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"The international criminal court which will soon be established is the symbol of the most noble aspiration which there is: that of seeing justice and the rule of law reigning throughout the world. With the court, the international community will finally have given itself a permanent judicial mechanism which the General Assembly recognized was necessary almost 50 years ago."

Kofi Annan, United Nations Secretary-General, Message to the African Conference on the International Criminal Court, Dakar, 5 February 1998

INTRODUCTION

This is the fourth position paper of a series by Amnesty International in support of the establishment of a just, fair and effective international criminal court. They are designed as easy-to-use manuals for decision-makers addressing topics scheduled to be discussed at the four sessions in 1997 and 1998 of the United Nations (UN) Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee). Each section of this paper discusses the relevant international law, standards and practice; identifies the strengths and weaknesses of the International Law Commission's 1994 draft statute (ILC draft statute) and makes recommendations for improvements (in bold type).

This position paper addresses some of the topics scheduled to be addressed at the final session of the Preparatory Committee (16 March to 3 April 1998), including methods for establishing the international criminal court, financing the court, final clauses and organizing the diplomatic conference. Discussion of some of the topics now scheduled for the final session began at earlier sessions, such as procedural matters, or were originally scheduled for earlier sessions, such as organization of the court, so the previous position papers in this series should be consulted for Amnesty International's positions on those topics. For ease of reference, the topics in the four position papers are indicated below:

> Complementarity, definitions of core crimes, general principles of law, permissible defences and penalties. *The international criminal court: Making the right choices - Part I: Defining the crimes and permissible defences and initiating a prosecution* (AI Index: IOR 40/01/97) (*Part I*)
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> Organization of the court, protecting victims and witnesses and guaranteeing the right to fair trial. *The international criminal court: Making the right choices - Part II: Organizing the court and guaranteeing a fair trial* (AI Index: IOR 40/11/97) (*Part II*)
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> State cooperation with the international criminal court. *The international criminal court: Making the right choices - Part III: Ensuring effective state cooperation* (AI Index: IOR 40/13/97) (*Part III*)

Establishing and financing the court, final clauses and organizing the diplomatic conference. *The international criminal court: Making the right choices - Part IV: Establishing and financing the court and final clauses* (AI Index: IOR 40/04/98) (*Part IV*)

Significant developments since the December session of the Preparatory Committee. (1) Adoption of Zutphen text. The chairs of the working groups and coordinators of the informal drafting groups met in Zutphen, The Netherlands from 19 to 30 January 1998 to make technical revisions in the draft consolidated texts adopted in the February, August and December 1997 sessions of the Preparatory Committee. This revised text (Zutphen text) has rearranged the order and numbering of the articles in a more logical fashion. For the convenience of the reader, this paper, which is based on the new text also cites the old numbers.

(2) Dakar Declaration by NGOs. Representatives from non-governmental organizations from a number of countries in Africa met in Dakar from 3 to 4 February 1998 and adopted a Declaration by the International Forum of NGOs. Representatives of international non-governmental organizations, including representatives of the International Committee of the Red Cross, Human Rights Watch and Amnesty International also participated. The Declaration called for the immediate establishment of an international criminal court; recognition of the right of reparation for victims, particularly women and children; an independent prosecutor able to initiate investigations on his or her initiative; jurisdiction over genocide, crimes against humanity, grave violations of humanitarian law and aggression; no reservations; strong cooperation between states and the court; respect for human rights at all stages of the proceedings; universal jurisdiction; funding assuring effective functioning; and a simple amendment procedure.

(3) Dakar Declaration by African governments and NGOs. The governments of 24 African countries and African and international non-governmental organizations participated in a conference in Dakar, Senegal from 5 to 6 February 1998. The Dakar Declaration on the Establishment of the International Criminal Court adopted by the participants affirmed, among other things, that the permanent international criminal court must "be independent, permanent, impartial, just and effective", that it must "be the judge of its own jurisdiction", that it must "operate without being prejudiced by actions of the Security Council", that "the independence of the Prosecutor and his functions must be guaranteed", that "the cooperation of all States is crucial in order to ensure the effectiveness of the International Criminal Court", that the court's statute "must ensure respect for Human Rights in all phases of the procedure", that the court's effective functioning "requires on a regular and permanent basis, financial, human and technical resources" and that the court's independence and impartiality "must not be affected by the method of its financing". In addition, it urged that the Preparatory Committee "intensify its efforts to establish a consensus on the question of victim compensation".

(4) OAU Council of Ministers resolution. On 27 February 1998, the Organization of African Unity (OAU) Council of Ministers followed up the conference in Dakar by adopting a resolution stating that it congratulates the President and Government of Senegal "on their excellent initiative and the efforts made to organize and hold the African Conference on the Establishment of the International Criminal Court", that it "*STRONGLY SUPPORTS* the proposed establishment of an International Criminal Court"

and "*URGES* all Member States of the OAU to participate massively in the Diplomatic Conference".[1]

(5) American Bar Association resolution. On 2 February 1998, the House of Delegates of the world's largest national lawyers association, the American Bar Association, adopted a resolution strongly reinforcing its 1992 and 1994 resolutions supporting the establishment of a permanent international criminal court:

> "RESOLVED, That the American Bar Association recommends the establishment of a permanent International Criminal Court (ICC) by multilateral treaty in order to prosecute and punish individuals who commit the most serious crimes under international law; and
>
> FURTHER RESOLVED, That the American Bar Association recommends that the United States Government continue to play an active role in the process of negotiating and drafting a treaty establishing the ICC, and that the ICC treaty embody the following principles:
>
> A. (1) The ICC's initial subject matter jurisdiction should encompass genocide, war crimes, and crimes against humanity;
>
> (2) The ICC should exercise automatic jurisdiction over these crimes, and no additional declaration of consent by states parties should be required;
>
> B. The jurisdiction of the International Criminal Court should complement the jurisdiction of national criminal justice systems;
>
> C. The United Nations Security Council, states parties to the ICC treaty, and, subject to appropriate safeguards, the ICC Prosecutor should be permitted to initiate proceedings when a crime within the ICC's jurisdiction appears to have been committed; and
>
> D. The rights afforded accused persons and defendants under internationally recognized standards of fairness and due process shall be protected in appropriate provisions of the ICC's constituent instruments and rules of evidence and procedure."

Copies of Parts I, II, III and IV are available on the Amnesty International Italian Section's World Wide Web page: http://www.amnesty.it and on the NGO Coalition for an International Criminal Court World Wide Web Page: http://www.igc.apc.org/icc.

[1] OAU Council of Ministers, Draft Rapporteur's Report of the Sixty-Seventh Ordinary Session of the Council of Ministers, CM/Plen/Draft/Rapt/Rpt (LXVII) (25-27 February 1998), para. 97.

BASIC PRINCIPLES CONCERNING ESTABLISHMENT AND FINANCING OF THE COURT AND FINAL CLAUSES

To ensure the prompt establishment of an effective permanent international criminal court, it should be first established by a multilateral treaty facilitating the widest possible participation.

The permanent international criminal court should be made a principal judicial organ of the UN as soon as possible after it is established through amendment of the UN Charter.

The court should be closely linked to the UN, but any agreement with the UN should preserve the court's independence.

Meetings of states parties under the statute should be open and permit participation by the court, intergovernmental organizations and non-governmental organizations.

The court should be financed as part of the regular budget of the UN, supplemented, with appropriate safeguards, by contributions from the peace-keeping budget in referrals by the Security Council under Chapter VII of the UN Charter and by contributions to a voluntary trust fund.

The court should not be financed by states parties or by the states bringing the complaints.

The court and its officials should have all the privileges and immunities necessary to guarantee the court the independence needed to render justice.

A low number of ratifications should be required for entry into force of the court to permit it to be established promptly.

No reservations should be permitted.

If withdrawal from the statute is permitted, any state party which withdraws must provide sufficient notice and fulfil all existing obligations, including cooperation with the court concerning any crime which occurred before the notice of withdrawal.

