrument that fails the test of unanimity be viewed as unacceptable. Some States are still opposed to the project, and they may attempt to reduce the draft statute to an impotent text before, ultimately, declining to ratify it in any case. Adoption of a text by consensus means that it can never go beyond the lowest common denominator. While this may be acceptable for programmatic resolutions in the General

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Assembly and other bodies, such an approach may prove to be a fatal impediment where the creation of an international criminal court is concerned.

These brief remarks are not intended to review all of the results obtained and the open issues, an impossible task in such limited time. On the subject of results obtained, suffice it to say that the success of the project now seems assured. The work and contribution of so many over years and even decades means that the promise of Article VI of the Convention for the Prevention and Punishment of the Crime of Genocide to create an international criminal jurisdiction, made by the General Assembly on December 9, 1948, will come true some forty-nine years later. As for open issues, I will attempt to address some of the procedural matters that remained unresolved following the August session of the Preparatory Committee, and the question of penalties, due to be considered in the upcoming December meeting of the Preparatory Committee.

1. Procedural questions

Debate about the procedural regime of the permanent criminal court has been enormously enriched by the practice of the two ad hoc criminal tribunals, established to adjudicate and punish war crimes and crimes against humanity committed in the former Yugoslavia and in Rwanda.

Originally, the Security Council had suggested that the Tribunals should observe an adversarial-type procedure, similar to that developed by the common law. The Rules adopted by the judges of the two Tribunals seem to give effect to this, although the practice of the Tribunals also reflects elements borrowed from the largely inquisitorial approach of the Romano-Germanic system. Nor is the practice of the two Tribunals entirely consistent. It appears that the Arusha tribunal leans somewhat more towards the Romano-Germanic system than the court in The Hague, perhaps a result of the personal influence of its president, Senegalese jurist Liaty Kama. The Appeals Chamber has not yet been able to enforce a coherent procedural model on both Tribunals because of its refusal to consider interlocutory matters.

Churchill once declared that the greatest legacy of England was the common law, which has taken root, thanks to British colonialism, in the far corners of the globe. Napoleon stated that he considered his greatest achievement to be the codification of civil law. Napoleon's Code penal, would appear to have filled the gaps where the common

law did not reach, particularly in Europe, Africa and Latin America. Both Churchill and Napoleon were convinced that their system was the better. They were both, no doubt, partly right and partly wrong. The two systems each have much to offer as international law struggles with the creation of a new jurisdiction. The problem is getting to the best parts of both, because each system is defended by loyal and astonishingly intolerant partisans who see only good in their own system and only bad in the other one.

Fortunately, this may be changing, thanks to the ad hoc Tribunals. What seems to be happening in Arusha and The Hague is an ongoing experiment with comparative criminal procedure, borrowing what may or may not prove to be the better elements of the two major systems of domestic criminal procedure. And this is influencing the debates about procedural issues for the permanent International Criminal Court.

There is then the question of guilty pleas. The August PrepCom spent several hours debating an amendment designed to provide for an expedited procedure in cases where an accused pleads guilty. While this may once have seemed highly theoretical, one accused before the Yugoslavia Tribunal has already taken such a step, admitting guilt and asking the court to sentence him in the absence of any independent evidentiary findings. Lawyers trained in the Romano-Germanic system were shocked at the suggestion, and when Drazan Erdemovic actually pleaded guilty in The Hague, the French judge who presided the hearing, Claude Jorda, was noticeably uncomfortable with the procedure, as his written judgment suggests.

Guilty pleas in the common law system are often linked to the system of "plea bargaining". However, plea bargaining as it is generally practised is used to deal with high volume crimes and seems clearly inapplicable to an international court designed to judge the world's criminal elite. There is much misunderstanding among Romano-Germanic lawyers about the legal effects of a guilty plea in the common law. It does not generally bind the court, which may and should refuse a guilty plea if the accused suggests the existence of a defence, or if the evidence of the crime appears insufficient. Moreover, common law judges are not bound by the common suggestions that prosecutor and defense lawyer may make following successful plea negotiations. In the Erdemovic case, the accused hinted at a defence of duress, but this was dismissed by the Tribunal which considered such a plea to be unavailable in the case of crimes against humanity, except in mitigation of sentence. What the guilty plea can offer the International Criminal Court is a technique of

expediting cases when an accused admits guilt. Surely this cannot be so objectionable to lawyers trained in the other system? Like the common law judge, the instructing magistrate of the Romano-Germanic system is not bound by an admission of guilt, although the latter will most certainly be influenced by such a development. A confession of criminal responsibility by the accused is surely a fact of paramount relevance, whatever the system of procedure.

