

## **Other International Developments**

## THE PROPOSED INTERNATIONAL CRIMINAL COURT

A Paper prepared for the Commonwealth Secretariat by Dr William C. Gilmore, Professor *elect* of International Criminal Law Faculty of Law, University of Edinburgh

### A. THE CONTEXT

1. The idea that the international community should create a judicial body to exercise criminal jurisdiction over individuals, as opposed to states,<sup>1</sup> has a lengthy history.<sup>2</sup> It will suffice for present purposes to recall that "it became an issue in international relations after 1945, partly due to the conviction that major war crimes or crimes against humanity should not go unpunished, partly due to a felt need to meet criticisms of the Nuremberg and Tokyo trials as victors justice, imposed *ad hoc* on the vanquished after the event".<sup>3</sup> The post-war political climate was not, however, conducive to the development of such a radical proposal and it was put to one side in the early 1950s.<sup>4</sup>

2. Its revival as a subject of serious international and governmental interest<sup>5</sup> in the latter part of the 1980s was due to a number of factors including, among others, the lessening of cold war political tensions<sup>6</sup> and the growth of concern about the nature and extent of the threat posed by various forms of transnational criminality. In so far as the latter is concerned the proposal by the Prime Minister of Trinidad and Tobago that consideration be given within the United Nations system to the possibility of establishing an international adjudicative body with jurisdiction over illicit drug trafficking and other transnational criminal activities struck a responsive cord.<sup>7</sup> In particular, it helped to focus attention on the special problems faced by small or otherwise vulnerable members of the international community. As the Commonwealth Secretary-General has since noted, it is important to "bear in mind that small countries cannot often handle the complex, expensive and sometimes dangerous consequences of a major trial involving international criminals".<sup>8</sup>

3. Within the United Nations system the General Assembly in 1989 remitted to the International Law Commission (ILC) the task of considering "the question of establishing an International Criminal Court or other

international trial mechanism".<sup>9</sup> Initially the work of the ILC on this subject took place within the context of its ongoing efforts to elaborate a draft Code of Crimes against the Peace and Security of Mankind.<sup>10</sup> Progress was such that "[a]t its forty-fourth session, in 1992, the Commission had before it the Special Rapporteur's tenth report on the topic .... , which was entirely devoted to the question of the possible establishment of an international criminal jurisdiction".<sup>11</sup> In the same year the ILC decided to create a Working Group which would focus exclusively on this question. By 1993 the Commission was in a position to receive a highly detailed report from this body containing a draft Statute with an extensive commentary.<sup>12</sup> The ILC "without formally adopting the text, referred it to the General Assembly for comment".<sup>13</sup>

4. While the work of the ILC was in progress concerns which had surfaced within the international community that insufficient attention had been devoted to ensure that individuals responsible for war crimes during the Gulf conflict were brought to justice were greatly reinforced by the tragic events which were unfolding in the former Yugoslavia. International opinion was particularly incensed by evidence of widespread and flagrant violations of the norms of international humanitarian law taking place within the region and especially in the Republic of Bosnia-Herzegovina.<sup>14</sup> On 25 May 1993 the United Nations Security Council formally expressed its determination to put an end to such acts and to bring to justice those responsible for them. Specifically invoking its powers of decision under Chapter VII of the United Nations Charter the Council, in Resolution 827 (1993), established an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law in that area of the Balkans in the period since 1 January 1991.<sup>15</sup> In this regard the Council required all states to afford the *ad hoc* Tribunal full co-operation and, to that end, to "take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by the Trial Chamber...".<sup>16</sup>

5. Developments within the ILC were examined by Commonwealth Heads of Government when they met in Cyprus in October 1993. The Report of the Committee of the

Whole on Functional Co-operation, which was approved by Heads of Government and attached to their final Communiqué, reads in relevant part as follows: "The Committee welcomed the work of the International Law Commission on the development of a draft Statute for an International Criminal Court. While accepting the difficulties inherent in the realisation of the concept, it recognised that the successful culmination of this initiative could provide the international community with an important instrument against serious international crime. It recommended positive Commonwealth efforts in achieving consensus on the issue and proposed that Law Ministers be requested to undertake such further consideration of the issues involved and the means of implementing the proposal as might be appropriate."<sup>17</sup>

6. It will be recalled that, pursuant to this mandate, Commonwealth Law Ministers, at their Meeting in Mauritius from 15 to 19 November 1993, took note of the work of the ILC and, in the context of discussions on the subject of extradition, explored some of the issues of co-operation which arose both in relation to the draft Statute and, more immediately, in connection with the creation by the Security Council earlier in the year of the ad hoc International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.<sup>18</sup> Insofar as the proposed International Criminal Court was concerned Ministers decided to authorise Senior Officials to revisit this matter at their meeting in Malta in April 1995.<sup>19</sup>

7. At that meeting Senior Officials had before them a paper commissioned by the Secretariat<sup>20</sup> and other materials relating to the progress of this initiative within the United Nations system. Although the Malta discussions revealed differences of view among participating delegations they were able to identify a number of matters of common concern. As noted in the final Communiqué these included:

- (a) the need to ensure that the court was only able to exercise jurisdiction over the most serious crimes of concern to the international community as a whole;
- (b) the need for precision in specifying the offences which would constitute the subject-matter jurisdiction of the proposed court (Article 20 of the draft Statute);

- (c) the need to ensure that the draft Statute was fully sensitive to the reality of the provision of relevant forms of international co-operation on the basis of Commonwealth Schemes rather than international treaties. In particular, they identified the need to secure wording in Article 21(2) which would cover rendition under the London Scheme, which was not technically an "international agreement";
- (d) the need for close examination of Article 51 (on co-operation and judicial assistance) to ensure its compatibility with Commonwealth arrangements and practice;
- (e) the need to examine more closely the relationship between the Security Council and the Court so as to ensure that the independence and impartiality of the Court would in no way be compromised.

8. Since that time the proposal to establish an International Criminal Court has been further discussed by Commonwealth Heads of Government. The Report of the Committee of the Whole issued at their meeting in New Zealand in 1995 took note of the ongoing work being carried out within the United Nations and "recommended that Law Ministers keep further developments under review".<sup>21</sup>

#### **B. OVERVIEW OF DEVELOPMENTS SINCE THE MAURITIUS MEETING**

9. During late 1993 when Commonwealth discussions were taking place in Cyprus and Mauritius the complex provisions of the draft Statute prepared by the ILC Working Group were receiving further detailed consideration in the Sixth (Legal) Committee at the United Nations General Assembly in New York. In the course of the debates on this issue, which attracted the participation of a substantial number of Commonwealth countries, there was strong support in principle for the initiative.<sup>22</sup> This is not to say, however, that there was evidence of a consensus surrounding the 1993 draft Statute as a whole. Many delegations expressed reservations about a range of issues. However, much of the debate concentrated on such fundamental matters as: the mode of creation of the Court and its relationship to the United Nations; the nature and extent of its jurisdiction including the right of the Security Council to initiate proceedings; and, the method of surrender of alleged offenders to the Court and related questions of international co-operation in criminal matters.<sup>23</sup>

10. In Resolution 48/31 of 4 December 1993 the General Assembly took note of the draft Statute and invited the ILC to continue to afford priority to its work on this subject with a view to finalising its proposals, if possible, in the course of 1994. To this end governments were invited to submit comments to the United Nations Secretary-General by 15 February 1994; an opportunity which was taken by a number of Commonwealth members.<sup>24</sup> The Working Group, now under the Chairmanship of Professor Crawford of Australia, undertook the demanding task of adapting and refining the 1993 proposals in the light of the views which had been articulated both by governments and other interested bodies.<sup>25</sup> The revised text consisting of 60 draft Articles and one Annex, again with extensive supporting commentaries, was formally adopted by the Commission in sufficient time to be included in its 1994 Report to the General Assembly.<sup>26</sup> The text is appended to this paper for ease of reference.

11. By the time this question was reached in the 1994 debates of the Sixth Committee planning in the Security Council to create, under Chapter VII of the Charter, a further ad hoc international tribunal to prosecute those responsible for genocide and other serious violations of international humanitarian law committed in Rwanda was at an advanced stage.<sup>27</sup> For many this initiative served to further underline the strength of the case for the creation of a permanent International Criminal Court. As the New Zealand representative in the Sixth Committee was to remark: "It is ironic that as this debate takes place, the Security Council, which last year established the Yugoslav War Crimes Tribunal for the former Yugoslavia, is considering the establishment of a second ad hoc criminal tribunal to deal with the genocide and other crimes against humanity that were perpetrated earlier this year in Rwanda. The fact that in the space of only two years the Council has felt the need to establish such ad hoc bodies is dramatic evidence of the international community's commitment to securing the prosecution and punishment of persons who engage in these most serious international crimes. However, it would be far better for the international community to be able to have recourse to a single and established International Criminal Court than for the Council to have to engage in the difficult process of establishing such ad hoc tribunals. The latter option runs the risk of there being inconsistencies in elaboration and application of international criminal law."<sup>28</sup>

12. As with the previous year many Commonwealth countries participated actively in the debates in the Sixth Committee in which strong support was expressed for a diplomatic conference to be convened in 1996 to elaborate and adopt a Statute for an International Criminal Court. However, some delegations were of the view that such a decision would be premature. In the final event it was agreed to establish an ad hoc Committee, open to all United Nations members, which would facilitate a further process of intensive consultation. Its task was to review the major issues arising from the ILC draft and to consider the convening of an international conference. This body held intensive discussions in April and August 1995 on the basis of which a detailed report was submitted to the United Nations General Assembly.<sup>29</sup> Following a further debate in the Sixth Committee the General Assembly in Resolution 50/46 decided to establish an open ended preparatory committee. Its mandate is "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...".<sup>30</sup> The Assembly also urged participation "by the largest number of States"<sup>31</sup> possible in the work of the committee which will meet from 25 March to 12 April and from 12 to 30 August 1996. The committee will report to the 51st session of the General Assembly which will decide on what course of action to adopt.

### C. THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

13. The 1994 draft Statute prepared by the ILC continues to provide the central focus for the ongoing intergovernmental discussions. Although an in-depth examination of that complex text lies beyond the scope of this paper it would be of value to recall some of its major features at this stage.