The procedure for amending the statute should permit the broadest possible consultation with the court, intergovernmental organizations, non-governmental organizations, independent experts and the general public.

Non-governmental organizations and the two *ad hoc* international criminal tribunals should be able to participate in the meetings of the preparatory commission in the same manner authorized by the General Assembly at the diplomatic conference.

I. THE BEST METHOD OF ESTABLISHING THE COURT

A. Creation of the court

The permanent international criminal court should be established promptly by a multilateral treaty, pending amendment of the UN Charter. In the long run, the UN Charter should be amended to make the court a principal judicial organ of the UN. Creation by a multilateral treaty is preferable to creation as a subsidiary organ of the Security Council or the General Assembly.

1. Creation by multilateral treaty

In the short term, the best method for creating the court is to adopt the statute in the form of a treaty.[2] Members of the International Law Commission believed that "a treaty would provide a firm legal foundation for the judgments delivered against the perpetrators of international crimes".[3] The Secretary-General in his report on the establishment of the Yugoslavia Tribunal explained the advantages of establishing international criminal courts by treaty.[4] As explained below in Section I.B, the treaty should provide that the court will have close links to the UN which also preserve the court's independence. A treaty would impose a binding legal obligation on all states parties to cooperate fully with the international criminal court. A multilateral treaty would be adopted by a diplomatic conference open to the participation of all states, including Members of the UN and non-Members, and would, therefore, represent a strong statement by the international community that it was taking serious steps to ensure that those responsible for the worst crimes imaginable will be brought to justice. To further reinforce this message, the diplomatic conference should ask the General Assembly, which has repeatedly endorsed the establishment of the court,[5] to endorse the statute and send it to all states with a request that they promptly ratify or accede to the statute to ensure its eventual universal acceptance and that all states cooperate with the court. The General Assembly has called upon states to ratify or accede to other important treaties, whether they have been adopted by the General Assembly[6] or they

[2] It is possible that the diplomatic conference will decide to make the statute an annex to a treaty in the same way that the Statute of the International Court of Justice is annexed to the UN Charter, but it is more likely that the entire document adopted will be called the statute, including final clauses as in other treaties, and the Secretariat has prepared final clauses on this basis. Whichever method is adopted is of little legal significance. This paper assumes that if the diplomatic conference decides to establish the court by a treaty it will adopt the statute as a single document.

[3] Report of the International Law Commission on the work of its forty-sixth session - 2 May - 22 July 1994, 49 UN GAOR Supp. (No. 10), UN Doc. A/49/10 (1994) (1994 ILC Report), p. 33.

[4] "Such an approach would have the advantage of allowing for a detailed examination and elaboration of all the issues pertaining to the establishment of the international tribunal. It also would allow the States participating in the negotiation and conclusion of the treaty fully to exercise their sovereign will, in particular whether they wish to become parties to the statute or not." Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, and Corrigendum, UN Doc. S/25704/Corr.1, 30 July 1993, para. 19.

[5] See, for example, GA Res. 260 B (III), 9 December 1948; GA Res. 48/31, 9 December 1993; GA Res. 45/41, 28 November 1990; GA Res. 50/46, 11 December 1995; GA Res. 51/207, 17 December 1996; GA Res. 52/160, 15 December 1997.

[6] The General Assembly appealed to all states to ratify or accede to the Convention on the Prevention and Punishment of the Crime of Genocide. GA. Res. 260 A (III), 9 December 1948; GA Res. 795 (VIII), 3

have been adopted by diplomatic conferences.[7] The diplomatic conference should also ask the General Assembly to invite the Secretary-General to undertake efforts to encourage states to become parties to the statute and, through the program of technical cooperation, or some other method, assist states, at their request, in ratifying or acceding to the statute, including the enactment of any necessary implementing legislation (see Section III.F.3 below on the urgent need for guidelines on national implementing legislation).[8]

The permanent international criminal court should be set up initially by a multilateral treaty. The diplomatic conference should ask the General Assembly to request state ratification of the statute as soon as possible and to provide technical assistance to states to facilitate ratification and enactment of implementing legislation.

2. Amendment of the UN Charter

Nov. 1953. It regularly appeals to all states to ratify or accede to the International Covenant on Civil and Political Rights (ICCPR) and its Protocols and the International Covenant on Economic and Social Rights, GA Res. 50/171 of 22 December 1995 ("*Appeals strongly* to all States that have not yet done so to become parties to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as to accede to the Optional Protocols to the International Covenant on Civil and Political Rights and to make the declaration provided for in its article 41"), the Convention on the Elimination of All Forms of Racial Discrimination (Racial Discrimination Convention), in GA Res. 51/80 of 12 December 1996 ("*Requests* those States that have not yet become parties to the Convention to ratify it or accede thereto"); the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention), in GA Res. 51/68 (urging "all States that have not yet ratified or acceded to the Convention on the Elimination of All Forms of Discrimination against Women to do so as soon as possible, that universal ratification of the Convention can be achieved by the year 2000"); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) in GA Res. 51/86 of 12 December 1996 ("*Urges* all States that have not yet done so to become parties to the Convention as a matter of priority") and the Convention on the Rights of the Child, in GA Res. 51/77 of 12 December 1966 ("*Urges once again* all States that have not yet done so to sign and ratify or accede to the Convention as a matter of priority, with a view to reaching the goal of universal adherence . . .").

[7] The General Assembly has appealed "to all States parties to the Geneva Conventions of 1949 that have not yet done so to consider becoming parties to the additional Protocols at the earliest possible date". GA Res. 51/155 of 16 December 1996.

[8] The General Assembly has invited the Secretary-General "to intensify systematic efforts to encourage States to become parties to the Covenants and, through the programme of advisory services in the field of human rights, to assist such States, at their request, in ratifying or acceding to the Covenants and to the Optional Protocols to the International Covenant on Civil and Political Rights". GA Res. 50/171 of 22 December 1995.

In the long run, as some members of the International Law Commission believed,[9] it would be best if the international criminal court were established as an independent judicial organ of the UN by amendment of the UN Charter, with binding legal effect on all UN Members. The court should have the same degree of independence possessed by the International Court of Justice. One of the advantages of establishing the international criminal court as a judicial organ of the UN through amendment of the UN Charter would be that under Article 108 of the UN Charter any amendment is binding on all Members of the UN.[10] It would enhance the court's permanence, legitimacy, authority, universality and acceptance in the same way that such status has done for the International Court of Justice over the past half century. In addition, as argued by some members of the International Law Commission who thought that the court should be made a judicial organ of the UN by amendment of the UN Charter, "the Court is intended as an expression of the organized international community as to its concern about and desire to suppress certain most serious crimes. It is logical that the Court be organically linked with the United Nations as the manifestation of that community."[11]

Nevertheless, amendment of the UN Charter to establish an entirely new body as a permanent organ of the UN is likely to be a lengthy and difficult process. Articles 108 and 109 require approval of any amendment by two thirds of the 186 Members, including the five permanent members of the Security Council. Thus, any one of the five permanent members could, in effect, veto the amendment. The UN Charter has been amended only three times in the past half century. Although these amendments were adopted relatively quickly, in two or three years, each was a technical amendment related to increasing the membership of existing principal organs of the UN, not adding an entirely new permanent organ, imposing new obligations on Members or making major structural changes in the organization.[12] Any amendment to the UN Charter to make the court an organ will, however, need to ensure that the statute can be amended in a less cumbersome fashion than that in the Statute of the International Court of Justice. As stated above, the Statute can only be amended in the same way as the UN Charter, requiring approval by two thirds of the UN Members, including all five permanent members of the Security Council, thus permitting any one permanent member to veto the amendment by inaction (see also Section III. E below).[13]

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[9] 1994 ILC Report, *supra*, n. 3, p. 32.

[10] Article 108 of the UN Charter states:

> "Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council."

[11] 1994 ILC Report, *supra*, n. 3, p. 47.