There is also the issue of in absentia trials. The Secretary-General's report to the Security Council at the time the International Criminal Tribunal for the former Yugoslavia was being created suggested that in absentia trials, a feature of the Romano-Germanic system of criminal procedure, was not being contemplated. However, international human rights norms, and specifically article 14 of the International Covenant on Civil and Political Rights, do not forbid such a practice. They do, of course, entrench the right of an accused to be present at trial, but an accused may renounce to such a right by refusing to give effect to a summons to attend in court. The Human Rights Committee has already ruled that in absentia trials do not violate article 14 of the Covenant. The judges of the ad hoc Tribunals attempted to meet the Romano-Germanic system half way by devising a special procedure that closely resembles the in absentia trial, with the significant distinction that it does not impose a penalty once criminal liability has been determined. Saving this distinction, however, the so-called "Rule 61" procedure looks suspiciously similar to the in absentia practice. Rule 61 states:

Rule 61: Procedure in Case of Failure to Execute a Warrant

a) If a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, and the Prosecutor satisfies the Judge who confirmed the indictment that:

i) he has taken all reasonable steps to effect personal service, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to him to be; and

ii) he has otherwise tried to inform the accused of the existence of the indictment by seeking publication of newspaper advertisements pursuant to Rule 60, the Judge shall order that the indictment be submitted by the Prosecutor to his Trial Chamber.

b) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the

evidence that before the Judge who initially confirmed the indictment and any other evidence submitted to him after confirmation of the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge.

c) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in Sub-rule (a) above.

d) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States.

e) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to co-operate with the Tribunal in accordance with Article 28 of the Statute, the Trial Chamber shall so certify, in which event the President shall notify the Security Council.

The only reason why the Rule 61 proceeding is not being used more widely at Arusha and The Hague is that the judges simply do not have time to hear the cases. They are too busy hearing cases where the accused is present to invest time considering cases where the accused is still at large.

In debates on the issue, common lawyers often treat the matter as if it is a question of fundamental rights. Actually, common law has never found in absentia procedure to be of any great interest for the same reason that the international judges use the Rule 61 procedure so infrequently. Common law views it as a waste of judicial energy to hear evidence in cases where the accused cannot be punished. And even common law jurisdictions recognise exceptions to the general rule, for example in summary hearings on relatively minor charges or where an accused absconds while a trial is underway. In other words, common law makes a practical objection, not one of fundamental principle.

The limited use of the Rule 61 procedure in The Hague has shown the procedure to be of some value. In the Karadzic and Mladic case, heard in July, 1996, the Tribunal reviewed evidence over several days of hearings and came to the conclusion that a strong prima facie case of guilt existed. This conclusion is of immense legal and above all political significance, especially should it ultimately prove

impossible to actually bring the two accused to court. Even common lawyers have understood and appreciated the value of such proceedings and hopefully the drafters of the statute for the International Criminal Court will profit from this experience.

2. Penalties

The agenda of the December session of the PrepCom includes the question of penalties. The Statutes of the two ad hoc tribunals contain brief provisions dealing with sentencing, proposing essentially that sentences be limited to imprisonment (thereby tacitly excluding the death penalty, as well as corporal punishment, imprisonment with hard labour, and fines) and that they be established taking into account the "general practice" of the criminal courts in the former Yugoslavia or Rwanda, as the case may be. The Rules of Procedure and Evidence adopted by the judges in accordance with the Statutes, provide somewhat more detail, identifying some of the aggravating and mitigating factors that may be taken into account by the trial court during the sentencing process. To date, discussions about sentencing in the International Law Commission, the Sixth Committee and the PrepCom suggest there will be little or no change from the approach in the case of the ad hoc Tribunals.

An important issue in the establishment of penalty provisions is the nulla poena sine lege rule. Review of the drafting of the statutes for the ad hoc Tribunals show how important this principle was. It resulted in a reference to sentencing practice in the former Yugoslavia and in Rwanda and the suggestion that the Tribunals should look to domestic sentencing practice in determining the appropriate sentence. But application of this concept has proven difficult if not impossible, as the Trial Chambers of the Tribunal in The Hague have indicated in their sentencing judgments in the cases of Erdemovic and Tadic. It would indeed be unfortunate if the drafters of the statute of the permanent Court get overly excited about this question. After all, the nulla poena issue was settled at Nuremberg, when Nazi war criminals were sentenced to death or life imprisonment even in the absence of positive law texts setting out the range of sentences in black letter provisions.

Some useful guidance in this respect comes from the European Court of Human Rights, which took a less "positivistic" approach to the nullum crimen nulla poena problem in two judgments issued on November 22, 1995. The rule nullum crimen nulla poena sine lege is enshrined in article 7 of the European Convention of Human Rights.

The cases before the Strasbourg Court dealt with the common law of England, and with the existence of an offense of spousal rape despite the absence of any legislated text. The accused argued that while it was open for Parliament to create a new offense of spousal rape, they could not be condemned for rape of their wives given that the common law defines rape as non-consensual intercourse with a woman other than the wife. Endorsing the report of the European Commission on Human Rights, the European Court affirmed that "laws" as they are meant in the maxim sine lege include unwritten laws, and moreover that these laws may be redefined over time by judges in accordance with changing social values. The question, said the Court, is not whether a positive law text enacted by Parliament exists prior to the commission of the offence, but only whether criminal liability was sufficiently foreseeable and accessible to the accused. Clearly, the European Court of Human Rights would have little difficulty with a sentencing provision relying on general principles of law or customary law, as was the case at Nuremberg. Can an accused seriously argue that since Nuremberg the possibility of a serious prison sentence for war crimes and crimes against humanity, up to and including life imprisonment, was not "accessible and foreseeable"?