14. First, it is of importance to emphasise that the Court, as envisaged by the ILC, is a body which is highly circumscribed in terms of its ambition. As is emphasised in the Preamble, it is to be used only in respect of "the most serious crimes of concern to the international community as a whole". Furthermore, as the ILC has noted: "it is intended to operate in cases where there is no prospect of those persons being duly tried in

national courts. The emphasis is thus on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial co-operation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of states to seek extradition and other forms of international judicial assistance under existing arrangements".<sup>32</sup> Various substantive provisions have been inserted in the text in an effort to ensure that only those cases envisaged in the Preamble are, in fact, dealt with by the Court. For example, under Article 35 the Court may, "on application by the accused or at the request of an interested State ... or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible ... ". As has been pointed out elsewhere, the decision to include this provision, which has no counterpart in the 1993 draft, "reflects the awareness that no matter how stringent the jurisdictional requirements ... may be, there could still be cases in which no action was warranted, or where national investigation and prosecution were sufficient".<sup>33</sup>

15. Throughout 1995, both within the ad hoc Committee and in the Sixth Committee, considerable emphasis was placed on the importance of this principle of "complementarity" in defining the proper role for the proposed Court. However, considerable difficulties have been encountered in translating the principle into a practical definition of the nature of the optimal relationship between the proposed international body and national courts and investigative procedures. Wide divergences of view exist on the precise impact it should have on the substantive provisions of the draft Statute. This was evident, for example, in discussions surrounding matters as diverse as its implications with regard to the proposed subject matter jurisdiction of the Court and its significance for the drafting of appropriate provisions on assistance in relation to investigations and prosecutions and the surrender of persons to the Court.<sup>34</sup> Indeed, there are indications that so open-textured is the concept of complementarity and so varied are the views of individual countries with regard to its translation into practice that its real utility in the current context may be open to question. Some degree of balance and compromise will obviously be necessary. As the delegate of Finland remarked in the Sixth Committee on 2 November 1995: "Safeguards for upholding the primacy of national jurisdictions should not render the Court irrelevant".<sup>35</sup>

16. In order to cater for this limited category of serious offences of international concern the draft Statute seeks to produce a workable structure for investigation, prosecution, and trial and, in cases where convictions are secured, for the appropriate punishment of the individuals concerned. To that end it is divided into eight parts; namely, (1) the establishment of the Court; (2) composition and administration; (3) jurisdiction; (4) investigation and prosecution; (5) the trial; (6) appeal and review; (7) international co-operation and judicial assistance; and, (8) enforcement.

17. In approaching this daunting task "the Working Group did not purport to adjust itself to any specific criminal legal system but rather, to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an International Criminal Court or tribunals and relevant provisions in national criminal justice systems within the different legal traditions".<sup>36</sup> The Working Group was also sensitive to numerous other considerations including that of cost. This factor is perhaps most clearly evident in the compromise decision to suggest the creation of a permanent institution but one which would sit only as and when required.<sup>37</sup> On the other hand the draft Statute is sufficiently flexible to permit the Court to operate on a full-time basis should its actual workload eventually justify such a step.<sup>38</sup>

18. It is clear from the debates in the Sixth Committee and in the 1995 work of the ad hoc Committee that Commonwealth members and other states continue to harbour a range of reservations and concerns about specific issues of detail. It appears, however, that the most significant differences of view continue to revolve around the suggested jurisdictional system for the Court. As the representative of Australia noted on 25 October 1994 "the proposed jurisdiction of the Court and the approach of the Statute with respect to the modalities of how matters would come before the Court are central to the Statute".<sup>39</sup>

#### (i) Jurisdiction and Related Issues

19. Of critical importance in this regard is the identification of the crimes falling within the jurisdiction of the Court. It will be recalled that the complex provisions on this issue contained in the 1993 text<sup>40</sup> had been subject to considerable criticism.<sup>41</sup> As a consequence a major review was undertaken by the Working Group and the fruits of its labours, designed to bring greater clarity

and simplicity to the subject, are now reflected in Article 20. This provision, which was generally regarded as constituting a major improvement,<sup>42</sup> reads in full as follows: "The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

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

20. There are two major changes as compared to 1993. The first relates to jurisdiction over crimes under general international law. Following criticism in the Sixth Committee the ILC decided to abandon its generic approach to this subject, contained in Article 26(2)(a) of the previous text, and to utilise an enumerative system. In doing so it accepted "that in the context of a new and untried jurisdictional system, provisions of indeterminate reference should be avoided. It has therefore limited the Court's jurisdiction ... to a number of specified cases ...".<sup>43</sup> It should be noted that Article 20(a)-(d) was not intended to be exhaustive but rather to reflect "a common core".<sup>44</sup> In the words of the official commentary, the matters listed are "limited to those crimes under general international law which the Commission believes should be within the jurisdiction of the Court at this stage whether by reason of their magnitude, the continuing reality of their occurrence or their inevitable international consequences".<sup>45</sup>

21. It is of interest that three of the four categories also find inclusion in the Statute of the ad hoc Tribunal for the Former Yugoslavia.<sup>46</sup> The exception is the crime of aggression. In spite of the special difficulties of definition which arise in this area, and the complexity which flows from the responsibilities of the Security Council under Chapter VII of the Charter for such matters, the ILC concluded that it would be "retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated

with the waging of a war of aggression) 50 years after Nuremberg".<sup>47</sup> It was, however, felt necessary to include a special safeguard provision in this area. Article 23(2) performs this function and is worded thus: "A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint."<sup>48</sup>

22. The second major departure from the 1993 draft in this context relates to the elimination of the previous distinction between "crimes defined by treaties"<sup>49</sup> and so-called suppression conventions.<sup>50</sup> As the 1993 Commentary to draft Article 22 noted, the intention had been to differentiate "between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law".<sup>51</sup> Jurisdiction over the latter, including offences addressed in Article 3(1) of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>52</sup> was to be further limited by reference to a threshold requirement; namely, that "having regard to the terms of the treaty [they] constitute exceptionally serious crimes".<sup>53</sup> This approach was deemed necessary "in order to prevent the Court from being overwhelmed with minor cases ...".<sup>54</sup>

23. Having taken into account the debates in the Sixth Committee and the comments subsequently submitted by governments the Commission decided to abandon the system of separate and distinct treatment for these two categories of treaties. It was influenced in its thinking by the fact that the distinction "can be difficult to draw in the context of some of the treaties listed in the 1993 draft Statute, and its retention would add an additional level of complexity".<sup>55</sup> By way of contrast the threshold requirement was retained (though now formulated in terms of "exceptionally serious crimes of international concern") and extended to all of the treaties listed in the Annex. As Professor Crawford has stated: "This is a *jurisdictional* limitation, and can therefore be raised by the Prosecutor or a state either at the time of complaint or before the Presidency when an indictment is being considered. It can also be raised by the Court itself at any time".<sup>56</sup> Furthermore, the power of the Court under Article 35, to which reference was made above, to decide that a case is inadmissible can be exercised

on the ground, *inter alia*, that the crime in question "is not of such gravity to justify further action by the Court".<sup>57</sup>

24. The list of treaties contained in the Annex to the draft Statute to which Article 20(e) refers is intended to be exhaustive.<sup>58</sup> It is, however, widely recognised that a procedure will be required to permit the subsequent incorporation of new conventions establishing crimes of international concern.<sup>59</sup> Only treaties which have entered into force and are universal in scope were deemed suitable for use. The latter criterion represents an additional limitation, at least in respect of suppression conventions, as compared to 1993.<sup>60</sup>

25. The instruments enumerated in the Annex include those addressing such central issues of international concern as war crimes contrary to the Geneva Conventions of 1949 and Protocol I of 1977,<sup>61</sup> hijacking, torture, and apartheid.<sup>62</sup> Significantly in terms of the history of this initiative it embraces: "Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3(1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension".<sup>63</sup> In this effort to limit the remit of the proposed International Criminal Court to only the most serious drug offences possessing an international dimension the ILC is building upon the approach which had commended itself to the drafters of that important United Nations instrument.<sup>64</sup>

26. Reference to the 1988 United Nations Convention in the draft Statute has been welcomed by some members of the international community. These include, among others, those small states which have afforded active support to the initiative taken by Trinidad and Tobago in the late 1980s.<sup>65</sup> Notwithstanding this fact and the importance which has been afforded to the 1988 Convention by, among others, Commonwealth Heads of Government and Law Ministers, reference to drug trafficking as a crime within the jurisdiction of the Court has proved to be highly controversial. As Ambassador Robinson of Jamaica noted in his address to the Sixth Committee on 31 October 1994, a tension has arisen between those favouring the ILC approach and certain other states "who are primarily interested in the Court as an instrument to

combat genocide, war crimes, crimes against humanity and even aggression".<sup>66</sup> This is, for example, the position which has been taken by The Netherlands. In the words of the representative of that country, Article 20(e) "broadens the scope of the subject matter jurisdiction beyond the limits of what seems to be acceptable to states at present. .... [T]hese crimes can be tackled to a sufficient extent by the system *aut dedere, aut iudicare*. This system is already laid down in most of the treaties in which such offences are elaborated. These offences, no matter how serious they are, do not meet the criterion that they violate fundamental humanitarian principles or outrage the conscience of mankind".<sup>67</sup>

27. Not all states which have voiced opposition to the inclusion of drug trafficking offences have done so for these reasons. For example, some have based their negative stance on more pragmatic grounds including the absence of sufficient precision in the drafting of Article 3(1) of the 1988 Convention and a concern that the threshold requirements will not prove to be workable or effective.<sup>68</sup>

28. Within the *ad hoc* Committee it soon became evident that there was substantial support for taking an even more restrictive view of the initial scope of subject matter jurisdiction. As is noted in its Report to the General Assembly: "With regard to subparagraph (e) of article 20 ... the view was expressed that the offences established in the treaties listed in the annex might be of lesser magnitude than the other offences provided for in article 20 and that their inclusion within the jurisdiction of the International Criminal Court entailed a risk of trivializing the role of the Court ... . Also in favour of the exclusion of the crimes in question from the jurisdiction of the Court, it was argued that the said crimes were more effectively dealt with by national courts or through international co-operation. With specific reference to terrorism and illegal drug trafficking, concern was expressed that extending the jurisdiction of the Court to the corresponding crimes would result in an overburdening of the Court."<sup>69</sup>

29. While no overall consensus in respect of treaty-based crimes emerged the preponderant view appears to have been that the proposals of the ILC in this regard were over-ambitious. The position articulated by the United Nations Crime Prevention and Criminal Justice Branch and the

United Nations International Drug Control Programme that the Court should be given jurisdiction over a broader range of offences associated with modern organised transnational crime does not appear to have found a receptive audience.<sup>70</sup>

30. Also of significance in this context was the widely held view that whatever the final scope of the subject matter jurisdiction might be, it was highly desirable that the crimes in question be much more precisely defined within the Statute itself. Here Article 20 of the ILC draft was compared unfavourably by many with the very detailed definitions contained in the statutes for the Yugoslav and Rwanda tribunals. As has been pointed out elsewhere: "A procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*) and that the constituent elements of each crime should be specified to avoid any ambiguity and to ensure full respect for the rights of the accused."<sup>71</sup>

31. Building on this perceived need for greater certainty and clarity many states questioned whether it would be possible to formulate an acceptable definition of the crime of aggression within an appropriate time-frame.<sup>72</sup>