[12] Jean-Pierre Cot & Alain Pellet, eds, *La charte des Nations Unies* (Paris: Economica 2d ed. 1991), pp. 1433-1435; Bruno Simma, ed., *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press 1995), pp. 1177-1178. Numerous proposals over the years for other amendments have failed to garner sufficient support. See Simma, *supra*, n. 12, pp. 1184-1189. Current efforts to amend the UN Charter are proceeding very slowly. See GA Res. 51/209 of 17 December 1996 concerning the Report of the Special Committee on the Charter of the United Nations and the Strengthening of the Role of the Organization.

[13] Simma, *supra*, n. 12, p. 1166; Egon Schwelb, "The Amending Procedure of Constitutions of International Organizations", 31 Brit. Y.B. Int'l L. (1954), pp. 89-90.

If, as is likely, the court is established by multilateral treaty, then as soon as practicable after establishment, the UN Charter should be amended to make the court a principal judicial organ of the UN.

3. Establishment as a subsidiary organ of the Security Council

Establishment of the permanent international criminal court as a subsidiary organ of the Security Council pursuant to Article 29 of the UN Charter [14] could certainly be accomplished more quickly than by amendment of the UN Charter or by a multilateral treaty, even if ratification by only a small number of states were required for the statute to enter into force. The Security Council has established two international criminal tribunals and the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) has, after a careful review of the powers of the Security Council, determined that it had the power to establish a criminal court as a subsidiary organ under Articles 39 and 41 in Chapter VII of the UN Charter as a measure "to maintain or restore international peace and security".[15] On 23 June 1997, Hans Corell, the UN Under-Secretary-General for Legal Affairs and Legal Counsel, assured the Secretary-General that the Security Council had the competence to create an international criminal tribunal to bring to justice those responsible for crimes against humanity and other crimes under international law committed in Cambodia between 1975 and 1979.[16]

Although it could be argued that a permanent international criminal court established by the Security Council would be within these powers, one observer has stated that "[c]reation of a permanent institution by the Security Council with broad subject-matter jurisdiction and substantial scope for prosecutorial initiative would seem to stretch the Council's powers close to or beyond breaking point."[17] Since it is inconceivable that the Security Council would or could under the UN Charter allow a prosecutor to determine whether a situation amounted to a threat to international peace and security, it is more likely that such a court would be, as one observer has suggested, "a 'permanent ad hoc' structure in place, with a passive prosecutor, awaiting use by the Council itself in individual cases in which it decided to take action, like a Rwanda or a Former Yugoslavia".[18]

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[14] Article 29 provides: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."

[15] *Prosecutor v. Tadi_*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 Oct. 1995, paras 37, 40. The Security Council has also established the quasi-judicial United Nations Compensation Commission to resolve claims against Iraq arising from its occupation of Kuwait. See S.C. Res. 687 (1991) of 3 April 1991 and S.C. Res. 692 (1991) of 20 May 1991.

[16] UN Press Briefing, Daily Press Briefing of Office of Spokesman for Secretary-General, 24 June 1997, p. 1.

[17] Roger S. Clark, "The proposed international criminal court: Its establishment and its relationship with the United Nations", revised version of paper delivered at the Conference of the Society for the Reform of Criminal Law, London, 27 July-1 August 1997, p. 7.

[18] *Id.(*citing the model of the Fact-Finding and Conciliation Commission for freedom of association matters established jointly by the International Labour Organisation (ILO) and ECOSOC). This suggestion of a permanent *ad hoc* court is reminiscent of the first serious proposal to establish a permanent international criminal tribunal more than a century and a quarter ago by Gustave Moynier, one of the founders of the International Committee of the Red Cross. See Gustave Moynier, *Note sur la*

création d'une Institution judicaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève, Bulletin International des Sociétés de secours aux militaires blessés, No. 11, 1872, p. 122. That court, however, would have been convened *automatically* by the President of the Swiss Confederation on the outbreak of a war between two or more states parties.

Although requests and orders of a court created by the Security Council pursuant to Chapter VII would, like those of the Yugoslavia and Rwanda Tribunals, be binding on all UN Members, so would requests and orders of a permanent international criminal court created by treaty when acting pursuant to a referral by the Security Council under Chapter VII. Moreover, a permanent *ad hoc* court, would have serious drawbacks. A court created by a Security Council resolution could be abolished at any time, by the decision of a few powerful states, even against the opposition of the overwhelming majority of UN Members, thus threatening the court's independence and further limiting its deterrent value. Its jurisdiction would be limited to crimes occurring in a situation under Chapter VII, not other crimes, and the Security Council, a political body, would have complete discretion to choose which of those situations would require international judicial action and which would not. As explained in a previous paper, such political selection would be inconsistent with the court's independence and would lead to uneven application of the law as, in certain situations, those responsible for genocide, other crimes against humanity and serious violations of humanitarian law would escape international criminal responsibility.[19] Indeed, the Security Council has established *ad hoc* tribunals in only two situations since May 1993. The Security Council might well decline to convene the court even in the face of genocide, crimes against humanity or serious violations of humanitarian law during an internal armed conflict on the ground that these grave crimes, although violations of international law within the court's jurisdiction, were not in themselves threats to or breaches of international peace and security, or because of a lack of political will.[20] In addition, convening an international criminal court on a temporary basis would be very costly and the institution would lack continuity and an institutional memory. The fact that the court would not be in continuous existence and the inevitable delays in convening it would seriously undermine

[19] Similar problems would result if the only way the prosecutor could initiate an investigation would be to wait until the Security Council or a state party acted. *Part I*, pp. 99-102.

[20] For example, the Security Council has declined to establish a new *ad hoc* international criminal tribunals or to expand the jurisdiction of the existing tribunals to include such crimes committed in Burundi and Cambodia, despite formal requests by the governments of those countries to do so. On 14 June 1997, President Buyoya of Burundi publicly called for the establishment of an international criminal tribunal with jurisdiction over genocide committed in that country since October 1993. The Secretary-General later reported that in response to a formal request addressed to him by the Government of Burundi, he replied that

> "given the circumstances prevailing in Burundi I was not in a position to recommend to the Security Council the establishment of such a tribunal at the present time. It is my intention to remain seized of the matter, however, and to review the question of the establishment of such a tribunal at a later date. I will, of course, keep the Council fully informed of developments in this regard."

Report of the Secretary-General on the Situation in Burundi, UN Doc. S/1997/547, 15 July 1997, para. 18.

The First and Second Prime Ministers of Cambodia sent a letter to the Secretary-General on 21 June 1997 asking the United Nations for assistance in bringing to justice those responsible for crimes against humanity and genocide in that country between 1975 and 1979, which the Secretary-General sent to the Presidents of the General Assembly and Security Council on 24 June 1997. UN Doc. A/51/930 - S/1997/488 (1997). The Special Representative of the Secretary-General on Human Rights in Cambodia supported this initiative, Statement to the Third Committee, 13 November 1997, and the General Assembly urged the Secretary-General to appoint a group of experts to study the question and recommend further measures. See UN Doc. A/C.3/52/L.68, 20 November 1997 (Third Committee text).

The Security Council has discussed both proposals, but had taken no action as of 2 March 1998.

one of its most important functions: to help deter the most serious crimes under international law.

The permanent international criminal court should not be established as a subsidiary body of the Security Council.

4. Establishment as a subsidiary organ of the General Assembly

The General Assembly could also establish the court more rapidly than could by done by a treaty.[21] The General Assembly has the power to establish courts as subsidiary bodies. Article 22 of the UN Charter provides that "[t]he General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions." The International Court of Justice has held that the General Assembly had the power to establish an administrative tribunal to resolve disputes concerning U N staff, both under Article 22 and an implied power under Article 101 to establish staff regulations and that the tribunal's decisions were binding upon the General Assembly.[22] On 23 June 1997, Hans Corell, the UN Under-Secretary-General for Legal Affairs and Legal Counsel, assured the Secretary-General that the General Assembly had the competence to create an international criminal tribunal to bring to justice those responsible for crimes against humanity and other crimes under international law committed in Cambodia between 1975 and 1979.[23] Nevertheless, such a subsidiary court, like tribunals created by Security Council resolution, could be abolished or have its mandate changed at any time,[24] similarly raising concerns about its permanence, independence and impartiality. One advantage cited by advocates of establishment by the General Assembly, which now has 186 Members, is that it might provide more universal acceptance of the court than establishment by the Security Council, but widespread ratification of a treaty would be a much more solid commitment by the international community.