Classical criminal law theory proposes several objectives for punishment: deterrence, retribution, protection of the public and rehabilitation. In the Erdemovic case, the Trial Chamber turned to the declarations of Security Council members at the time Resolution 827 was adopted, in May, 1993. These show, according to the Trial Chamber, "that they saw the International Tribunal as a powerful means for the rule of law to prevail, as well as to deter the parties to the conflict in the former Yugoslavia from perpetrating further crimes or to discourage them from committing further atrocities. Furthermore, the declarations of several Security Council Members were marked by the idea of a penalty as proportionate retribution and reprobation by the international community of those convicted of serious violations of international humanitarian law". The Trial Chamber continued: "The International Tribunal's objectives as seen by the Security Council - i.e. general prevention (or deterrence, reprobation, retribution (or "just deserts"), as well as collective reconciliation - fit into the Security Council's broader aim of maintaining peace and security in the former Yugoslavia. These purposes and functions of the International Tribunal as set out by the Security Council may provide guidance in determining the punishment for a crime against humanity".

Much of the struggle for international justice, and the battle against impunity, is a search for truth. As United States permanent representative Madelene Albright told the Security Council at the time of the adoption of the Statute for the Yugoslav tribunal, in May 1993: "Truth is the cornerstone of the rule of law and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process". The eternal contribution of the Nuremberg judgment is not so much the individual punishment of the handful of accused, most of whose names have been long forgotten by all but the experts, but rather in its affirmation of the facts of Nazi atrocities. The jurisprudence of Nuremberg and the subsequent national military tribunals remain the most authoritative argument against revisionists who attempt to deny the existence of the gas chambers at Auschwitz and the other horrors of Nazi rule. Yet once the truth is determined and guilt or innocence pronounced, the court's work is not completed. It must also render an individualised sentence, one that fits the crime. The precedents set by the post-Second World War tribunals, as well as general principles derived from comparative criminal law, provide some guidance in this respect.

At Nuremberg and Tokyo, and in the various successor trials of the national military tribunals, retribution played a major role in the fixing of sentences, as is shown by the widespread use which was made of the death penalty. The statements by Churchill and Roosevelt of October 25, 1941 focused exclusively on retribution as the objective of war crimes prosecutions. As the Trial Chamber notes in Erdemovic, retribution was also a major factor in the sentence of death handed down by the Supreme Court of Israel in the Eichmann case. Historically, retribution derives from the lex talionis: "If a man injures his neighbour, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered".

Retribution is synonymous with vengeance. Accompanying the new focus of human rights law upon the battle against impunity, the significance of retribution as an objective in sentencing is heard with disconcerting frequency. Activists whose social vision is normally pervaded by tolerance and forgiveness become, in the name of retribution, militant advocates of severe punishment. It is often said that society cries out for punishment, of "justice". Subsidiarily, retributive theorists argue that if the authorities fail to punish, then individual self-help will take over, and vigilante action will become the rule.

But while it may be important to recognise the danger of such developments, surely a human rights approach must aim at combating these tendencies in society, which run counter to the rule of law and the protection of individual rights. In the Security Council, when the Statute of the International Tribunal for Rwanda was being adopted, New Zealand's representative Keating stated: "We do not believe that following the principle of 'an eye for an eye' is the path to establishing a civilised society, no matter how horrendous the crimes the individuals concerned may have committed". At best, the retributive sentiments of victims and their families, and of the public in general, must be taken into account in developing appropriate policies to deal with punishment for gross human rights abuses. But their encouragement may have unwanted and unhappy side effects, particularly where society is concerned with rebuilding and reconciliation. It should not be forgotten that many of the most appalling crimes in both the former Yugoslavia and Rwanda were committed in the name of retribution for past grievances.

Punishment is also expected to fulfil an objective of rehabilitation. This seems to be of great significance in the context of human rights violations, where reconstruction and reconciliation are paramount. The Security Council resolution creating the Rwanda tribunal expresses the view that prosecutions will contribute to "the process of national reconciliation and to the restoration and maintenance of peace". That punishment must take this goal into account can also be discerned with reference to human rights norms. Article 10(3) of the International Covenant on Civil and Political Rights states that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". The United Nations Human Rights Committee, in its second general comment on article 7 of the International Covenant on Civil and Political Rights, has stated that "[n]o penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner".