32. Overall, therefore, discussions within the ad hoc Committee revealed the desire of many states for a very much more modest Court in the terms of jurisdictional reach. There was strong support to limit the offences under the jurisdiction of the Court to some or all of the "core crimes" listed in paragraphs (a) to (d) of article 20. Possible compromise positions were, however, also aired. One consisted of "initially limiting the court's jurisdiction to the first three or four crimes, while providing for some type of mechanism to enable the States parties to the Statute to consider the addition of other crimes at a later stage. A suggestion was also made for an approach in which States could agree to refer to the Court extraordinary cases which were not otherwise covered."<sup>73</sup>

33. This high level of concern over the scope of the subject matter jurisdiction as proposed by the ILC continues in spite of the fact that the ability of the Court to play a role in relation to the offences covered by Article 20 is severely circumscribed by subsequent provisions which, in large measure, give emphasis to the concepts of

consent and state control. Thus, as a general rule, the Court may exercise its jurisdiction in respect of a relevant offence only if a complaint is lodged by a State party<sup>74</sup> which has expressed its acceptance, under Article 22, of the jurisdiction of the Court with respect to the crime in question. Pursuant to it a State Party is permitted to "opt in" to the jurisdictional system "with respect to such of the crimes referred to in article 20 as it specifies" in its declaration of acceptance.<sup>75</sup>

34. When a complaint is brought the Court may normally act only if its jurisdiction with respect to that crime has also been accepted both by the "custodial state"<sup>76</sup> and "by the State on the territory of which the act or omission in question occurred".<sup>77</sup> These consent requirements are strict ones. Indeed, in so far as drug trafficking offences are concerned they represent a tightening of the rules when compared to the 1993 text.<sup>78</sup> A further relevant and limiting innovation is to be found in Article 21(2) whereby the assent is also required "of a State which has already established, or eventually establishes, its right to the extradition of the accused pursuant to an extradition request".<sup>79</sup>

35. There are two major exceptions to the general thrust of the draft Statute outlined above; namely, in respect of the crime of genocide and cases referred to the Court by the Security Council. Insofar as the former is concerned the Commission took the view that "the prohibition of genocide is of such fundamental significance, and the occasions for legitimate doubt or dispute over whether a given situation amounts to genocide are so limited, that the Court ought, exceptionally, to have jurisdiction over it by virtue solely of the States participating in the draft Statute, without any further requirement of consent or acceptance by any particular State".<sup>80</sup> This approach which proved to be somewhat controversial finds expression in a number of provisions of the draft Statute.<sup>81</sup> For example, in cases of genocide the requirements for the consent of the "custodial State" and the State on whose territory the act occurred are dispensed with. However, one limitation is common to all alleged offences including genocide. It is contained in Article 23(3) and reads thus: "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression

under Chapter VII of the Charter, unless the Security Council otherwise decides."

36. As Crawford has explained: "This proviso is intended to avoid 'collateral challenges' to Security Council action that is under way. But it does not go so far as to give the Security Council a veto over complaints or prosecutions under the Statute in cases where the Council has failed to act, for whatever reason".<sup>82</sup>

37. While the attachment to the concept of tight individual state control of the process remains as a significant dimension to recent intergovernmental discussions there appears to be a fairly widespread sentiment that the current approach of the ILC text should be re-evaluated in the light of any decision to limit the subject matter jurisdiction of the Court.<sup>83</sup> In particular, a number of states which favour the deletion of jurisdiction in respect of treaty crimes would be prepared to accept a relaxation of certain of the preconditions and restraints which surround the exercise of the jurisdiction of the Court as reflected in the 1994 text some of which, at least, were inserted in order to make the possession of jurisdiction over drugs and terrorist offences more acceptable. Particularly noteworthy in this regard has been the suggestion that the inherent jurisdiction of the Court be expanded from genocide to embrace other or all "core offences".<sup>84</sup>

38. The strictness with which the concept of state consent is expressed in the draft Statute is, to some extent at least, mitigated by the authority given to the Security Council to refer cases to the Court in certain circumstances. Provision to this effect is contained in Article 23(1) which reads thus: "Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations."

In such circumstances "a complaint is not required for the initiation of an investigation".<sup>85</sup>

39. This approach has been the source of spirited debate within the United Nations system and was also the subject of discussion by Senior Officials in Malta. In the ILC, it was eventually concluded "that such a provision was necessary in order to enable the Security Council to make use of the Court as an alternative to establishing ad

hoc tribunals and as a response to crimes which affront the conscience of mankind".<sup>86</sup> By way of contrast, it was decided that no similar power should be conferred on the United Nations General Assembly since it "lacked authority under the Charter to affect directly the rights of States against their will, especially in respect of issues of criminal jurisdiction".<sup>87</sup>

40. While this proposal has attracted a considerable body of support within the international community others have expressed serious doubts or outright opposition to the role envisaged for the Council. To the extent that this negative stance has been based on an assessment of the nature and extent of the powers possessed by the Council under Chapter VII of the United Nations Charter some reconsideration will no doubt be called for in the light of the October 1995 judgment of the Appeals Chamber of the Yugoslav Tribunal in the case of *Prosecutor v. Dusko Tadić*.<sup>88</sup> It will be recalled that in that case the Appeals Chamber rejected the contention that the establishment of the Tribunal had been invalid under the Charter.

41. Notwithstanding this development concern has been expressed in a number of quarters that Article 23 is, in whole or in part, objectionable on other grounds. For example, some delegations have expressed the view that paragraph 2 does not represent an appropriate balance between the requirement of the independence of the Court and the primary responsibility of the Security Council for the maintenance of international peace and security.<sup>89</sup> As noted above, however, no consensus has yet been reached on whether the proposed Court should have jurisdiction over the crime of aggression. If the decision to delete it from Article 20 were to be taken paragraph 2 of Article 23 would be rendered superfluous. However, similar issues as to the appropriate interface between the exercise of power by a political body and the operation of the judicial function are raised by paragraph 3. This remains as an important matter of controversy.

42. At a somewhat different level, there is to be found some sentiment, even among those states which have endorsed the general approach of the 1994 draft Statute, that the Security Council should not have the power to refer complaints against named individuals. At present the wording of Article 23(1) would not preclude such action against named persons although the Commission has expressed the expectation that

the Council would "not normally" adopt such a course of action.<sup>90</sup>

43. It is the considered view of the Legal and Constitutional Affairs Division of the Commonwealth Secretariat that the nature and extent of the differences of view which continue to be held by Commonwealth members and others in relation to the jurisdiction of the Court and associated issues represents the most significant single obstacle to progress. If a broadly acceptable solution is to be forthcoming it will require, in the words of the Commonwealth Secretary-General, "a monumental exercise in compromise ...".<sup>91</sup> The nature of that eventual compromise may well in turn, and as seen above, have a significant impact on the manner in which other issues are resolved. As was noted in the 1995 Report of the ad hoc Committee: "Attention was also drawn to the implications that the selection of crimes would have on other issues relating to the Court, including the principle of complementarity, the State consent requirements and the trigger mechanism for the exercise of jurisdiction, as well as the obligations of State parties with respect to the co-operation and judicial assistance to be provided to the Court."<sup>92</sup>

#### **(ii) Other Issues of Particular Interest to the Commonwealth**

44. Commonwealth Law Ministers have, over many years, afforded priority to promoting and facilitating the greatest possible level of co-operation between member countries in the fight against crime and in the administration of criminal justice. The London Scheme for the Rendition of Fugitive Offenders and the Harare Scheme Relating to Mutual Assistance in Criminal Matters Within the Commonwealth, both as amended in 1990, represent the most visible symbols of that commitment. The approach of the draft Statute for an International Criminal Court to the question of international co-operation is thus one of obvious interest and importance within a Commonwealth context.

45. As was seen at an earlier stage of this paper, a central consideration for the ILC throughout the drafting process has been to elaborate an approach in which the proposed International Criminal Court "will complement existing national jurisdictions and existing procedures for international judicial co-operation in criminal matters ...".<sup>93</sup> The sensitivity of the Commission

to such matters is evident, for example, in its treatment of the preconditions to the exercise of jurisdiction in Article 21. It will be recalled that, in addition to requiring the consent of the custodial and territorial states, the interests of any country which has requested the extradition of the individual concerned in respect of an alleged offence (other than genocide) are acknowledged.<sup>94</sup>

46. In a somewhat similar fashion Article 34 provides "any interested State" with the right to challenge the jurisdiction of the Court. The Commission has indicated its expectation that this term will be afforded a broad interpretation. As it has stated in the Commentary: "a State which has lodged an extradition request with respect to an accused would be an 'interested State' for this purpose, as also would be a State whose co-operation had been sought under Part 7 of the Statute".<sup>95</sup> A further interesting illustration of the general approach of the ILC is found in Article 54. Pursuant to this provision a custodial state which is a party to a relevant Article 20(e) treaty but which has not expressed its acceptance of the jurisdiction of the Court in relation thereto "shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose". As the Commission has pointed out, "[a]s between parties to the Statute this in effect integrates the International Criminal Court into the existing system of international criminal jurisdiction and co-operation in respect of treaty crimes".<sup>96</sup>

47. The ILC has been primarily concerned with fashioning what it sees as an appropriate interface between the draft Statute and existing treaties within the meaning of public international law. However, Commonwealth 'Schemes' do not possess this quality. As Professor McClean has stated: "A Scheme does not create binding international obligations, and is not registered under Article 102 of the United Nations Charter; it represents more an agreed set of recommendations for legislative implementation by each Government".<sup>97</sup> At their 1995 meeting in Malta Senior Officials considered that it would be appropriate to seek to ensure that the draft Statute "was fully sensitive to the reality of the provision of relevant forms of international co-operation on the basis of Commonwealth Schemes rather than international treaties". An obvious focus for such attention is provided by Article 21(2) which requires the assent of a state requesting extradition for offences other than

genocide as a precondition for the exercise of the jurisdiction of the Court. At present, however, this applies only where the request is made "under an international agreement"; wording which may be construed as being limited to instruments within the meaning of the Vienna Convention on the Law of Treaties. If so it would not, by definition, extend to a situation in which both the requesting and custodial states regulate their bilateral relationship on the basis of the London Scheme.<sup>98</sup> Only a relatively minor amendment of the existing wording would, it is suggested, be required to place such countries on a plane of equality in this regard.<sup>99</sup> Senior Officials articulated the need to secure appropriate wording in any final text giving effect to an International Criminal Court to satisfy this concern.