[21] ECOSOC has established subsidiary bodies under Article 68 of the UN Charter, which expressly requires it to "set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions", including the Commission on the Status of Women and the Commission on Human Rights. The express power to set up commissions suggests that ECOSOC might not have the power to establish a permanent international criminal court.

[22] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 ICJ Rep., pp. 47, 53, 61; GA Res. 351A (IV) of 24 November 1949. In addition to the Administrative Tribunal, the General Assembly also established two short-lived tribunals to decide all disputes arising during the transfer of authority from Italy to the newly independent Libya, the United Nations Tribunal in Libya, GA Res. 388 (V) of 15 December 1950, and to the autonomous territory of Eritrea, the United Nations Tribunal in Eritrea, GA Res. 530 (VI) of 29 January 1952. The General Assembly did not mention Article 22 as the source of its authority to do so, but said that it was acting pursuant to a request by the four Allied Powers pursuant to the Treaty of Peace with Italy.

[23] UN Press Briefing, Daily Press Briefing of Office of Spokesman for Secretary-General, 24 June 1997, p. 1.

[24] The International Court of Justice noted that the UN Administrative Tribunal was "subordinate in the sense that the General Assembly can abolish the Tribunal by repealing the Statute, that it can amend the Statute and that it can amend the Staff Regulations and make new ones". *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 ICJ Rep., p. 61. One observer has argued that this danger is "overstated" as it might be difficult to find a majority to change or repeal the resolution. Clark, *supra*, n. 17, pp. 11-12. Nevertheless, the political danger to the permanence of the court would still exist.

Moreover, resolutions of the General Assembly impose binding legal obligations on Members of the UN and non-Members in only a limited number of situations, none of which appear to apply to requests and orders of an international criminal court.[25] Indeed, those members of the International Law Commission who opposed establishing the court by a General Assembly resolution raised the same concerns:

> "General Assembly resolutions do not impose binding, legal obligations on States in relation to conduct external to the functioning of the United Nations itself. In the present case important obligations - for example the obligation of a State to transfer an accused person from its own custody to the custody of the Court - which are essential to the Court's functioning could not be imposed by resolution. A treaty commitment is essential for this purpose. Moreover, a treaty accepted by a State pursuant to its constitutional procedures will normally have the force of law within that State - unlike a resolution - and that may be necessary if that State needs to take action *vis-à-vis* individuals within its jurisdiction pursuant to the Statue. And, finally, resolutions can be readily amended or even revoked: that would scarcely be consistent with the concept of a permanent judicial body."[26]

One observer has argued that lack of a binding legal effect of General Assembly resolutions is not a fatal flaw with respect to giving them effect at the national level, noting that although Security Council resolutions and treaties are legally binding, in many states, including Australia, Canada, New Zealand, Samoa, the Solomon Islands, the United Kingdom and the United States, they are not self-executing.[27] However, it is more important that the state itself be legally bound, making it internationally responsible to all other states parties, as well as to the court, to comply with court requests and orders. This international legal obligation will require states to take effective steps in good faith to implement the statute, whether through legislation or executive or judicial action.

The permanent international criminal court should not be established as a subsidiary body of the General Assembly.

B. Relationship of the court to the United Nations

There was general agreement in the International Law Commission "on the importance of establishing a close relationship between the United Nations and the court to ensure its international character and moral authority".[28] It was agreed that the court "could only operate effectively if brought into a close relationship with the United Nations, both for administrative purposes, in order to enhance its universality, authority and permanence,

[25] These matters include, but are not limited to, suspension of membership rights and privileges, expulsion from the UN, budgetary matters, organization of peace-keeping forces and terminations of Trusteeships and Mandates. Jennings & Watts, *Oppenheim's International Law*, vol. I (London: Longman 9th ed. 1996), pp. 45-46 n. 1; *Certain Expenses of the United Nations*, 1962 ICJ Rep., pp. 162-163; *Namibia (South West Africa) Legal Consequences Case*, 1971 ICJ Rep., pp. 47-50; *Case Concerning the Northern Cameroons*, 1963 ICJ Rep., p. 32.

[26] 1994 ILC Report, *supra*, n. 3, p. 46.

[27] See Clark, *supra*, n.17, pp. 10-11.

[28] 1994 ILC Report, *supra*, n. 3, p. 34.

and because in part the exercise of the Court's jurisdiction could be consequential upon decisions of the Security Council".[29]

The necessity of a close link is clear, but that link should guarantee the independence of the permanent international criminal court and its officials, as required by such standards as Article 10 of the Universal Declaration of Human Rights, Article 14 (1) of the ICCPR, the UN Basic Principles on the Independence of the Judiciary and the UN Guidelines on the Role of Prosecutors. One way to ensure that independence is to provide that the link between the UN and the court be negotiated between the two institutions promptly after the court is established. Even if the preparatory commission prepares a draft or provisional agreement between the UN and the court (see Section III.F.3 below), subject to approval by the meeting of states parties, the court must be free to amend that agreement in the light of experience. The agreement must ensure that the court has the freedom to organize itself and hire expert staff and not be bound by UN procedures which are not suitable for a criminal court.

The court should be closely linked to the UN, but any agreement with the UN should preserve the court's independence.

C. Meeting of states parties

[29] *Id.*, p. 47.

Meetings of states parties under human rights treaties generally play a minor, but important, role in the implementation of those treaties. In most cases, their only expressly provided role is to elect members of the monitoring committees.[30] In addition, special meetings or conferences of states parties are convened to consider amendments to the treaty.[31] There are advantages in such a limited role for the meeting of states parties as it helps to insulate the monitoring body from political interference and pressure when it adopts unpopular decisions. It will be essential to ensure that the proposed meeting of states parties cannot interfere with the independence of the court.

[30] See, for example ICCPR, Art. 30 (1) - (4); Women's Convention, Art. 17 (1) - (4), (6); Convention against Torture, Art. 17 (1) - (4), (6); Racial Discrimination Convention, Art. 8 (2) - (4); Convention on the Rights of the Child, Art. 43 (3) - (5).

[31] See, for example, ICCPR, Art. 11 (1) (adoption of proposed amendments to be submitted to General Assembly for approval and submission to states parties for acceptance); ICESCR, Art. 29 (1) (same); Convention against Torture, Art. 29 (1) (adoption of proposed amendments for submission to states parties for acceptance); Convention on the Rights of the Child, Art. 50 (1) (adoption of proposed amendments to be submitted to General Assembly for approval and submission to states parties for acceptance).

Nevertheless, there are a limited number of tasks which the conference could undertake which would not interfere with the court's independence, provided that appropriate safeguards were placed in the statute. The conference should review nominations of judges, prosecutor and deputy prosecutors, elect them and, if necessary, remove them, in accordance with the principles outlined in a previous paper to ensure selection of the most qualified candidates and removal on non-political grounds.[32] The conference could play an important role in considering and adopting amendments to the statute and to the rules proposed by the court, states parties, intergovernmental organizations or non-governmental organizations (see Section III.E below for a discussion of methods for amending the statute).[33] One method to encourage compliance with requests and orders of the court would be to provide that no state which the court has determined has failed to comply with a court order should be permitted to participate in the meeting of states parties to determine the budget request, to participate in nominations, elections or removals of officials or to participate in any other respect until it complies with the request or order. The conference should not play a role, however, in preparing or reviewing budget requests prepared by the court; budgets should be prepared by the court and the decision on the budget request should be taken by the General Assembly without a political filter..

The meeting of states parties should have certain limited powers, including the election and removal of judges, the prosecutor and deputy prosecutors and approval of statutory amendments or court rules proposed by the court or a state party. These powers should be subjected to appropriate safeguards to ensure the court's independence. No state party which the court has found to have failed to comply with a court request or order should be permitted to participate in the meeting of states parties until it complies.