Rehabilitation's importance in criminal sentencing is also recognized in the Standard Minimum Rules for the Treatment of Prisoners. The American Convention on Human Rights states: "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners". In the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, the Participating States undertake to "pay particular attention to the question of alternatives to imprisonment". It is of considerable significance that Judge Jorda,

in the Erdemovic sentencing decision, considered the condemned man to have a *personalite amendable*. It may be difficult or impossible for society to reconcile and rebuild without serious efforts at rehabilitation undertaken within the context of effective action against impunity.

The recognized principles of punishment - foremost among them deterrence and retribution - are derived from criminal law, and are applicable generally, not just to the context of human rights violations. Human rights law has its own contribution to make to the debate, by its prohibition of punishment which is "cruel, inhuman and degrading".

Although this is a norm which remains subject to a degree of vagueness and imprecision, and one which is also liable to evolve over time, clearly punishment which is disproportionate or arbitrary is inadmissible. Certain punishments, notably corporal punishments and the death penalty, are also difficult to reconcile with the prohibition of cruel, inhuman and degrading punishment. It is no doubt for this reason that most of the draft provisions on sentencing for the permanent Criminal Court have excluded all forms of punishment that violate the offender's physical integrity, specifying that punishment shall be limited to imprisonment". This represents enormous progress since the Nuremberg tribunal, whose Statute provided: "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just".

Exclusion of the death penalty is a significant benchmark in its progressive abolition, which has been a theme of both criminal and human rights law since the end of the Second World War. In the debates in the International Law Commission, the Sixth Committee and the PrepCom show, there have only been a few, isolated calls for employment of the death penalty. Despite suggestions that Singapore and other retentionist States intend to make a fight on the point, their chances would seem remote.

Although Singapore and its allies have occasionally succeeded, in the past, in obstructing abolitionist resolutions within international bodies using procedural gambits, this is a rearguard fight. They have never dared make an aggressive, proactive pitch in favour of the death penalty, and any effort along these lines seems assured of ignominious rejection. Thus, the adoption of the penalty provision for the new International Criminal Court will also be an important stage in international recognition of the goal of abolition of the death penalty.

The issue of life imprisonment seems more problematic. During debates in the International Law Commission, several members took the view that life imprisonment without possibility of parole or other mitigation of sentence constituted punishment which is cruel, inhuman and degrading. However, they eventually compromised on this point. The Convention on the Rights of the Child forbids "life imprisonment without possibility of release", but of course the provision is only applicable to offenders under the age of eighteen or for crimes committed beneath that age. Life imprisonment without possibility of release effectively excludes the possibility of rehabilitation which is not only a legitimate goal of sentencing but one which is dictated by human rights law. Therefore, it seems particularly important that the statute of the International Criminal Court contemplate the possibility of provisional release or parole.

The elimination of the death penalty is already an important step away from retributive punishment. Although the ad hoc Tribunals are probably entitled to impose sentences of life imprisonment without violating the nulla poena sine lege principle, serious thought should be given to the wisdom of such a course, except in the rare cases where offenders are so disturbed that protection of the public against recidivism overrides all other sentencing considerations. As a general rule, they should never lose sight of rehabilitation, conscious of its close relationship to the social imperative of reconciliation in a wartorn country. If parole or some other form of release cannot be assured, then life sentences should not even be considered.

3. Conclusion

The establishment of the permanent International Criminal Court draws upon three distinct but related areas of law: international criminal law, international humanitarian law and international human rights law. It is the presence of this third area that sets it apart from its predecessors. An early effort at international justice, proposed in the 1919 Versailles Treaty but never effectively implemented, was concerned essentially with punishing individual leaders for their responsibility in the breaches of international treaties by sovereign states. International human rights law was in its infancy when the allies planned the Nuremberg tribunal, in August 1945, and to the extent that human rights abuses were punished, this was only on the condition that they were related, as crimes against humanity, to the armed conflict. Lest we forget, this seminal experiment in justice for humanity was entitled the

"international military tribunal". Thus, until the 1990s, international justice addressed primarily the laws of armed conflict. Yet it was because of the danger of legitimising armed conflict that the United Nations originally chose to remain aloof from the field of international humanitarian law. War was outlawed by the Charter, and an area of law whose purpose was only to regulate the waging of war could hardly be compatible with the aims of the Organization.

Our new models eschew the nexus with illegal war. Moreover, they muddle the classic dichotomy between international and non-international armed conflict, a distinction rooted in the specifics of humanitarian law but one which is irrelevant from a human rights standpoint. To be sure, international criminal justice in the 1990s bears the imprimatur of its legal predecessors, notably in the somewhat anachronistic preoccupation with infractions whose recognition dates to 1945. Indisputably, however, the new court is fundamentally interested in massive violations of human rights which we continue to label violations of the laws and customs of war, or grave breaches of the humanitarian law conventions, or crimes against humanity, out of concern for the nullum crimen principle.

As a human rights tribunal, the permanent International Criminal Court will provide a model of enlightened justice. Judges around the world, sitting in the most mundane criminal cases, will be influenced by its approaches to criminal law. Hopefully, the Court will draw on the best elements of the major legal systems, particularly in terms of criminal procedure. Also, international justice should provide an example of an enlightened and progressive approach to sentencing of offenders. Lessons learned in this system will without doubt percolate back down into national systems, to the benefit of all.