48. In the process of drafting the Statute the ILC has also sought to recognise the fact that "[t]he effective functioning of the Court will depend upon the international co-operation and judicial assistance of States".<sup>100</sup> Indeed, for the proposed structure to operate effectively a very intense level of co-operation will be required at all stages.<sup>101</sup> It was largely for this reason, for example, that the decision was taken to depart from the precedent set by Article 18 of the Statute of the ad hoc Tribunal for the Balkans and Article 17 of that for Rwanda and to restrict the jurisdiction of the Court to cases in which either a complaint has been lodged by a state or a matter has been referred by the Security Council. Under the current proposals the prosecutor possesses no independent right to initiate an investigation. As the Commission has explained, "in practice the Court could only satisfactorily deal with a prosecution initiated by complaint if the complainant is co-operating with the Court ... in relation to such matters as the provision of evidence, witnesses, etc."<sup>102</sup>

49. Central to the approach of the draft Statute to this critical area are Articles 51-57 which together constitute Part 7 entitled "International Co-operation and Judicial Assistance". In the formulation of its approach in this sphere the Commission was faced with a number of difficulties. As has been pointed out elsewhere, "[t]he essential problem ... is that a state that does not accept the jurisdiction of the Court with respect to a given offense, or that is not a party to the treaty on which the charge is based ... cannot be expected to co-operate with the Court in the same way as a state that is a party and does

accept the court's jurisdiction".<sup>103</sup> In this important sense, therefore, the task faced by the ILC was considerably more complex than that which arose in connection with the establishment of the ad hoc Tribunals by the Security Council. For instance, by virtue of Chapter VII of the Charter, it was possible to work on the basis of the imposition of a uniform obligation on all member states.

50. Article 51(1) of the draft Statute imposes a general obligation on state parties to co-operate with the Court in relation to investigations and proceedings. Paragraph 2 thereof then empowers the Registrar to request co-operation in relation to a range of matters including the identification and location of persons; the production of evidence; arrest and detention; and, the taking of other steps "which may facilitate the administration of justice, including provisional measures as required".<sup>104</sup> Requirements concerning the content and communication of such requests are laid down in Article 57.<sup>105</sup>

51. Finally, in paragraph 3 the specific obligation which attaches to all state parties in respect of genocide and to those which have, in other cases, accepted the jurisdiction of the Court in relation to the crime in question is set out: namely, to respond to such requests "without undue delay". This is a less robust formulation than is to be found in Article 29 of the Statute of the Yugoslav Tribunal where the requirement is to "comply" with rather than to "respond" to such requests. As the Commission noted in its Commentary, paragraph 3 "does not, in terms, require States to comply with such requests, since whether they will be able to do so will depend on the circumstances: a State cannot, for example, arrest a person who has fled its territory".<sup>106</sup>

52. It is apparent that the approach of the ILC in this context has been to draw from, but not to be restricted by, existing mutual assistance in criminal matters arrangements. One clear example of the latter tendency is to be found in Article 26 dealing with the investigation of alleged crimes. As has been noted elsewhere, paragraph 2 thereof "seems to empower the Prosecutor to undertake a range of activities, including the collection of evidence and the conduct of on-site inspections, without the need to secure the approval or assistance of the States parties in whose territories these activities might be carried out. Article 26.2(e) lends weight to this view by providing that the Prosecutor may as

appropriate, seek the co-operation of any State or of the United Nations'.<sup>107</sup>

53. By way of contrast, in the critical area of the surrender of accused persons to the International Criminal Court the ILC has opted to suggest the creation of an entirely new regime of assistance which is not rooted in existing international extradition or rendition practice. Drawing upon the precedents established by the two ad hoc Tribunals the Commission has utilised in Article 53 the alternative concept of "transfer" to cover cases where an accused is made available to the Court. Notwithstanding this fact the decision was also taken to retain certain principles familiar in extradition law and practice, such as speciality,<sup>108</sup> and to incorporate modified versions of others.<sup>109</sup>

54. Furthermore, and as with Article 51, it was necessary to address various differing levels of obligation in relation to transfer depending on the fact circumstances of the case. In this respect Article 53 makes provision for four different categories of obligation for state parties.<sup>110</sup> In the words of the official commentary:

- "(a) All States parties to the Statute will have accepted the Court's "inherent" jurisdiction over genocide under articles 20 (a) and 21 (1) (a). In that case, subject to the other safeguards and guarantees in the Statute, the transfer obligation in article 53 (2) (a) will apply.
- (b) The same obligation should apply to States parties which have accepted the jurisdiction of the Court with respect to the crime in question; they must take immediate steps to arrest and surrender the accused person to the Court under paragraph 2 (a).
- (c) In the case of crimes defined by the annexed treaties, a State party which is also a party to the relevant treaty defining the crime in question but which has not accepted the Court's jurisdiction must arrest and either transfer, extradite or prosecute the accused.
- (d) In any other case, a State party must consider whether its own law permits the arrest and transfer of the accused. As to other crimes under general international law, some States may not have some of these crimes (e.g. aggression) as part of their own criminal code; it was thought that

the only obligation that could be imposed in such cases, if a State does not accept the jurisdiction of the Court in relation to the crimes, was that spelt out in paragraph 2 (c)."<sup>111</sup>

55. These and related matters were subject to discussion within the ad hoc Committee under the heading 'Relationship between States parties, non-States parties and the international criminal court'.<sup>112</sup> To facilitate that process an open-ended Working Group was asked to prepare detailed guidelines<sup>113</sup> which are reproduced at Appendix II of this paper for ease of reference.

56. The resulting debate served to underline the centrality of the topic of international co-operation to the effective functioning of the proposed Court. Here the principle of complementarity was also a key issue although it was widely recognised that the role to be played by it in this area "was ultimately connected with other issues such as the overall scope and nature of the jurisdiction of the Court, the regime of States' consent, or the trigger mechanism, to be provided under the statute".<sup>114</sup> Considerable attention was also paid to the advantages and disadvantages of the regime of co-operation proposed by the ILC as well as to the identification and analysis of alternative approaches. No consensus position has, as yet, emerged.

57. One further issue of interest to Commonwealth countries in the context of international co-operation arises from the decision of the ILC to exclude from the draft Statute any treatment of the subject of the confiscation of the proceeds of crime. The ability to take such action, and to receive significant international assistance in so doing, has been increasingly emphasised in the years since the conclusion of the Harare Scheme in 1986.<sup>115</sup> Confiscation is now generally regarded as a necessary strategic weapon in the fight against those forms of criminal activity which generate significant profits. Its relevance in the present context flows primarily though not exclusively from the inclusion in the Annex of the 1988 United Nations Convention on drug trafficking.

58. The current stance of the draft Statute on this matter, it will be recalled, contrasts with that taken in the 1993 text. There Article 53 (Applicable Penalties) permitted the Court to "order the confiscation of property unlawfully

obtained or the proceeds of unlawful conduct".<sup>116</sup> Funds derived from such confiscation orders could, along with fines paid, be devoted to a number of specified purposes including defraying the costs of the trial.<sup>117</sup> In deciding, for a variety of reasons, to delete reference to this and related matters from what is now Article 47, the Commission expressed the view that confiscation was a subject "best left to national jurisdictions and to international judicial co-operation agreements, of which there is a growing network".<sup>118</sup>

59. While there is no doubt considerable merit in the desire not to interfere with the developing international practice in this specialised area the introduction of an international scheme for the investigation, prosecution and conviction of individuals will necessarily give rise to certain technical difficulties. For example, provisions concerning co-operation in the tracing, freezing and seizing of proceeds contained in agreements and arrangements have been based on the assumption or requirement that proceedings are in train, or in contemplation, in the requesting state. Similarly assumptions in respect of the involvement of the courts of the requesting state were naturally made in the drafting of provisions relating to the obligation to confiscate.

60. By way of illustration, it will be recalled that the Harare Scheme is explicitly designed to provide for assistance by one country "in respect of criminal matters arising in another ...".<sup>119</sup> A criminal matter arises for the purposes of the Scheme when it is certified "that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted".<sup>120</sup> The question arises whether the existing wording of these and other relevant provisions is sufficiently open textured to accommodate the introduction of the International Criminal Court experiment without change. Should it be concluded that safeguarding the efficiency and effectiveness of the Scheme in this regard would require additional measures attention would have to be given in due course to the possible formulation of further amendments. An alternative or supplementary strategy might be to urge the inclusion of some form of appropriate treatment of this matter in the text of the draft Statute itself. A somewhat analogous measure has, for example, been introduced in Article 53(3)

whereby "[t]ransfer to the Court is to be taken, as between parties to the Statute which accept the jurisdiction of the Court with respect to the crime, to constitute compliance with *aut dedere aut judicare* provisions in extradition treaties".<sup>121</sup> Indeed, the use of "deeming provisions" in treaties concerning crimes of international concern is fairly common place.<sup>122</sup> Resort to such a course of action in this context would, however, represent only a partial solution in that it would apply only among such members of the Commonwealth as elected to become parties to the Statute of the Court.

#### D. CONCLUSION

61. In the period since the Commonwealth Law Ministers Meeting in Mauritius in November 1993 substantial progress has been recorded within the United Nations system in formulating a detailed draft Statute for an International Criminal Court and subjecting it to analysis. That proposal, in giving expression to the now generally accepted principle that the purpose of such an institution "is to fill a gap in the existing international order, not to undermine the primary responsibility of States to bring perpetrators of the most serious offences to justice"<sup>123</sup> without doubt brings this important initiative a step closer to realisation.

62. International consideration of this matter is, however, now entering a critical phase and much remains to be done if the concept is to be transformed into reality. The ILC has brought within sight the possibility of providing, through institutional means, that those responsible for the commission of grave crimes of concern to the international community can more readily be brought to justice. As we have seen, there are various issues of principle, and many outstanding matters of detail, which still need to be resolved. Members of the Commonwealth have, from the outset, played an active and constructive role in this process. If they can bring to the present debate the same spirit of compromise and consensus that has traditionally characterised Commonwealth discussions of legal matters they can do much to ensure that a positive outcome is secured.

## NOTES

1. The subject of the criminal responsibility of states is also under discussion within the International Law Commission. See, e.g., *Report of the International Law Commission on the work of its Forty Sixth Session: 2 May - 22 July 1994*, UNGA, Official Records, 49th Session, Supplement No. 10 (A/49/10) (hereafter 1994 ILC Report), at pp.329-343.
2. See, e.g., M.C. Bassiouni and C.L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, (1992) 25 *Vanderbilt Journal of Transnational Law*, p.151, at pp.152-158.
3. J. Crawford, *The ILC's Draft Statute for an International Criminal Court*, (1994) 88 *American Journal of International Law*, p.140, at p.141.
4. See, *id.*
5. In the intervening years the subject continued to attract a certain level of academic attention.
6. See, e.g., American Bar Association Task Force on an International Criminal Court, (1993) 27 *International Lawyer*, p.258, at p.260. See also, C. Warbrick, *International Criminal Law*, (1995) 44 *International and Comparative Law Quarterly*, p.466, at pp.466-468.
7. See, e.g., F. Patel, *Crime Without Frontiers: A Proposal for an International Narcotics Court*, (1990) 22 *New York University Journal of International Law and Politics*, pp.709-747.
8. Secretary-General's Remarks at the Oxford Conference on International and White Collar Crime, 2 September 1993, (typescript), p.8.
9. 1994 ILC Report, p.26.
10. See, e.g., UN General Assembly Resolutions 45/41, 28 November 1990, and 46/54, 9 December 1991. See also, e.g., 1994 ILC Report, at pp.161-194; and, T. MacCormack and G. Simpson, *The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, (1994) 5 *Criminal Law Forum*, pp.1-55.
11. 1994 ILC Report, p.25.
12. See, UN Doc. A/CN.4/L.490; 19 July 1993; and A/CN.4/L.490/Add.1; 19 July 1993 (hereafter 1993 text).
13. J. Crawford, *The ILC Adopts a Statute for an International Criminal Court*, (1995) 89 *American Journal of International Law*, p.404, at p.404.
14. See e.g., Parliamentary Assembly, Council of Europe, "Report on the establishment of an international court to try serious violations of international humanitarian law", 28 July 1993 (ADOC 6902/1403 - 15/7/93 - 1 - E). See also, M.C. Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, (1994) 88 *American Journal of International Law*, pp.784-805.
15. For the text of the Statute of the Tribunal with explanatory commentary see, (1993) 32 *International Legal Materials*, pp.1159-1191. See also, Justice Without Victors, *The Economist* (London) 7 January 1995, p.34.
16. Para 4 of UN Security Council Resolution 827 (1993).