The court, intergovernmental organizations and non-governmental organizations should be able to participate in the meeting of the states parties on the same basis as guaranteed by the General Assembly at the diplomatic conference and reports of meetings should be published promptly.

II. THE BEST WAY TO FINANCE THE COURT

"While states' concern for the content of the ICC statute is focussed on legal and political issues, one of the most important elements in the success or failure of an ICC will be the extent and independence of its financial resources. A court in which the prosecutor is unable to properly investigate, the judges are unable to deal effectively with the information presented to them and the defendants are unable to defend themselves due to lack of financial resources could be a regressive step for the development of the rule of law."

[32] *Part II*, pp. 9 - 13 (prosecutor and deputy prosecutor), 26 - 29 (judges).

[33] Proposals by non-governmental organizations for amendment of the rules of the two international criminal tribunals have had a significant impact on subsequent revision of the rules. See, for example, Virginia Morris & Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*
(Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1994), pp. 263-264 (rules concerning evidence of rape and sexual assault).

Daniel Mac Sweeney, "Prospects for the Financing of an International Criminal Court", World Federalist Movement/Institute for Global Policy Discussion Paper, August 1996, p. 1.

It will be essential for the permanent international criminal court to have adequate, long-term secure funding which does not endanger its independence. The most effective way to secure such funding is through the regular UN budget, supplemented by certain other sources, including the peace-keeping budget when the court is considering a situation referred by the Security Council pursuant to Chapter VII of the UN Charter and a voluntary fund. Of course, there must be appropriate safeguards for judicial independence when the court receives funding through supplementary sources. Funding by states parties or by complainant states would prevent universal adherence to the statute by deterring ratifications and undermine the court's independence. Funding through fines and confiscation of assets of convicted persons would divert resources which should go to victims and their families and would be inconsistent with the requirements of impartiality. Other sources, such as levies on arms sales, could be used in the future to supplement funding from the regular UN budget, when they become available.

The cost of an international investigation and prosecution of genocide, other crimes against humanity and serious violations of humanitarian law will be infinitesimal in comparison to the cost of a peace-keeping operation and the damage caused to societies when such crimes are committed, each amounting to billions of dollars. Ending impunity by prompt and impartial investigations and prosecutions of such crimes will help deter the grave human rights violations which often are the cause of armed conflicts and, by thus avoiding the costs of such destruction and peace-keeping operations, justify their expense many times over. Moreover, prompt and effective action by the international criminal court should inspire most national jurisdictions to fulfil their primary responsibilities to bring those responsible for such crimes to justice, thus, reducing the court's case load over the long term. Nevertheless, investigations and prosecutions by the court - usually of complex cases with multiple defendants - will require a significant amount of funds. The experience of the two *ad hoc* tribunals demonstrates that international criminal courts are more costly (although a large portion of the costs in the first years has been in the form of one- time start-up costs) than international courts and arbitral tribunals, where states parties absorb much of the cost of individual cases. Therefore, methods of financing such judicial and quasi-judicial institutions are of limited relevance as models for the permanent international criminal court.

A. The regular United Nations budget

". . . the effectiveness of the International Criminal Court requires on a regular and permanent basis, financial, human and technical resources for its functioning. . . . [T]he independence and impartiality of the International Criminal Court must not be affected by the method of its financing."

Dakar Declaration on the Establishment of the International Criminal Court, 6 February 1998

It is essential for the success of the permanent international criminal court that it have long-term secure financing which is fully consistent with the requirement that it be independent and impartial. The most effective way to provide such long-term, secure financing is through the regular UN budget. This method of financing the court would also enhance its universal character by making it an integral part of the UN system in much the same way that the International Court of Justice is part of that system. It is appropriate to have the General Assembly fund the court as part of the regular UN budget since the court will be acting on behalf of the entire international community. Although the UN faces a number of serious financial problems at the moment, the regular UN budget is still more likely to provide the court adequate resources over the long term than other methods.[34] Experience with funding of the International Court of Justice demonstrates that this method of financing is less likely to be susceptible to political pressure than some of the other possibilities.[35] Certain other methods of financing, such as financing part of the costs of proceedings associated with a referral of a situation by the Security Council under Chapter VII of the UN Charter and voluntary contributions to a trust fund, could be used to supplement funding through the regular UN budget. However, such supplementary funding must be provided in a way which enhances, rather than undermines, the independence, impartiality and effectiveness of the court.

As with the International Court of Justice, the permanent international criminal court should prepare the budget request for approval by the General Assembly, without any political filter by states parties. This approach would make it less likely that decisions on the budget would be affected by political considerations.

The primary method of financing the permanent international criminal court should through the regular UN budget, although other methods of financing could be used to supplement this method, provided that they do not undermine the independence, impartiality and effectiveness of the court.

B. Peace-keeping budget

Many of the investigations and prosecutions of crimes within the court's jurisdiction will involve situations which involve threats to or breaches of international peace and security. In some instances, the Security Council will have referred the situation to the prosecutor for investigation. In those instances, financing though the UN peace-keeping budget of the investigations, prosecutions and proceedings could be used to supplement financing through the regular UN budget, provided, however, that this supplementary financing does not distort the priorities of the prosecutor or otherwise undermine the independence, impartiality and effectiveness of the court.

[34] The current regular UN budgetary assessments rely disproportionately on certain states and if one or more of those states is in arrears, that will affect the overall budgetary resources of the UN, but it will not distort the allocation of those resources by the UN to particular budget items. The delays in the approval by the General Assembly of the budgets of the Yugoslavia and Rwanda Tribunals in their first years appears to be related to differences between the General Assembly and the Security Council over the extent to which the tribunals should be financed by the regular budget and the peace-keeping budget.

[35] Of course, the current financial problems of the UN as a whole has to some extent limited the effectiveness of the International Court of Justice, but the budget debates in the General Assembly have generally not involved attacks on the independence of the Court itself.

Among the possible ways which could be explored to avoid these consequences would be to ensure that supplementary funding through the peace-keeping budget be no more than a certain percentage of the total court budget, to require that such funding be allocated on a multi-year basis and to give the court the freedom to allocate these additional funds to any of the pending proceedings pursuant to the referrals, based solely on need. There is a risk that the Security Council, a political body, might determine that certain situations referred to the prosecutor posed greater threats to international peace and security than others and, therefore, allocate greater resources to those situations than to others where the number of crimes committed was far greater.

Some of the funding of the permanent international criminal court could come from the UN peace-keeping budget, provided, however, that it does not undermine the independence, impartiality and effectiveness of the court.

C. Voluntary trust fund and other voluntary contributions

The two voluntary trust funds established to assist the Yugoslavia and Rwanda Tribunals have been extremely valuable. As of 15 July 1997, the voluntary fund for the Yugoslavia Tribunal had received US$ 8.6 million.[36] All states, both Members of the UN and Observers, have been able to contribute to these funds. The ability of the UN to accept voluntary contributions from individuals, as well as from states, has been of significant value during the recent financial problems it has faced. The UN Secretary-General has established a voluntary trust fund to assist states in filing complaints before the International Court of Justice which can accept contributions from states, corporations, foundations, legal organizations and other sources.[37] The Administrative Council of the Permanent Court of Arbitration established a similar fund in 1994 to assist states in

[36] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the former Yugoslavia (1997 Report of the Yugoslavia Tribunal), UN Doc. A/52/375-S/1997/729 of 18 September 1997, para. 163 (contributions of $8.6 million as of 15 July 1997 from Switzerland and 21 UN Members: Austria, Cambodia, Canada, Chile, Denmark, Hungary, Ireland, Israel, Italy, Liechtenstein, Malaysia, Malta, Namibia, Netherlands, New Zealand, Norway, Pakistan, Slovenia, Spain, Sweden and the United States); Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (1997 Report of the Rwanda Tribunal), UN Doc. A/52/582-S/1997/868 (1997), para. 67 (The Holy See, Switzerland and 17 UN Members, including Belgium, Canada, Chile, Denmark, Egypt, Greece, Ireland, Israel, Lebanon, Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States, have contributed cash, personnel and *matériel*, including $7,388,996.77 to the voluntary fund, since Rwanda Tribunal was established). For further information concerning the voluntary trust funds and how states may make voluntary contributions to those funds, see Amnesty International, *The international criminal tribunals: Handbook for government cooperation* (AI Index: IOR 40/07/96), pp. 35-39.