YEHUDA BLUM*

I should like to address myself to the issue of "trigger mechanism", that is, the question of what, or which actors could initiate (or "trigger") court proceedings.

This important issue is now dealt with in Article 25 of the draft Statute and is widely considered as one of its most significant provisions.

It is well recognized that, however well drafted its Statute, the proposed International Criminal Court can only hope to be effective if it attracts the support of a large majority of states. In order to do so, it must satisfy them that its operation will be as objective as possible, and reassure them in the face of existing suspicions that its procedures will not be implemented in a selective or manipulative manner.

That provision of the draft makes a distinction between the complaint procedure for the investigation of an allegation of the crime of genocide and the investigation of other crimes referred to in the Statute. With regard to allegations of genocide, the draft correctly requires that such a complaint be made only by a state party which is also a contracting party to the Genocide Convention of 1948.

With regard to complaints in respect of other crimes, Article 25 provides, again correctly, that only a state party which has accepted the jurisdiction of the court with regard to a particular crime should be entitled to file a complaint in respect of the commission of that crime.

Inevitably, then, the fact that complaints are to filed by states creates a very real danger that the investigative procedure may be abused for political ends. It may be impossible to eliminate this danger entirely, but it could be greatly reduced by establishing somewhat more stringent criteria for the filing of a complaint than are currently proposed by the ILC draft. The current proposal, in paragraph 3 of Article 25, is hedged with reservations. Thus, the

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complaint is required to specify the circumstances of the crime "as far as is possible" and is to be accompanied by such supporting documentation "as is available" to the complainant state.

In view of the severity of the crimes with which the Statute is intended to deal, one might expect a minimum threshold of information indicating that an investigation by the Court is warranted. It might also be helpful to require that the complainant state conduct an investigation itself, in so far as possible, to ensure that the complaint is well founded and to ascertain all available evidence in support of the complaint.

It has been proposed on a number of occasions that the Prosecutor should be empowered to initiate investigations *ex officio* or on the basis of information obtained from any source. Although these proposals reflect provisions in the Statutes of the Tribunals for the former Yugoslavia and Rwanda, the granting of such power to the Prosecutor is not appropriate in the case of a permanent Criminal Court. The Court is intended to deal only with international crimes of grave concern to the international community as such. Where no complaint has been forthcoming from any state, this would seem to indicate that the international community - in this case those states which have accepted the jurisdiction of the court in respect of the specific crime - has taken no interest in the prosecution.

An independent power for the Prosecutor to initiate investigations would also open the prosecution mechanism to allegations of politicization, and thus damage the credibility of the Court. In particular, a troubling distinction would arise between those complaints lodged by the Prosecutor (on his or her own initiative) and those which have the support of a complainant state.

I would also venture to suggest that the Court should not be empowered to accept *amicus curiae* briefs.

The establishment of an organ such as the Criminal Court necessitates a fine balancing act between the ideals and the practicalities. In certain cases it may be necessary to compromise on our most ambitious aims for the Court in order to achieve the widespread acceptance that the Court will require if it is to be effective. In striking such a balance, it seems there are two fundamental aims that must remain uppermost in our mind. The first is that the Court must retain a clear focus on the most heinous of international crimes. The second is the need to take every measure possible to ensure the objectivity and impartiality of the Court, and so encourage the community of states to accept this new organ as an integral and valuable part of the international scene.

CLOSING SESSION

ZAID BIN RA'ED, PRINCE OF JORDAN, AMBASSADOR TO THE UN

In 1936, an unknown British adventurer, and former pilot from the First World War - a man by the name of Cecil Lewis - published what was to be a classic book entitled **Sagittarius Rising**: essentially a thoughtful recollection of the author's wartime experiences. In one passage, Lewis makes reference to the inevitability of violence, war, and its attendant miseries: an inevitability brought on by what he called "the invincibility of man's stupidity". It is of course a rather grim and cynical perspective of the human political condition: one which may well be considered extreme by many of us - at least as a general assertion - but few would disagree that countless, shameful, stretches of human history are fettered with human stupidity.

The creation of an international criminal court, perhaps the most sane international undertaking since the establishment of the United Nations itself, is a profound challenge to Lewis's assertion. Here we have a great opportunity to prove Lewis wrong: that our stupidity is not invincible but permeable; that we can forge a credible juridical deterrent to those who contemplate genocide, or other grave breaches of international humanitarian law or, if deterrence fails, that we can, in bringing a case against those believed to be culpable before an international criminal court, reveal the truth - as Professor Schabas rightly asserted - and afford some measure of justice to the victims. In doing so, we also succeed ourselves in overcoming, once and for all, those narrower, political, interests that have hitherto beset our efforts to advance the cause of justice.

Our efforts are therefore crucial and perhaps now we can allow ourselves to be cautiously optimistic that a court will, in one form or another, be established in due course, one which we hope will be credible and will enjoy broad official support.