17. (1993) *Commonwealth Law Bulletin*, p.2006.
18. See, "Recent Developments in Extradition", LMM (93) 48, at p.3.
19. See, *supra*, note 17, p.2012.
20. See, SOLM (95) 4.
21. Para 33.
22. See, e.g., Delaume, The Work of the Sixth Committee of the Forty-Eighth Session of the UN General Assembly, (1994) 88 *American Journal of International Law*, p.343, at p.350.
23. See, e.g., A.R. Perera, Towards the Establishment of an International Criminal Court, (1994) *Commonwealth Law Bulletin*, p.298, at pp.302-308.
24. See, UN Doc. A/CN.4/458; 18 February 1994; and, Add. 1-8.
25. See, e.g., Amnesty International, *Establishing a Just, Fair and Effective International Criminal Court* (1994).
26. See, 1994 ILC Report, pp.43-157.
27. For the text of UN Security Council Resolution 955 (1994) and the Statute of the Tribunal see, (1994) 33 *International Legal Materials*, pp.1598-1613. See also, Whose Justice for the Hutus, *The Economist* (London) 30 July 1994, pp.18-19.
28. "Statement Delivered by the New Zealand Representative Mr Gerard van Bohemen", 27 October 1994, (typescript), p.1. See also, Making Rules for War: The World Tries Again, *The Economist* (London) 11 March 1995, at pp.21-23.
29. Sec, General Assembly, Official Records, Fiftieth Session, Supplement No. 22 (A/50/22).
30. Para 2.
31. Para 4.
32. 1994 ILC Report, p.44. Similarly the 3rd preambular para emphasises that the "court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective".
33. *Supra*, note 13, pp.414.
34. See, e.g., *supra*, note 29, at pp.6-10, 21, 27, and 37-38.
35. UN Doc. GA/L/2879; 2 November 1995, p.5.
36. 1994 ILC Report, p.42.
37. See, *id.*, at p.49. See also, *supra*, note 6, American Bar Association, at p.273.
38. See, 1994 ILC Report, at p.57. But see, *supra*, note 25, at p.26 where greater flexibility, in terms of increasing the overall number of judges, is advocated.
39. "Statement by Ms Jan Linehan for the Delegation of Australia", 25 October 1994 (typescript), p.3.

40. See, *supra*, note 3, at pp.143-147.
41. See, e.g., *supra*, note 23, at pp.304-308.
42. See, e.g., "Statement by Ms. Noor Farida Ariffin, Representative of Malaysia", 28 October 1994 (typescript), at p.3.
43. 1994 ILC Report, p.67.
44. See, *id.*, p.71.
45. *Id.*, pp.77-78.
46. See, Articles 3-5 of the Statute, *supra*, note 15.
47. 1994 ILC Report, p.72.
48. It will be recalled that the UN Security Council has yet to make such a determination in practice.
49. See, 1993 text, Article 22.
50. See, 1993 text, Article 26(2)(b).
51. UN Doc. A/CN.4/L.490; 19 July 1993, p.22.
52. See generally, W. Gilmore, *Combating International Drugs Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991).
53. 1993 text, Article 26(2)(b).
54. *Supra*, note 51, p.30.
55. 1994 ILC Report, p.68.
56. *Supra*, note 13, p.412. For a call for the use of a "more concrete standard" see, UN Doc.A/AC.244/1/Add.1; 30 March 1995, at p.10.
57. Article 35(c). There is considerable sentiment in favour of making the application of this rule mandatory. See, e.g., UN Doc.A/AC.244/2; 21 April 1995, p.20.
58. See, 1994 ILC Report, at p.71.
59. See, e.g., *id.*, at p.147 and *supra*, note 42, at p.3.
60. See, *Supra*, note 3, p.146.
61. The failure to include mention of Protocol II of 1977 has been subjected to criticism in some circles.
62. Other suggestions for inclusion continue to be made.
63. Annex, para 9. For the reasons for the inclusion of reference to Article 2 of the 1988 Convention see, 1994 ILC Report, at pp.145-146.
64. See, 101st Congress, 1st Session, SENATE, Executive Report 101-15, p.26.

65. See, e.g., *supra*, note 3, p.146.
66. "Statement by H.E. Ambassador Patrick Robinson, Jamaican Delegate to the Sixth Committee", 31 October 1994, (typescript), p.3.
67. "Statement by the Representative of the Kingdom of the Netherlands, Mr. Adriaan Bos", 26 October 1994, (typescript), para 5.
68. See, e.g., the view of the United Kingdom, UN Doc. A/CN.4/458/Add. 1; 28 February 1994, at p.16. See also, "Statement by the Honourable Conrad K. Harper, Legal Adviser, United States Department of State", 25 October 1994 (typescript), p.3.
69. *Supra*, note 29, pp.17-18.
70. See, e.g., UN Doc. A/AC.244/1/Add.1; 30 March 1995, at pp.9-10.
71. *Supra*, note 29, p.12.
72. See, *id.*, at pp.13-14.
73. *Id.*, p.11.
74. See, Article 25(2).
75. Article 22(1).
76. But see, Article 54 on the obligation to extradite or prosecute. Jamaica has urged that "the Statute should acknowledge as a basic principle that custody over a person should not be acquired in breach of international law". *Supra*, note 66, p.15.
77. Article 21(1)(b)(ii). Such wording would not encompass serious acts of international drug trafficking carried out by stateless vessels in international waters. This is, however, addressed in a number of international agreements. See, e.g., Article 17(2) of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.
78. See, UN Doc. A/CN.4/L.490; 19 July 1993, p.31. However, under Article 26(1) the concept of consent also extended to the exercise of "jurisdiction over specified persons or categories of persons".
79. 1994 ILC Report, p.80.
80. *Id.*, pp.67-68.
81. See, e.g., Article 21(1)(a) and Article 25(1).
82. *Supra*, note 13, p.413.
83. See, *supra*, note 29, at p.11.
84. See, *id.*, at pp.20-23; and, *supra*, note 35, at pp.8-10.
85. Article 25(4).
86. 1994 ILC Report, p.85.
87. *Id.*, p.86.

88. Judgment of 2 October 1995 (Case No. IT-94-1-AR 72).
89. See, e.g., *supra*, note 29, at p.15.
90. 1994 ILC Report p.85.
91. *Supra*, note 8, p.7.
92. *Supra*, note 29, pp.11-12.
93. 1994 ILC Report, p.44.
94. See, Article 21(2).
95. 1994 ILC Report, p.105.
96. *Id.*, p.81.
97. D. McClean, *International Judicial Assistance* (1992), p.151. See also, *Commonwealth Schemes on Mutual Assistance in the Administration of Justice* (1991), at p.iii.
98. It should be noted that the surrogate extradition treaty provisions contained in multilateral conventions dealing with crimes of international concern tend to be drafted in permissive rather than mandatory terms. See, e.g., Article 6(3) of the 1988 UN drug trafficking convention. See also, Article 6(4).
99. The formulation "under an international agreement or arrangement" might go some way to meeting such concerns.
100. 1994 ILC Report, p.129.
101. See, e.g., Articles 26, 28, 29, 38, 41 and 44. See also *supra*, American Bar Association note 6, at p.274.
102. 1994 ILC Report, p.89.
103. *Supra*, note 3, p.150.
104. Article 51(2)(c). See, Article 52 on the issue of provisional measures.
105. On co-operation with States not parties to the Statute of the Court see, Article 56. See also, Article 22(4).
106. 1994 ILC Report, p.130.
107. "Discussion Paper on Assistance in Relation to Investigations and Prosecutions and the Surrender of Persons to the Court" (Typescript submitted to the August 1995 session of the UN Ad Hoc Committee), para 21. (Text supplied by the Attorney-General's Department, Australia).
108. See, Article 55.
109. See, Article 42 for the approach to *non bis in idem*.
110. On the issue of 'priority' see, Article 53(4).
111. 1994 ILC Report, p.133.

112. See, *supra*, note 29, p.37 *et seq.*
113. See, *id.*, at p.2.
114. *Id.*, p.37.
115. See, e.g., D. McClean, *op. cit.*, Ch. 9.
116. UN Doc., A/CN.4/L.490/Add.1; 19 July 1993, p.35.
117. See, Article 53(4)(a) of the 1993 text.
118. 1994 ILC Report, p.125.
119. Para 1(2).
120. Para 3(1).
121. 1994 ILC Report, p.134.
122. See, e.g., Article 6(2) of the 1988 UN drug trafficking convention.
123. "Statement by the Representative of the United Kingdom of Great Britain and Northern Ireland", 27 October 1994 (typescript).

**DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT**

**(UN Doc. A/49/355; 1 September 1994)**

II. DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

The States parties to this Statute,

Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court;

Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole;

Emphasizing further that such a 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;

Have agreed as follows:

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

There is established an International Criminal Court ("the Court"), whose jurisdiction and functioning shall be governed by the provisions of this Statute.

Article 2

Relationship of the Court to the United Nations

The President, with the approval of the States parties to this Statute ("States parties"), may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.

Article 3

Seat of the Court

1. The seat of the Court shall be established at ... in ... ("the host State").

2. The President, with the approval of the States parties, may conclude an agreement with the host State establishing the relationship between that State and the Court.

3. The Court may exercise its powers and functions on the territory of any State party and, by special agreement, on the territory of any other State.

Article 4

Status and legal capacity

1. The Court is a permanent institution open to States parties in accordance with this Statute. It shall act when required to consider a case submitted to it.
2. The Court shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

PART 2. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 5

Organs of the Court

The Court consists of the following organs:

- (a) a Presidency, as provided in article 8;
- (b) an Appeals Chamber, Trial Chambers and other chambers, as provided in article 9;
- (c) a Procuracy, as provided in article 12; and
- (d) a Registry, as provided in article 13.