[37] See Mac Sweeney, "Prospects for the Financing of an International Criminal Court", World Federalist Movement/Institute for Global Policy Discussion Paper, August 1996, p. 15; UN Doc. A/44/PV.43; Cesare P.R. Romano, *Paying for Essentials - The Cost of International Justice*, Background paper prepared for discussion at a meeting on the use and financing of international courts and dispute settlement bodies held in London, 31 January-1 February 1997, co-sponsored by the Foundation for International Environmental Law Development (FIELD) and the Center on International Cooperation at New York University, 21 January 1997 (draft) (to be published in the Commonwealth Law Bulletin in 1998), pp. 9-10; M.E. O'Connell, "International legal aid: The Secretary-General's trust fund to assist states in the settlement of disputes through the International Court of Justice", *in* M.W. Janis, ed., *International Courts for the Twenty-First Century* (Dordrecht: Martinus Nijhoff Publishers 1992), p. 236..

meeting the costs of arbitration, the Financial Assistance Fund for Settlement of Disputes, which can accept donations from states, intergovernmental organizations, national institutions and natural and legal persons.[38] The most notable recent example of voluntary funding has been the donation by Ted Turner to a foundation of one billion US dollars for the UN to use in development projects not funded under the regular UN budget. In each case when an intergovernmental organization or one of its bodies accept voluntary contributions, it is essential to put in place measures to ensure that such contributions do not distort the priorities of the organization or body or undermine its independence, impartiality or effectiveness.

[38] Permanent Court of Arbitration, *95th Annual Report*, Annex 5, Financial Assistance Fund for Settlement of International Disputes, Terms of Reference and Guidelines;. Romano, *supra*, n. 37, pp. 44-45.

In addition, the ability of the two tribunals to accept staff and equipment donated by states has been invaluable.[39] The host states for the two tribunals and more than 20 other states have provided significant amounts of resources to the two tribunals, including the United Kingdom, which has pledged sufficient resources to build an interim courtroom for the Yugoslavia Tribunal.[40] Similarly, contributions of facilities to the Permanent Court of International Court of Justice and the International Tribunal for the Law of the Sea (ITLOS) helped to speed the establishment of these international criminal courts.[41]

The permanent international criminal court should be able to accept voluntary financial contributions, as well as contributions of staff and equipment from states, intergovernmental organizations, non-governmental organizations, individuals and other sources, with appropriate safeguards to ensure that these contributions do not undermine the independence, impartiality and effectiveness of the court.

D. Other methods of financing the court

Most of the other methods which have been proposed for financing the court would either undermine its independence, impartiality and effectiveness or would be unlikely to be available in the near future.

1. State parties

Funding of the court by states parties rather than through the regular UN budget would be ineffective because some states would not pay their assessments and would deter less developed countries and least developed countries from becoming parties to the statute.

[39] 1997 Report of the Yugoslavia Tribunal, *supra*, n. 36, paras 164-170. For further information concerning voluntary contributions of staff and equipment to the two tribunals and how states can make such contributions, see Amnesty International, *The international criminal tribunals: Handbook for government cooperation* (AI Index: IOR 40/07/96), pp. 24-35. For further discussion of the importance to the permanent international criminal court of donated staff, see *Part II*, p. 12.

[40] 1997 Report of the Yugoslavia Tribunal, *supra*, n. 36, para. 166.

[41] The Scottish philanthropist, Andrew Carnegie, donated the funds to build the Peace Palace, the seat of the Permanent Court of International Justice, and Germany donated premises for the International Tribunal for the Law of the Sea (ITLOS). See Clark, *supra*, n. 17, p. 19 n. 46; UN Doc. LOS/OCN/52, Vol. I, pp. 155-157.

The short-lived experiment of funding the Committee against Torture and the Committee on the Elimination of All Forms of Discrimination by states parties rather than through the regular UN budget was a failure. In contrast to the direct financing of other international human rights treaty bodies, the Committee against Torture formerly was wholly funded by states parties and the Committee on the Elimination of All Forms of Racial Discrimination was partly funded by states parties.[42] This system of financing, however, simply did not work. According to one expert, "the amounts in themselves were quite trivial for each state concerned but in the aggregate they led to a financial crisis over and above the recurring U.N. crises through non-payment."[43] This failure led the states parties to adopt amendments to the Convention against Torture and the Racial Discrimination Convention which would provide that these two committees would be financed by the UN budget. As of 20 February 1998, these amendments had not yet entered into force, but the UN General Assembly has agreed to pay the expenses of these two bodies through the UN budget.[44]

The system of funding by states parties may also have been one factor deterring states from ratifying the Convention against Torture and the Racial Discrimination Convention. In contrast to certain international judicial institutions, such as the Permanent Court of Arbitration, which are designed to resolve disputes between states and directly implicate questions of state sovereignty and core state interests, the international criminal court would be seen by some states as an institution primarily for the benefit of third parties - victims and their families - rather than for the direct benefit of states and, therefore, less deserving of limited state resources. Of course, such an assessment would be wrong, as international justice directly serves state interests in having peace by helping to remove one cause of conflict, but this perception could deter ratification of the statute. In addition, the costs of these other international judicial institutions, which do not require prosecutors, legal aid, victim and witness protection units and detention facilities, are much lower than the budgets of international criminal courts (see above). Therefore, the assessments owed by each state are relatively small.[45]

2. Complaining or "interested" states

At least one state has suggested that the costs of an investigation and prosecution be borne by the complaining state or by "interested" states. Either method of financing the

[42] Article 17 (7) of the Convention against Torture provides that "States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties." Under Article 18 (5) of that Convention, the states parties are also responsible for paying the expenses incurred in connection with the meetings of states parties and the Committee, including reimbursement for UN Secretariat staff and facilities for these meetings. Article 8 (6) of the Racial Discrimination Convention provides that "States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties". In addition, under Article 12, states parties to a dispute submitted to an ad hoc Conciliation Commission "shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations."

[43] Clark, *supra*, n.17, p. 17 n. 43.

[44] GA Res. 47/111 of 16 December 1992.

[45] For example, the annual expenses of the Permanent Court of Arbitration in 1996 were Dfl. 557,260 ($316,822). Permanent Court of Arbitration, *95th Annual Report*, Annex 9; Romano, *supra*, n. 37, p. 35.

permanent international criminal court would be inconsistent with the very concept of an independent, impartial and truly international criminal court.

Complaining states. As one observer has stated, "To charge states which alert a prosecutor of a situation of concern is analogous to charging a concerned citizen for alerting the police of a burglar in a neighbour's house."[46] A leading non-governmental organization has identified the danger to the integrity of the court and its universality if it were to be dependent upon funding by the complaining states:

[46] Mac Sweeney, *supra*, n. 37, p. 5.