Using the court - in the first instance - and using good faith - in the second - will be the next challenge to confront the international community, as Professor Dinstein made clear.

Unless we are careful, and mature in our thinking, and responsible, Lewis's belief in the "invincibility of our stupidity" may still come back to haunt us and, like some face mask from a carnival, laugh mockingly at our noble effort, and insult us for having been so naive, so moral. Let us all pray this does not happen.

Finally, while accepting the force and realistic character of the arguments presented by Professors Clark and Dinstein, as well as by Mr Ruxton, we should not overlook Professor Bassiouni's underscoring of the simple educational or psychological impact the creation of a court will have on people. It could unlock, or initiate, subtle, psychological - almost hidden - processes, that accumulate and, over time, culminate in an eventual modification of circumstances. Or, to quote Hammarskjold: "Never measure the height of a mountain until you have reached the top. Then you will see how low it was". Not only is the climbing, in and by itself, a crucial experience but also it is unwise - and here I speak as a historian - to dismiss out of hand the role of the unforseen, perhaps the greatest protagonist of history. Certainly, the capture of Karadzic is no impossibility - should it occur, it may well release a momentum that will demolish what initially had appeared to be a daunting series of obstacles.

MARINO BUSDACHIN, General Secretary, No Peace Without Justice, Italy

First of all I wish to thank our Maltese friends at the Foundation for International Studies for having organized, together with us, this conference. I particularly wish to thank the Prime Minister, Alfred Sant, the Minister of Foreign Affairs, who is with us today, George Vella, who, together with the Rector of the University, Roger Ellul Micallef and the European Commissioner Emma Bonino, have kindly accepted to open our meeting. Lastly, naturally, I thank all of you for having participated and particularly for the high quality of your contributions.

At the conclusion of this meeting, however, it seems important to me to stress a message common in all the papers given at this conference. This is the need to be reasonable as well as to proceed with the greatest urgency. It seems to be a contradiction, a paradox. But I do not think so. Today it seems possible to us that a certain reasonableness be achieved in the language of the preparatory drafts of the statute. It seems possible to reach compromise solutions regarding inherent jurisdiction of the complementary integral mechanism. Reasonable compromise solutions which however cannot hide the precedence of limited, although exact, international jurisdiction. As well as a reasonable conditional renunciation of national jurisdiction, limited here as well to the exceptional crimes under consideration. Moreover it seems possible to reach a considerable number of acceptances: thirty, fifty countries make up almost a third of the members of the United Nations. If you recall the situation of certain treaties, for example those about torture or human rights, you will find that after a quarter of a century there still is, on the whole, a very limited number of countries which have signed these treaties. A good start will be one with a reasonable number, even though this will not be a large number, of countries which will sign these treaties.

Today all this appears possible. The impossible has become a number of reasonable things taken as a whole. The problem is not really to have a perfect Court, but having a Court which will start to operate with urgency and effectively on crimes which, at this point in time, can be considered the least common denominator of a great

number of states, as the last meeting of the Preparatory Committee has in some way demonstrated.

Before us we have a United Nations' agenda which is very demanding, which includes a debate of the sixth Committee of the 52nd Assembly of the UN, the Third Session of the Preparatory Committee planned for December, and finally the resolution of the General Assembly which should confirm the calling of and the rules which would govern the Diplomatic Conference planned for June in Rome. On this, Professor Bassiouni is right, and he was right yesterday when he insisted that the work of the preparatory committee is today marked by, on the whole, a state of constructive confusion, and that this confusion could hold back substantially the work of the committee. In this way it becomes realistic to think of how to gain time by using the experts of the Preparatory Committee, perhaps with the contribution and support of non-governmental organizations. All in all, if it will not be possible to move from a consolidated compilation of documents to a consolidated text, it will be difficult to get to Rome next June.

Here I wish to make a digression to stress the enormous amount of work that has been done in the last ten years by some non-governmental organizations and by some forerunners belonging to the academic environment. There are some of them here today, others we shall be meeting in the other conferences. Particular credit is due to Bill Pace, the convenor of the NGO coalition for the International Court. The work that has been done, the continuous lobbying, the continuous pressure in all the places where work has been going on to create this important machinery for international justice - the NGO Coalition for an International Criminal Court has been a very important element in all this. So much so that today we are thinking in an absolutely exceptional manner of allowing non-governmental organizations to participate, in a rather limited way, in the sessions of the Diplomatic Conference of Plenipotentiaries, with observer status. It is an absolute novelty, but which is probably a credit to the energetic collaboration which the NGOs have given.

The same goes for the academic community, starting with the first ones, in this case Professor Bassiouni, and Benjamin Ferenz, who for fifty years, on their own, have been striving to promote this debate within the framework of the United Nations and in a wider sense in the Academic world. To these people must go our heartfelt thanks, as Secretary of the "There's no Peace without Justice"; special thanks must go to the Open Society Institute of New York and to the European Union for the funds which they have invested in this

Campaign for the Institution of the 1997/98 Court of "There's no Peace without Justice".