Article 6

Qualification and election of judges

1. The judges of the Court shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices, and have, in addition:
  - (a) criminal trial experience;
  - (b) recognized competence in international law.
2. Each State party may nominate for election not more than two persons, of different nationality, who possess the qualification referred to in paragraph 1 (a) or that referred to in paragraph 1 (b), and who are willing to serve as may be required on the Court.
3. Eighteen judges shall be elected by an absolute majority vote of the States parties by secret ballot. Ten judges shall first be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (a). Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (b).

/...

4. No two judges may be nationals of the same State.
5. States parties should bear in mind in the election of the judges that the representation of the principal legal systems of the world should be assured.
6. Judges hold office for a term of nine years and, subject to paragraph 7 and article 7 (2), are not eligible for re-election. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.
7. At the first election, six judges chosen by lot shall serve for a term of three years and are eligible for re-election; six judges chosen by lot shall serve for a term of six years; and the remainder shall serve for a term of nine years.
8. Judges nominated as having the qualification referred to in paragraph 1 (a) or 1 (b), as the case may be, shall be replaced by persons nominated as having the same qualification.

#### Article 7

##### Judicial vacancies

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 6.
2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and if that period is less than five years is eligible for re-election for a further term.

#### Article 8

##### The Presidency

1. The President, the first and second Vice-Presidents and two alternate Vice-Presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier.
2. The first or second Vice-President, as the case may be, may act in place of the President in the event that the President is unavailable or disqualified. An alternate Vice-President may act in place of either Vice-President as required.
3. The President and the Vice-Presidents shall constitute the Presidency which shall be responsible for:
  - (a) the due administration of the Court; and
  - (b) the other functions conferred on it by this Statute.

4. Unless otherwise indicated, pre-trial and other procedural functions conferred under this Statute on the Court may be exercised by the Presidency in any case where a chamber of the Court is not seized of the matter.

5. The Presidency may, in accordance with the Rules, delegate to one or more judges the exercise of a power vested in it under articles 26 (3), 27 (5), 28, 29 or 30 (3) in relation to a case, during the period before a Trial Chamber is established for that case.

#### Article 9

##### Chambers

1. As soon as possible after each election of judges to the Court, the Presidency shall in accordance with the Rules constitute an Appeals Chamber consisting of the President and six other judges, of whom at least three shall be judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (b). The President shall preside over the Appeals Chamber.

2. The Appeals Chamber shall be constituted for a term of three years. Members of the Appeals Chamber shall, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. Judges may be renewed as members of the Appeals Chamber for a second or subsequent term.

4. Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and other chambers required by this Statute, and to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified.

5. The Presidency shall nominate in accordance with the Rules five such judges to be members of the Trial Chamber for a given case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (a).

6. The Rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial.

7. No judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a chamber dealing with the case.

#### Article 10

##### Independence of the judges

1. In performing their functions, the judges shall be independent.

2. 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.

3. Any question as to the application of paragraph 2 shall be decided by the Presidency.

4. On the recommendation of the Presidency, the States parties may by a two-thirds majority decide that the work-load of the Court requires that the judges should serve on a full-time basis. In that case:

(a) existing judges who elect to serve on a full-time basis shall not hold any other office or employment; and

(b) judges subsequently elected shall not hold any other office or employment.

#### Article 11

##### Excusing and disqualification of judges

1. The Presidency at the request of a judge may excuse that judge from the exercise of a function under this Statute.

2. Judges shall not participate in any case in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.

3. The Prosecutor or the accused may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the members of the Chamber concerned. The challenged judge shall not take part in the decision.

#### Article 12

##### The Procuracy

1. The Procuracy is an independent organ of the Court responsible for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions. A member of the Procuracy shall not seek or act on instructions from any external source.

2. The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, who may act in place of the Prosecutor in the event that the Prosecutor is unavailable. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character and have high competence and experience in the prosecution of criminal cases. They shall be elected by secret ballot by an absolute majority of the States parties, from among candidates nominated by States parties. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of five years and are eligible for re-election.
4. The States parties may elect the Prosecutor and Deputy Prosecutors on the basis that they are willing to serve as required.
5. The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality.
6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor.
7. The staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor.

#### Article 13

##### The Registry

1. On the proposal of the Presidency, the judges by an absolute majority by secret ballot shall elect a Registrar, who shall be the principal administrative officer of the Court. They may in the same manner elect a Deputy Registrar.
2. The Registrar shall hold office for a term of five years, is eligible for re-election and shall be available on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on, and may be elected on the basis that the Deputy Registrar is willing to serve as required.
3. The Presidency may appoint or authorize the Registrar to appoint such other staff of the Registry as may be necessary.
4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar.

#### Article 14

##### Solemn undertaking

Before first exercising their functions under this Statute, judges and other officers of the Court shall make a public and solemn undertaking to do so impartially and conscientiously.

/...

Article 15

Loss of office

1. A judge, the Prosecutor or other officer of the Court who is found to have committed misconduct or a serious breach of this Statute, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office.
2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:
  - (a) in the case of the Prosecutor or a Deputy Prosecutor, by an absolute majority of the States parties;
  - (b) in any other case, by a two-thirds majority of the judges.
3. The judge, the Prosecutor or any other officer whose conduct or fitness for office is impugned shall have full opportunity to present evidence and to make submissions but shall not otherwise participate in the discussion of the question.

Article 16

Privileges and immunities

1. The judges, the Prosecutor, the Deputy Prosecutors and the staff of the Procuracy, the Registrar and the Deputy Registrar shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.
2. The staff of the Registry shall enjoy the privileges, immunities and facilities necessary to the performance of their functions.
3. Counsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.
4. The judges may by an absolute majority decide to revoke a privilege or waive an immunity conferred by this article, other than an immunity of a judge, the Prosecutor or Registrar as such. In the case of other officers and staff of the Procuracy or Registry, they may do so only on the recommendation of the Prosecutor or Registrar, as the case may be.

Article 17

Allowances and expenses

1. The President shall receive an annual allowance.
2. The Vice-Presidents shall receive a special allowance for each day they exercise the functions of the President.

3. Subject to paragraph 4, the judges shall receive a daily allowance during the period in which they exercise their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 10.

4. If it is decided under article 10 (4) that judges shall thereafter serve on a full-time basis, existing judges who elect to serve on a full-time basis, and all judges subsequently elected, shall be paid a salary.

#### Article 18

##### Working languages

The working languages of the Court shall be English and French.

#### Article 19

##### Rules of the Court

1. Subject to paragraphs 2 and 3, the judges may by an absolute majority make rules for the functioning of the Court in accordance with this Statute, including rules regulating:

- (a) the conduct of investigations;
- (b) the procedure to be followed and the rules of evidence to be applied;
- (c) any other matter which is necessary for the implementation of this Statute.

2. The initial Rules of the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States parties for approval. The judges may decide that a rule subsequently made under paragraph 1 should also be submitted to a conference of States parties for approval.

3. In any case to which paragraph 2 does not apply, rules made under paragraph 1 shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections.

4. A rule may provide for its provisional application in the period prior to its approval or confirmation. A rule not approved or confirmed shall lapse.

### PART 3. JURISDICTION OF THE COURT

#### Article 20

##### Crimes within the jurisdiction of the Court

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

/...

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

#### Article 21

##### Preconditions to the exercise of jurisdiction

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:
  - (a) in a case of genocide, a complaint is brought under article 25 (1);
  - (b) in any other case, a complaint is brought under article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:
    - (i) by the State which has custody of the suspect with respect to the crime ("the custodial State"); and
    - (ii) by the State on the territory of which the act or omission in question occurred.

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

#### Article 22

##### Acceptance of the jurisdiction of the Court for the purposes of article 21

1. A State party to this Statute may:
  - (a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or
  - (b) at a later time, by declaration lodged with the Registrar;accept the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time.

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

4. If under article 21 the acceptance of a State which is not a party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the Court exercising jurisdiction with respect to the crime.

#### Article 23

##### Action by the Security Council

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

#### Article 24

##### Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

#### PART 4. INVESTIGATION AND PROSECUTION

#### Article 25

##### Complaint

1. A State party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.

/...

2. A State party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.

3. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

4. In a case to which article 23 (1) applies, a complaint is not required for the initiation of an investigation.

#### Article 26

##### Investigation of alleged crimes

1. On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23 (1), the Prosecutor shall initiate an investigation unless the Prosecutor concludes that there is no possible basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency.

2. The Prosecutor may:

(a) request the presence of and question suspects, victims and witnesses;

(b) collect documentary and other evidence;

(c) conduct on-site investigations;

(d) take necessary measures to ensure the confidentiality of information or the protection of any person;

(e) as appropriate, seek the cooperation of any State or of the United Nations.

3. The Presidency may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purposes of an investigation, including a warrant under article 28 (1) for the provisional arrest of a suspect.

4. If, upon investigation and having regard, inter alia, to the matters referred to in article 35, the Prosecutor concludes that there is no sufficient basis for a prosecution under this Statute and decides not to file an indictment, the Prosecutor shall so inform the Presidency giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

5. At the request of a complainant State or, in a case to which article 23 (1) applies, at the request of the Security Council, the Presidency shall review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision.

6. A person suspected of a crime under this Statute shall:

(a) prior to being questioned, be informed that the person is a suspect and of the rights:

(i) to remain silent, without such silence being a consideration in the determination of guilt or innocence; and

(ii) to have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the Court;

(b) not be compelled to testify or to confess guilt; and

(c) if questioned in a language other than a language the suspect understands and speaks, be provided with competent interpretation services and with a translation of any document on which the suspect is to be questioned.

#### Article 27

##### Commencement of prosecution

1. If upon investigation the Prosecutor concludes that there is a prima facie case, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

2. The Presidency shall examine the indictment and any supporting material and determine:

(a) whether a prima facie case exists with respect to a crime within the jurisdiction of the Court; and

(b) whether, having regard, *inter alia*, to the matters referred to in article 35, the case should on the information available be heard by the Court.

If so, it shall confirm the indictment and establish a trial chamber in accordance with article 9.

3. If, after any adjournment that may be necessary to allow additional material to be produced, the Presidency decides not to confirm the indictment, it shall so inform the complainant State or, in a case to which article 23 (1) applies, the Security Council.

/...

4. The Presidency may at the request of the Prosecutor amend the indictment, in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence.

5. The Presidency may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b) requiring the disclosure to the defence, within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence;

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing for the protection of the accused, victims and witnesses and of confidential information.

#### Article 28

##### Arrest

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the provisional arrest of a suspect if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

(b) the suspect may not be available to stand trial unless provisionally arrested.

2. A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow.

3. As soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest and transfer of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. A person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges.

Article 29

Pre-trial detention or release

1. A person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused have been respected.
2. A person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial.
3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation.
4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State.