> "Prosecutions funded by rich states would be thoroughly investigated and well litigated, whereas prosecutions brought by poor states may not meet the same standards. Consequently, the wealth and ability to pay of the State complainant would become of the utmost importance. Under such circumstances the Court may well be brought into disrepute as being an instrument accessible only by the rich. If the Court is to be truly international, all states must have equal access to it, regardless of their ability to support the Court financially. It must be emphasised that the Court is to be a criminal court and not a civil court and, as such, should not be financed by the parties."[47]

The chances that leaving funding to complaining states would deter many states from filing complaints, even when involving victims who are nationals of their states, is very real. Indeed, the cost of filing complaints involving the very direct state interests which can be brought before the International Court of Justice tends to deter small states, developing states and the least developed states from filing complaints. As a result, the UN Secretary-General has established a voluntary trust fund to help such states to finance state complaints in the International Court of Justice (see Section II.C above). Similar problems led the Administrative Council of the Permanent Court of Arbitration to set up the Financial Trust Fund for the Settlement of Disputes to assist states in meeting the costs of arbitration (see Section II.C above). Even if such a fund were established for the permanent international criminal court, however, it would be an unsatisfactory way of ensuring that all meritorious cases which the court should pursue are investigated and, if evidence warrants, prosecuted. Although voluntary funding will always remain a useful supplement (see Section II.C above), it can never be an adequate replacement for a truly international system of justice maintained as a matter of obligation by the entire international community, not as a matter of grace by a few wealthy states. The court should not be dependent on voluntary funding any more than it should be dependent on voluntary compliance. Moreover, states in any event will be more reluctant to file complaints on behalf of third parties - even their own nationals - than to file complaints which are of direct concern to the narrow state interest.

Interested states. Similarly, requiring "interested" states to finance investigations and prosecutions would be inconsistent with the concept of a truly international criminal court. The term "interested" states has often been defined in the discussions in the International Law Commission, the Ad Hoc Committee and the Preparatory Committee as being limited to a small group of states, usually the state on whose territory the crime occurred, the state with custody of the suspect or accused, the state of the nationality of the suspect or accused and the state of the victims' nationality. In many cases, these will be states with judicial systems which are unable or unwilling to investigate or prosecute those responsible, so it is unlikely that they would be able to fund at the international level what they cannot do at the national level, thus, in effect, creating havens for suspects of the worst possible crimes. However, much more importantly, *all states are interested states*. The core crimes of genocide, other crimes against humanity and serious violations of humanitarian law are crimes of international concern. Indeed, they are crimes of universal jurisdiction, involving obligations *erga omnes* (obligations

[47] International Commission of Jurists, *The International Criminal Court: Third Position Paper on the ICC*, August 1995, p. 62-63.

owed towards the international community as a whole), which all states have an interest in repressing.[48]

3. Confiscation of assets or fines

[48] See generally, *Part I*, pp. 13-18.

Financing the permanent international criminal court through the confiscation of assets from convicted persons or fines would be inconsistent with requirement that the court not only be impartial, but be seen to be impartial.[49] The judiciary must "decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[50] If the court were to be funded, even in part, in this way there would be a risk that the public would think that one factor in decisions whether to investigate, prosecute or convict was the possibility of confiscation of assets to fund the court. Many countries where national courts which were funded in part by confiscation of assets or fines have now ended this practice to avoid the perception of partiality. In any event, confiscation of assets and fines are unlikely to be reliable sources or to raise a significant amount of money. Moreover, it would be far better for any confiscated assets or fines to go to the victims and their families as reparations, including restitution, compensation and rehabilitation, than to the registrar to pay for the costs of the trial or to the state of the victim's nationality.[51] In all cases where the victims and their families cannot be identified, the money confiscated should go into a general fund for victim reparations.[52]

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[49] There is no provision in the ILC draft statute for confiscation of assets, although the draft consolidated text adopted by the Working Group on penalties in December 1997 includes provisions for forfeiture of instrumentalities of crime, proceeds, property and assets of convicted individuals, UN Doc. A/AC.249/1997/WG.6/CRP.8 (1997), para. A (c) (ii) (Zutphen text, Art. 68), and from legal persons, UN Doc. A/AC.249/1997/WG.6/CRP.11 (1997), para. F (new Article 47 *bis* (v)) (Zutphen text, Art. 69 (v)). Article 47 of the ILC draft statute provides for fines to be paid by individuals and the draft consolidated text includes fines to be paid by legal persons. UN Doc. A/AC.249/WG.6/CRP.11 (1997), para. F (new Article 47 *bis* (v)) (Zutphen text, Art. 69).

[50] UN Basic Principles on the Independence of the Judiciary, Principle 2.

[51] Article 47 of the ILC draft statute provides that fines which have been paid shall be transferred by court order "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 victims of the crime;
>
> (c) a trust fund established by the Secretary-General of the United Nations for the benefit of the victims of crime."

The draft consolidated text adopted by the Working Group on penalties in December 1997 provides for a different order of priority, but still permits the court to allocate fines to the registrar to pay for the trial or to the state of the victim's nationality:

> "[Fines [and assets] collected by the Court may be transferred, by order of the Court, to one or more of the following:
>
> [(a) [as a matter of priority,] a trust fund [established by the Secretary-General of the United Nations] or [administered by the Court] for the benefit of victims of the crime [and their families];]
>
> [(b) a State the nationals of which were victims of the crime;]
>
> [(c) the Registrar, to defray the costs of the trial.]]".

UN Doc. A/AC.249/1997/WG.6/CRP.12 (1997), para. G (new Article 47 *ter*) (Zutphen text, Art. 72).

[52] See *Part II*, pp. 40-42.

Any money or other property confiscated from convicted persons should go to victims or their families directly as reparations or, when they cannot be identified, to a general fund for the benefit of all victims.

4. Special levies

The World Federalist Movement and the Institute for Global Policy have suggested that "[t]here should be scope for innovative revenue flows to the ICC and other international judicial organs from such sources as levies or the use of global commons or, for example, the proposals for levies on international currency exchanges (Tobin Tax)."[53] The World Federalist Movement has suggested that if the voluntary UN registry on the weapons trade is made mandatory, a levy should be imposed to fund the work of monitoring bodies and the international criminal court. Two experts on the UN have suggested that it raise funds by a worldwide levy on arms sales.[54] One leading organization in the NGO Coalition for an International Criminal Court is exploring the possibility that a portion of the funds belonging to victims of crimes against humanity and war crimes in the Second World War where the victims and their heirs cannot be traced might be allocated to the international criminal court as a concrete step to deter such crimes in the future. Other judicial and treaty monitoring institutions have been funded from independent sources of revenue, but such sources of revenue would neither be appropriate nor adequate sources of funding for an international criminal court, which requires secure, regular financing and the ability to commence investigations and prosecutions promptly at any time (see Section II.D.3 above). For example, the Deep Sea Bed Mining Authority is to receive revenue from annual fees for deep sea mining licences, a levy on contracts and, under certain circumstances, a share of net profits.[55] Although some of these alternative revenue sources could resolve some of the budgetary requirements of the court, there does not appear sufficient support for such sources to make resort to them by the diplomatic conference a realistic possibility. It is possible that some of these possible supplementary sources will be made available in the future to the UN as part of the current reform of the UN budgetary process.

III. FINAL CLAUSES

The final clauses of the statute of the permanent international criminal court received almost no consideration by the International Law Commission, largely because there was no agreement on the method of creating the court, and there has been little discussion of such clauses in either the Ad Hoc Committee on the International Criminal Court or in the Preparatory Committee. Nevertheless, they are of crucial importance and will have to be carefully drafted to ensure that the court can be promptly established and an effective complement to national criminal justice systems. The UN Secretariat has prepared draft final clauses for consideration by the Preparatory Committee. As explained below, they need to be strengthened in a number of ways.

[53] Mac Sweeney, *supra*, n. 37, p. 10.

[54] E. Childers & Brian Urquhart, *Renewing the United Nations System* (Uppsala, Sweden: Dag Hammarskjold Foundation 1994), p. 153. See also The Report of the Commission on Global Governance, *Our Global Neighbourhood* (Oxford: Oxford University Press 1995), p. 220. For a brief discussion of these proposals and creative funding suggestions, see Mac Sweeney, *supra*, n. 37, pp. 10, 14.

[55] United Nations Convention on the Law of the Sea, Annex III, Art. 13.