To go back to the topic, one must say that there is a particular reason for the urgency with which it is necessary to overcome all the obstacles and create the Permanent International Court. It is urgent because it can be an effective deterrent to the massacres and crimes that are now being perpetrated, as well as those of the future. The dilemma is always the same one: it is either urgent or it is not! In this regard it must be stressed that among the circumstances, the exceptional concurrent events which in the last four or five years have helped the process of the constitution of the Court to move impressively faster, there are also small concrete elements which are intelligently pragmatic on the preparatory committees, on the fixing of dates, on the willingness to host the conference and to obtain the necessary funds for it. If one compares the importance of the topics with the "technical and scientific" debate they do not seem much, but it was these elements which made all the difference.

The same concreteness can be seen in today's request to keep the planned date: June 1998 in Rome, above all the request to be given five or six weeks' time to conclude the proceedings. The impression is that if the time-wasting tactics and the opposition of many countries will not be overcome, the Diplomatic Conference for the Institution of the Court will not be in a position to conclude its work in four or six weeks, with the approval of the Statute, and that the discussion could reopen and start all over again wasting the efforts of fifty years.

It also seems to us that the remaining obstacles cannot be overcome unless a strong political leadership is established, which is at present lacking, and which would lead the process of the institution of the International Court in the next six or eight months.

Only a great mobilization of public opinion world-wide and of the civil society which could bear strong pressure on governments and parliaments in the majority of the member-states of the United Nations can be, in our opinion, an effective instrument to overcome the last strong resistance. For the first time we are facing the possibility of a form of justice which does not only belong to the victors, as in the case of the *ad hoc* court on Yugoslavia. This opportunity must not be missed. It is necessary to conquer for the next millennium an important segment of international law, of international jurisdiction and of international justice.

GEORGE W VELLA, Deputy Prime Minister and Minister of Foreign Affairs and the Environment of Malta

Excellencies, Distinguished Participants, Ladies and Gentlemen,

For these last two days the maxim 'peace through justice' has been echoed throughout this Conference by each and every speaker. Indeed, in a tranquil and relaxed atmosphere, all those that have participated in this important dialogue, have been able to discuss and deliberate as well as exchange views and experiences that will contribute, in a structured and clear manner, towards the process started nearly fifty years ago when the United Nations General Assembly asked the International Law Commission to establish a permanent international criminal court.

I have been told that the discussions that have been held, the presentations, and the various interventions, have all been of a very high level, and that one could sense that there was a lot of preparation judging by the quality and high level of the presented material and of the debate. Above all I understand that the debate was frank, open and spontaneous, containing many new and fresh ideas on the subject of this conference.

For nearly five decades, the international community seemed to be ambivalent to the sufferings of millions of people around the world, victims of repression, genocide, war crimes and crimes against humanity. Perpetrators of atrocious crimes have gone unpunished. Those who have committed atrocities against innocent people and against vulnerable groups of our societies, could not be brought to justice.

The participation of politicians, diplomats, students, non-governmental bodies as well as independent experts in this ongoing debate has enriched the discussion and helped bring out the salient points, in favour and against the setting up of this International Criminal Court. Besides, all along, this discussion has continued to reveal how much we all depend on one another, particularly on issues that touch the lives of millions of the earth's inhabitants.

The arguments brought in favour and against the establishment of an International Criminal Court are intriguing since this involves the creation of a new world body. The discussion at the United Nations has shown that there still exist marked divergencies of views,

that if not resolved, will block any move forwards. Commissioner Emma Bonino, in her address at the opening of this Conference stated that the countdown to the Diplomatic Conference next year, starts here in Malta. Indeed, with the conclusion of our deliberations today, we can safely say that the countdown has started. All of you, distinguished participants, have a crucial role to play in pushing forward this initiative. We have to convince our Governments to give their full support and to urge their representatives at the United Nations to ensure that a final decision be taken to bring the discussions and negotiations on the Draft Statute of the Court to a positive conclusion.

I feel the forthcoming United Nations General Assembly should lift the conditionality it posed in its resolution of December 1996, so that the Diplomatic Conference to set up the Court should be convened in June 1998.

Many participants here have, in their well-researched papers and learned interventions, referred to the tragic situations which have beset countries like the former Yugoslavia, Rwanda, Somalia, Cambodia and other countries.

Many have hailed the setting up by the United Nations Security Council of the two ad hoc International Tribunals for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia and in the Territory of Rwanda, as a concrete development in this respect. We have also heard that although these tribunals are only a stop-gap measure aimed at solving specific contemporary problems, they are neither permanent nor global in scope. At the same time their establishment is tantamount to an expression of the collective international will to assert the rule of law and to uphold the principle that certain minimum standards of behaviour should be observed even under the most acute, tense and difficult political situations.