Article 30

Notification of the indictment

1. The Prosecutor shall ensure that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, in a language understood by that person:
  - (a) in the case of a suspect provisionally arrested, a statement of the grounds for the arrest;
  - (b) in any other case, the confirmed indictment;
  - (c) a statement of the accused's rights under this Statute.
2. In any case to which paragraph (1) (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.
3. If, 60 days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 28 (3), or for some reason the requirements of paragraph 1 cannot be complied with, the Presidency may on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

Article 31

Persons made available to assist in a prosecution

1. The Prosecutor may request a State party to make persons available to assist in a prosecution in accordance with paragraph 2.
2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor, and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to their exercise of functions under this article.
3. The terms and conditions on which persons may be made available under this article shall be approved by the Presidency on the recommendation of the Prosecutor.

PART 5. THE TRIAL

Article 32

Place of trial

Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court.

Article 33

Applicable law

The Court shall apply:

- (a) this Statute;
- (b) applicable treaties and the principles and rules of general international law; and
- (c) to the extent applicable, any rule of national law.

Article 34

Challenges to jurisdiction

Challenges to the jurisdiction of the Court may be made, in accordance with the Rules:

- (a) prior to or at the commencement of the hearing, by an accused or any interested State; and
- (b) at any later stage of the trial, by an accused.

Article 35

Issues of admissibility

The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:

(a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;

(b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or

(c) is not of such gravity to justify further action by the Court.

Article 36

Procedure under articles 34 and 35

1. In proceedings under articles 34 and 35, the accused and the complainant State have the right to be heard.

2. Proceedings under articles 34 and 35 shall be decided by the Trial Chamber, unless it considers, having regard to the importance of the issues involved, that the matter should be referred to the Appeals Chamber.

Article 37

Trial in the presence of the accused

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;

(b) the accused is continuing to disrupt the trial; or

(c) the accused has escaped from lawful custody under this Statute or has broken bail.

/...

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4. In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) recording the evidence;

(b) considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

5. If the accused is subsequently tried under this Statute:

(a) the record of evidence before the Indictment Chamber shall be admissible;

(b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

#### Article 38

##### Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

(a) have the indictment read;

(b) ensure that articles 27 (5) (b) and 30 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

(c) satisfy itself that the other rights of the accused under this Statute have been respected; and

(d) allow the accused to enter a plea of guilty or not guilty.

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. The Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

/...

4. The trial shall be held in public, unless the Chamber determines that certain proceedings be in closed session in accordance with article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence.

5. The Chamber shall, subject to this Statute and the Rules have, inter alia, the power on the application of a party or of its own motion, to:

(a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;

(b) require the attendance and testimony of witnesses;

(c) require the production of documentary and other evidentiary materials;

(d) rule on the admissibility or relevance of evidence;

(e) protect confidential information; and

(f) maintain order in the course of a hearing.

6. The Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

#### Article 39

##### Principle of legality (nullum crimen sine lege)

An accused shall not be held guilty:

(a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the act or omission in question constituted a crime under international law;

(b) in the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the accused;

at the time the act or omission occurred.

#### Article 40

##### Presumption of innocence

An accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt.

/...

Article 41

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees:

(a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;

(b) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing;

(c) to be tried without undue delay;

(d) subject to article 37 (2), to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court, without payment if the accused lacks sufficient means to pay for such assistance;

(e) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

(f) if any of the proceedings or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt.

2. Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.

Article 42

Non bis in idem

1. No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 20 for which that person has already been tried by the Court.

2. A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:

(a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served.

#### Article 43

##### Protection of the accused, victims and witnesses

The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means.

#### Article 44

##### Evidence

1. Before testifying, each witness shall, in accordance with the Rules, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. States parties shall extend their laws of perjury to cover evidence given under this Statute by their nationals, and shall cooperate with the Court in investigating and where appropriate prosecuting any case of suspected perjury.

3. The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility.

4. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

5. Evidence obtained by means of a serious violation of this Statute or of other rules of international law shall not be admissible.

#### Article 45

##### Quorum and judgment

1. At least four members of the Trial Chamber must be present at each stage of the trial.

2. The decisions of the Trial Chamber shall be taken by a majority of the judges. At least three judges must concur in a decision as to conviction or acquittal and as to the sentence to be imposed.

3. If after sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.

/...

4. The deliberations of the Court shall be and remain secret.
5. The judgment shall be in writing and shall contain a full and reasoned statement of the findings and conclusions. It shall be the sole judgment issued, and shall be delivered in open court.

Article 46

Sentencing

1. In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.
2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

Article 47

Applicable penalties

1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:
  - (a) a term of life imprisonment, or of imprisonment for a specified number of years;
  - (b) a fine.
2. In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of:
  - (a) the State of which the convicted person is a national;
  - (b) the State where the crime was committed; and
  - (c) the State which had custody of and jurisdiction over the accused.
3. Fines paid may be transferred, by order of the Court, to one or more of the following:
  - (a) the Registrar, to defray the costs of the trial;
  - (b) a State the nationals of which were the victims of the crime;
  - (c) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.

PART 6. APPEAL AND REVIEW

Article 48

Appeal against judgment or sentence

1. The Prosecutor and the convicted person may, in accordance with the Rules, appeal against a decision under articles 45 or 47 on grounds of procedural error, error of fact or of law, or disproportion between the crime and the sentence.
2. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

Article 49

Proceedings on appeal

1. The Appeals Chamber has all the powers of the Trial Chamber.
2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:
  - (a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;
  - (b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.
3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.
4. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court. Six judges constitute a quorum.
5. Subject to article 50, the decision of the Chamber shall be final.

Article 50

Revision

1. The convicted person or the Prosecutor may, in accordance with the Rules, apply to the Presidency for revision of a conviction on the ground that evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction.
2. The Presidency shall request the Prosecutor or the convicted person, as the case may be, to present written observations on whether the application should be accepted.

/...

3. If the Presidency is of the view that the new evidence could lead to the revision of the conviction, it may:

- (a) reconvene the Trial Chamber;
- (b) constitute a new Trial Chamber; or
- (c) refer the matter to the Appeals Chamber;

with a view to the Chamber determining, after hearing the parties, whether the new evidence should lead to a revision of the conviction.

#### PART 7. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

##### Article 51

##### Cooperation and judicial assistance

1. States parties shall cooperate with the Court in connection with criminal investigations and proceedings under this Statute.

2. The Registrar may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons; and
- (e) any other request which may facilitate the administration of justice, including provisional measures as required.

3. Upon receipt of a request under paragraph 2:

- (a) in a case covered by article 21 (1) (a), all States parties;
- (b) in any other case, States parties which have accepted the jurisdiction of the Court with respect to the crime in question;

shall respond without undue delay to the request.

##### Article 52

##### Provisional measures

1. In case of need, the Court may request a State to take necessary provisional measures, including the following:

- (a) to provisionally arrest a suspect;

(b) to seize documents or other evidence; or

(c) to prevent injury to or the intimidation of a witness or the destruction of evidence.

2. The Court shall follow up a request under paragraph 1 by providing, as soon as possible and in any case within 28 days, a formal request for assistance complying with article 57.

### Article 53

#### Transfer of an accused to the Court

1. The Registrar shall transmit to any State on the territory of which the accused may be found a warrant for the arrest and transfer of an accused issued under article 28, and shall request the cooperation of that State in the arrest and transfer of the accused.

2. Upon receipt of a request under paragraph 1:

(a) all States parties:

(i) in a case covered by article 21 (1) (a), or

(ii) which have accepted the jurisdiction of the Court with respect to the crime in question;

shall, subject to paragraphs 5 and 6, take immediate steps to arrest and transfer the accused to the Court;

(b) in the case of a crime to which article 20 (e) applies, a State party which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to that crime shall, if it decides not to transfer the accused to the Court, forthwith take all necessary steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution;

(c) in any other case, a State party shall consider whether it can, in accordance with its legal procedures, take steps to arrest and transfer the accused to the Court, or whether it should take steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution.

3. The transfer of an accused to the Court constitutes, as between States parties which accept the jurisdiction of the Court with respect to the crime, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case referred to the competent authorities of the requested State for the purpose of prosecution.

4. A State party which accepts the jurisdiction of the Court with respect to the crime shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States.

5. A State party may delay complying with paragraph 2 if the accused is in its custody or control and is being proceeded against for a serious crime, or serving a sentence imposed by a court for a crime. It shall within 45 days of receiving the request inform the Registrar of the reasons for the delay. In such cases, the requested State:

(a) may agree to the temporary transfer of the accused for the purpose of standing trial under this Statute; or

(c) shall comply with paragraph 2 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be.

6. A State party may, within 45 days of receiving a request under paragraph 1, file a written application with the Registrar requesting the Court to set aside the request on specified grounds. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 2 but shall take any provisional measures necessary to ensure that the accused remains in its custody or control.

#### Article 54

##### Obligation to extradite or prosecute

In a case of a crime referred to in article 20 (e), a custodial State party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21 (1) (b) (i) shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose.

#### Article 55

##### Rule of speciality

1. A person transferred to the Court under article 53 shall not be subject to prosecution or punishment for any crime other than that for which the person was transferred.

2. Evidence provided under this Part shall not, if the State when providing it so requests, be used as evidence for any purpose other than that for which it was provided, unless this is necessary to preserve the right of an accused under article 41 (2).

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes specified in the request.

#### Article 56

##### Cooperation with States not parties to this Statute

States not parties to this Statute may assist in relation to the matters referred to in this Part on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.

Article 57

Communications and documentation

1. Requests under this Part shall be in writing, or be forthwith reduced to writing, and shall be between the competent national authority and the Registrar. States parties shall inform the Registrar of the name and address of their national authority for this purpose.
2. When appropriate, communications may also be made through the International Criminal Police Organization.
3. A request under this Part shall include the following, as applicable:
  - (a) a brief statement of the purpose of the request and of the assistance sought, including the legal basis and grounds for the request;
  - (b) information concerning the person who is the subject of the request on the evidence sought, in sufficient detail to enable identification;
  - (c) a brief description of the essential facts underlying the request; and
  - (d) information concerning the complaint or charge to which the request relates and of the basis for the Court's jurisdiction.
4. A requested State which considers the information provided insufficient to enable the request to be complied with may seek further particulars.

PART 8. ENFORCEMENT

Article 58

Recognition of judgments

States parties undertake to recognize the judgments of the Court.

Article 59

Enforcement of sentences

1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.
2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State.
3. A sentence of imprisonment shall be subject to the supervision of the Court in accordance with the Rules.

/...

Article 60

Pardon, parole and commutation of sentences

1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Court.
2. If a notification has been given under paragraph 1, the prisoner may apply to the Court in accordance with the Rules, seeking an order for pardon, parole or commutation of the sentence.
3. If the Presidency decides that an application under paragraph 2 is apparently well-founded, it shall convene a Chamber of five judges to consider and decide whether in the interests of justice the person convicted should be pardoned or paroled or the sentence commuted, and on what basis.
4. When imposing a sentence of imprisonment, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to pardon, parole or commutation of sentence of the State of imprisonment. The consent of the Court is not required to subsequent action by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment.
5. Except as provided in paragraphs 3 and 4, a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

Annex

Crimes pursuant to Treaties (see art. 20 (e))

1. Grave breaches of:

- (i) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by Article 50 of that Convention;
- (ii) the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by Article 51 of that Convention;
- (iii) the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by Article 130 of that Convention;
- (iv) the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by Article 147 of that Convention;
- (v) Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, as defined by Article 85 of that Protocol.

2. The unlawful seizure of aircraft as defined by Article 1 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970.

3. The crimes defined by Article 1 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971.

4. Apartheid and related crimes as defined by Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973.

5. The crimes defined by Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973.

6. Hostage-taking and related crimes as defined by Article 1 of the International Convention against the Taking of Hostages of 17 December 1979.

7. The crime of torture made punishable pursuant to Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

/...

8. The crimes defined by Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 and by Article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988.

9. Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3 (1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension.

**GUIDELINES FOR THE CONSIDERATION OF THE QUESTION OF THE RELATIONSHIP BETWEEN STATES PARTIES, NON-STATES PARTIES AND THE INTERNATIONAL CRIMINAL COURT**

(UN General Assembly, Official Records, 50th Session, Supplement No. 22)

**I. GENERAL ISSUES RELATING TO STATES' CO-OPERATION WITH THE INTERNATIONAL CRIMINAL COURT**

1. The question of co-operation is intrinsically linked with the overall problem of the applicability of national law to the national part of the co-operation: in this context the question arises as to whether the State, when acting within the framework of co-operation, acts within the ambit of the court's authority as its organ or whether the co-operation is performed by the State on its own authority and subject to national law.

2. Choice of mutually non-exclusive approaches for dealing with assistance (both surrender and judicial assistance) in the Statute:

- (a) A general facilitating provision, relying on existing judicial assistance and extradition regimes; for example, for judicial assistance, a general provision supplemented by a non-exclusive list of the type of assistance that could be sought;
- (b) A detailed regime in, or annexed to, the statute; for example, for surrender of accused persons, a new mechanism of "transfer" as proposed by the ILC.

3. Extent of obligations of States Parties to assist:

- (a) Absolute, or subject to exceptions: if exceptions, what should be the exceptions and what are the justifications for those exceptions?
- (b) Factors which may influence the extent of obligations: State's consent to jurisdiction of the International Criminal Court for the

type of crime, or for the specific crime at issue;

- (c) Principle of complementarity;
- (d) Traditional considerations of essential interests (*ordre public*);
- (e) Compliance with other conventions.

4. Role of national laws/courts in guaranteeing fundamental rights: can or should national authorities defer to the International Criminal Court on these matters?

**II. CLUSTERS OF ISSUES RELATING TO SPECIFIC ASPECTS OF CO-OPERATION**

**First Cluster: Apprehension and Surrender**

1. Triggering act by the International Criminal Court: arrest warrant issued by the court. Confusion created by concept of "provisional arrest" in article 28 (as compared to Article 52).

The difference between pre-indictment arrest and post-indictment arrest.

Are a court arrest warrant and some form of accusation prerequisites to the apprehension of the accused by a State?

2. Request by the International Criminal Court for arrest of accused - form and content of the request and its communication to national authorities:

- (a) For provisional arrest (Art. 52); for formal request for arrest and surrender (Art. 57);
- (b) Extent to which detailed guidance is needed in the statute (or in an annex thereto).

3. Arrest of accused by national authorities for purposes of surrender to the International Criminal Court (based either on a request for provisional arrest (Art. 52) or a formal request for arrest and surrender (Art. 57)).

Roles of national authorities and of the International Criminal Court at the phase of initial arrest:

(a) Executing warrant of the court versus executing request to arrest, pursuant to national authority and laws?

(b) Applicability of national judicial proceedings [constitutional requirements/fundamental rights];

(c) Protection of the rights of the accused in connection with arrest - application of the standards of the court versus national standards;

(d) Arrest of persons other than the accused.

#### 4. Pre-surrender detention:

(a) Determined by the court (application of Art. 29 to be considered) or determined by national authorities?

(b) Governed by national law, relevant international standards, or standard provided in the statute of the International Criminal Court?

#### 5. The surrender decision:

(a) Role, if any, of national courts or other authorities;

(b) Applicability of national judicial proceedings; in the affirmative, what legal issues may be addressed (e.g., identity of accused, whether valid court accusation and arrest warrant; crime charged is a crime within the jurisdiction of the court, legal rights of the accused concerning the request for surrender):

- Different national requirements regarding sufficiency of evidence;
- Relevance of dual criminality and statutes of limitation;

(c) Application of national law, particularly issues/rights of fundamental or constitutional dimension.

6. Absolute obligation to surrender versus general obligation subject to exceptions. If exceptions, to what extent are traditional limitations on extradition appropriate in the context of the International Criminal Court?

Some examples of traditional limitations or exceptions include:

- Non bis in idem;
- Political offence;
- Nationality of the accused.

Some examples of traditional delays include:

- Pendency of national proceedings relating to same crime;
- Deferral of surrender versus temporary surrender where accused subject to proceedings for other offence.

7. Transfer of accused to the court or to a "detaining" State acting as custodian for court pre-trial detainees:

(a) Does transfer of the accused (or the decision to surrender) occasion a shift in primary responsibility for the accused from the national authorities to the International Criminal Court?

(b) Which authorities are responsible for transfer?

8. Problems of transit through third States in the course of transfer of accused to the International Criminal Court or to a "detaining" State:

- Scope of the duties of the transit State.

#### 9. Pre-trial detention of the accused:

(a) (The text of the draft Statute does not clearly distinguish between (a) detention by national authorities pending national decision to surrender and (b) detention (pre- or post-trial) by national authorities agreeing to act as custodial agent for the court - referred to here as a "detaining" State);

(b) Determined by the court (Art. 29) or by "detaining" State authorities?

(c) Whether the statute of the court, other relevant international standards or national law should control;

(d) Accused's challenges to the lawfulness of detention:

- Decided by the court (Art. 29(3)) or by national authorities?
- Does recourse to the court under article 29(3) exclude accused's fundamental rights under national law to challenge in national courts the lawfulness of detention? If not, what is *locus standi* of the International Criminal Court in proceedings before a national court?

10. Other surrender issues:

(a) Obligations to the International Criminal Court versus obligations/rights under existing extradition treaties, other bilateral or multilateral arrangements, or status-of-forces agreements:

- Should the international criminal court's request be given priority (Art. 53(4))?
- Should the answer to this question depend on whether a State party to the statute has consented to the jurisdiction of the court over the crime at issue?

(b) Rule of speciality (Art. 55).

**Second cluster: judicial assistance**

1. Judicial Assistance During Investigation Phase (Prior to the Indictment)

- Different kinds of judicial assistance (should an enumerative list be included; should a distinction be drawn between compulsory and non-compulsory measures?);
- Should the prosecutor be entitled to carry out activities on the territory of a State other than the host State:
  - On its own (such as to collect documentary and other evidence, to conduct on-site investigations);
  - On its own but subject to the consent to the State concerned;

or should the State concerned carry out those activities (in conformity with

traditional practice in matters of international judicial assistance)?

- Possibility of different approaches under different circumstances;
- Examination of lawfulness of on-site activities undertaken by the prosecutor or carried out on behalf of the prosecutor by a State; sanction and compensation for unlawful acts;
- Need to clarify the relation between articles 26 and 51;
- Requirement and conditions of consent of the State concerned;
- Extent of the legal obligation to comply with a request by the International Criminal Court to carry out such activities:
  - Exceptions and limitations to such obligation;
  - Which States are obliged? Is the criterion consent to the jurisdiction of the court over the crime, participation in the statute or any other factor?
- Applicability of constitutional requirements or of standards of fundamental human rights to the activities of the prosecutor;
- Applicability of national law and procedures;
- Possibility of ad hoc arrangements of the prosecutor with a State concerning modalities for transfer of information.

2. Co-operation relating to indictment (Arts. 30 and 38)

- Notification of the indictment to the suspect through national authorities;
- Forms of assistance of States to the court to bring the indictment to the attention of the accused.

3. Judicial assistance during post-indictment phase and during trial (Art. 38) (many of the issues described under point 1 arise in this context as well)

- Legal effect of a request by the court under paragraph 5 (b) and (c); legal obligation incumbent on (which) State?
  - Legal consequences of a refusal to comply with such a request for the refusing State (impact on process?);
  - Request for co-operation made on behalf of the accused;
  - Capacity to compel attendance of witnesses (are there other alternatives?).
4. Provisional measures (Art. 52)
- Form and content of a request for provisional measures;
  - Legal consequences of the provisional seizure of documents and other evidence (compensation for costs incurred);
  - Which procedures are applicable to a State's measures to prevent injury to or intimidation of a witness or the destruction of evidence?
  - Legal implications of the absence of a subsequent formal request.
5. Speciality (Art. 55)
- Power of the International Criminal Court to deviate from the rule of speciality in respect of evidentiary documents and materials - condition of the consent of State?
  - Power of the court to request waiver of the condition of speciality - duty to comply?
6. Communications and documents (Art. 57)
- Form and content of communications and documents required in the context of co-operation;
  - Modern methods of communication and conditions of their use.
7. Obligations
- Obligations to the court versus obligations/rights under existing extradition treaties and arrangements on judicial assistance.

**Third cluster: recognition of judgements of the International Criminal Court**

- Different types of judgements of the court and their impact on their recognition and implementation;
- Character of a judgement of the court - qualified as a national judgement?
- Is it subject to examination through national procedures? If so, to what extent?
- Applicability of national law on recognition procedures (continued enforcement or conversion);
- Protection of the rights of third parties.

**Fourth cluster: enforcement of sentences**

- Requirement of consent of State (case-by-case or general acceptance?) (see sub-topics (a) and (b) below);
- Necessary documentation (see sub-topics (a) and (b) below):
  - (a) Enforcement of sentences involving imprisonment:
    - Imprisonment according to national law or international standards;
    - Applicability of national procedure (to, for example, temporary absences);
    - Status of the International Criminal Court in the supervision of the imprisonment;
    - State's duties concerning communications between the prisoner and the International Criminal Court;
    - National court versus International Criminal Court responsibility for decisions on pardon, parole and commutation of sentences;
  - (b) Enforcement of sentences involving penalties other than imprisonment:

- Procedure for the enforcement of judgements (national versus internationally regulated);
- Protection of the rights of third parties;
- Asset sharing.

**Fifth cluster: mutual recognition of judgements**

- *Non bis in idem*:
  - As a bar to judicial assistance;
  - As a bar to trial proceedings;
  - Recognition by the International Criminal Court of other national judgements.