The recurrence of war crimes and crimes against humanity over the last five to ten years has added a new sense of urgency for the creation of an international criminal court. The establishment of a permanent international court would not by itself solve all problems, but it could and can provide a framework for deterrence. It could prove to be an essential tool in preventing gross violations of international humanitarian law. Bringing perpetrators to justice sends a clear message that crimes against humanity and similar serious crimes will not be tolerated and that persons committing such acts will be held accountable and will be brought to justice. The Court will be a vehicle for justice and, as such, would serve as

an indispensable tool to effect reconciliation after the commission of barbaric atrocities. Otherwise wounds will remain, open and unhealed, a stark reminder of a past which keeps encroaching on the present and possibly also the future.

It is rather sad to realise that today, on the threshold of the new millennium, war crimes, genocide and crimes against humanity are still being perpetrated in various parts around the world, and as we do not have the necessary legal judicial structures, some perpetrators remain unpunished. However, in today's global village, criminal acts are instantaneously transmitted throughout the four corners of the world and flashed on the silverscreens in our drawing rooms and offices. Public opinion is being increasingly mobilised and is becoming more vociferous in its calls that the perpetrators of these crimes be brought to justice. The international community faced with such awareness and such reaction has to respond immediately to these calls. Such a response has to be efficient and convincing, to be psychologically satisfying.

There are limits to what the law can achieve. The law needs the clear will of all States to investigate, prosecute and punish war crimes for the effective workings of this Court. The setting up of this Court would be a landmark development towards the creation of a balanced and effective system aimed at ensuring that international crimes, especially massive violations of the basic fundamental human rights, do not remain unpunished. The creation of an effectively operating International Criminal Court will not only serve to ensure punishment, but will also remove that sense of impunity which has unfortunately characterised these types of international crimes in the past, and will serve as a powerful deterrent against the commission of such violations in the future.

Malta subscribes and agrees to the establishment of such an International Criminal Court. As a small country, the establishment of this Court is a reassurance that countries like Malta can benefit from and have recourse to an international system that asserts the rule of law and upholds minimum standards of human behaviour. This position converges with the foreign policy of the Government of Malta which is based on the upholding and protection of fundamental human rights, on the promotion of peaceful means for the settlement of disputes and on a policy which opposes military aggression.

Malta has consistently promoted these principles by advancing initiatives which have as their principal objective the well-being of humankind. The hosting of this Conference in Malta is in itself a

clear indication and commitment of Malta's active interest in the process leading to the forthcoming Diplomatic Conference in Italy next year, where hopefully a landmark political decision will be taken to set up an International Criminal Court.

During these last years, Malta has been closely following the work of the Preparatory Committee set up by the General Assembly, where it has constantly supported positions that would contribute to the creation of a fair and effective International Criminal Court, a Court which would be a reflection of the need to achieve an effective balance between on the one hand the respect for the sovereignty of States, and on the other hand, the need to ensure that International Criminal Law is respected.

Malta, together with all like-minded States, including the European Union, will therefore continue to work assiduously, to ensure that the target date for the Conference in June 1998 is honoured and to ensure that the discussions in the Preparatory Committee on the establishment of the Court, come to a successful end. Malta will also be ready to work closely with all delegations concerned so that the Sixth Committee of the 52nd Session of the General Assembly will adopt an appropriate resolution that will garner the necessary consensus on this issue.

The Government of Malta earnestly hopes that consensus is achieved on this particularly important topic in time for the Diplomatic Conference next June in Italy, and that such a consensus would lead to the establishment of a fair and effective system of international criminal justice.

I would not like to bring this successful and fruitful Conference to a close without first thanking the mentor of this initiative, EU Commissioner Emma Bonino, for her drive and her role in advancing the establishment of a permanent international criminal court as a concrete manifestation of her maxim "no peace without justice". Her participation here in Malta fills us with encouragement to proceed with Malta's vocation as a Euro-Mediterranean rendezvous, where issues of transnational importance could be debated and moulded in this small country of ours.

The choice of Malta as the venue for the first in a series of conferences at regional level, to mobilise public opinion and decision making classes, is in itself a vote of confidence in our country. The holding of this conference here in Malta reaffirms our belief in Malta's natural vocation as a harbinger of peace and stability in the Mediterranean region.

My government strongly believes in maximising the potential of

Malta's geopolitical status, and grabs every opportunity to prove its readiness to take concrete steps such as today's conference, to help contribute towards the greater stability of the Mediterranean itself.

I would also like to thank the Organisers, the 'No peace without justice' Forum and the University of Malta for providing us - Parliamentarians, independent experts, diplomats, the judiciary, and all interested persons - with the unique opportunity to contribute in a valid and open manner to the on-going discussion in favour of the setting up of the International Criminal Court. A special thank you should go to the media for the excellent coverage they have given to this event.

To you ladies and gentlemen, I wish you all a safe journey back to your homes and your families, whilst congratulating you on your commitment to the establishment of the rule of law around the globe.

The fifty-year dream of an International Court of Justice is becoming a reality. Together with all of you Malta is proud to be contributing to the realisation of this dream.

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