A. Entry into force

If the permanent international criminal court is to be established by a treaty, the number of ratifications required for the treaty to enter into force should be low enough for it to enter into force quickly, as with treaties establishing monitoring bodies, such as the ICCPR (35 states), Racial Discrimination Convention (27 states), Women's Convention (20 states), Convention against Torture (20 states) and Convention on the Rights of the Child (20 states).[56] Requiring that the number should be as high as one half of the membership, as suggested by one state, could delay the statute's entry into force for possibly a decade or more,[57] thus depriving those states ready to fulfill their obligations under international law of the opportunity to create a mechanism to enable them to do so collectively when they are unable to do so individually. States are able to decide whether they want to ratify the treaty and, therefore, should not block others who are ready to do so. Article G of the Secretariat's Draft Text (Zutphen text, Art. 97) should set a low number of ratifications for the statute to enter into force.

Prompt entry into force would ensure that the court could be established quickly to meet what is widely recognized as a pressing need and before the end of the twentieth century, a century plagued by atrocities on a scale unprecedented in history. It will take some time to establish the court; adopt rules of procedure, evidence, legal aid and detention; appoint judges, prosecutors and other staff and begin the first investigations, even with the necessary assistance of a preparatory commission (see section III.F below). The likelihood of prompt entry into force would encourage many states to become parties as soon as possible to ensure that they would be able to play a role as members of the proposed meeting of states parties in nominating and selecting judges and the prosecutor, approving court rules and proposing amendments to modify the statute or increase the number of crimes within its jurisdiction. It would also encourage them to enact implementing legislation as soon as possible. Prompt establishment of the court would allow the court to demonstrate its effectiveness and this fact in turn would encourage other states to ratify the statute. A statute which provides the court with the same universal jurisdiction over crimes which each of its states parties has under

[56] In 1966 when the ICCPR was adopted, 35 states amounted to approximately 29% of the 121 UN Members; in 1965, when the Racial Discrimination Convention was adopted, 27 states amounted to approximately 23% of the 116 UN Members; in 1979, when the Women's Convention was adopted, 20 states amounted to approximately 13% of the 148 UN Members; in 1984, when the Convention against Torture was adopted, 20 states amounted to approximately 13% of the 157 UN Members, and in 1989, when the Convention on the Rights of the Child was adopted, 20 states amounted to approximately 13% of the 157 UN Members.

[57] In any event, the number of ratifications required for the statute to enter into force should not be as high as the approximately one third of UN membership for the Chemical Weapons Convention, which established new norms and a complex new system of monitoring. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, UN Sales No. E.95.IX.2 (1994), Art. XXI (1) (65 states). The length and complexity of the Convention on the Law of the Sea, which established a completely new legal regime, as well as the Law of the Sea Tribunal, understandably required a high number of ratifications (60 states) before entry into force, UN Doc. A/CONF.62/122, *opened for signature* 10 December 1982, Montego Bay, Jamaica, *entered into force* 16 November 1994, *reprinted in* Int'l Leg. Mat. (1982), p. 1261, Art. XXI. The international criminal court, in contrast, will simply establish an international court with concurrent jurisdiction over violations of customary and treaty law which are already within the existing universal jurisdiction of national courts and two international tribunals with regional jurisdiction.

contemporary international law, without the onerous consent requirements proposed by certain states, will not need a large number of states parties before it could start being effective.

The statute should provide that it will enter into force on the day that the last required instrument of ratification is deposited with the UN Secretary-General. In general, the purpose for provisions in other treaties for a delay in entry into force after receipt of the last required instrument of ratification appears to be to permit the necessary preliminary steps to be taken to arrange for nominations and elections, location of office facilities at a UN headquarters or in a host state, allocation of an interim budget and employment of temporary staff. If the statute provides for a preparatory commission to begin making these arrangements well before the statute enters into force, then such a delay is not only unnecessary, but counter-productive. Article G of the Secretariat's Draft Text (Zutphen text, Art. 97) provides that the statute shall enter into force on the 60th day after the date of deposit of the last required instrument of ratification, acceptance, approval or accession with the UN Secretary-General and that it shall enter into force for each state after entry into force of the statute on the 60th day after the deposit of such an instrument. This draft article should be amended as indicated above.

The diplomatic conference should arrange for the treaty to be sent to the General Assembly as soon as it is opened for signature, with a formal request that the General Assembly send it to all states with an appeal for prompt ratification. The General Assembly has often called upon Members, states which are Observers and other states to ratify important treaties promptly (see Section I.A.1 above). Such appeals will assist the UN Secretary-General and the UN High Commissioner for Human Rights in following up these calls in meetings with state representatives at the UN Headquarters and when travelling.

The statute should provide that a low number of ratifications is required for the statute to enter into force and that it should enter into force immediately when the last instrument of ratification required is deposited.

B. Prohibition of reservations

The statute should expressly prohibit any reservations, as in Article B of the Secretariat's Draft Text (Zutphen text, Art. 92), which states: "No reservations may be made to this Statute." Such a provision would be appropriate for a permanent international criminal court to ensure that all states parties assume the same obligations and that these obligations are readily known to all states and to the general public. Permitting reservations would defeat the object and purpose of the statute - to bring to justice those responsible for the worst crimes in the world. In particular, they could undermine the court's inherent jurisdiction over the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law by allowing states to redefine crimes, to add defences not consistent with international law or to avoid obligations to cooperate with the court.[58] It could lead to an unwieldy system in which the prosecutor

[58] Although Article 21 (1) (a) of the ILC draft statue provides that the court would have inherent jurisdiction only over the crime of genocide, it is increasingly recognized by states that it is essential for the court to have inherent jurisdiction over the other core crimes - other crimes against humanity, serious violations of humanitarian law and, possibly, aggression - if the court is to be effective. In the light of the practical administrative and deterrent problems that a patchwork system of jurisdiction over these other

and court would have to review reservations of all relevant states to determine the extent of the obligations each of those states had accepted.

For practical administrative reasons alone, simplicity would be better than complexity.[59] Similarly, if the full extent of each state party's obligations were known only by reviewing the list of reservations deposited with the UN Secretary-General, the deterrent and educational value of the court would be seriously weakened as members of the public, both within the state and throughout the rest of the world, would not know what each state's commitments were under the statute. Although the International Court of Justice is designed to resolve disputes between states, rather than administer justice in individual criminal cases, the problems of the system of voluntary declarations accepting the Court's compulsory jurisdiction and the large number of reservations, many of which seriously limit the scope of the acceptance of jurisdiction, demonstrate the danger of permitting reservations to the statute of the permanent international criminal court.[60]

The same reasons which led the Human Rights Committee to conclude that *any* reservations to the Optional Protocol to the ICCPR were incompatible with that treaty as they would defeat its object and purpose apply with even greater force to the statute of the permanent international criminal court, which, like the Human Rights Committee is a mechanism for ensuring implementation of states' substantive legal obligations which is designed to operate as a coherent whole:

> ". . . because the object and purpose of the Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case."[61]

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core crimes would pose if the opt-in or *à la carte* approach found in Article 22 of the ILC draft statute is retained, a majority of states favour the court having inherent jurisdiction over all core crimes without a separate state consent requirement. Moreover, the court's jurisdiction should not be limited by any reservations by states parties to the statute which are also parties to treaties defining some of the crimes within the jurisdiction of the court since the court will have jurisdiction over such crimes, not as treaty crimes, but as crimes under customary law or as general principles of law.

[59] The International Law Commission explained why reservations to the statute were inappropriate:

> "The draft Statute has been constructed as an overall scheme, incorporating important balances and qualifications in relation to the working of the Court: it is intended to operate as a whole. These considerations tend to support the view that reservations to the Statute should either not be permitted or should be limited in scope."

1994 ILC Rep., p. 147.

[60] See generally Shabtai Rosenne, *The World Court: What it is and how it works* (Dordrecht: Martinus Nijhoff Publishers 5th ed. 1995), pp. 85-93; Rosalyn Higgins, *Problems and Process: International Law and How We Use it* (Oxford: Clarendon Press 1994), pp. 189-190.

[61] Human Rights Committee, General Comment No. 24, UN Doc. E/1995/49 (1995), para. 13

Although the UN Charter does not contain an express provision prohibiting reservations, it was adopted at a time when it was the majority view that no reservations were permitted to multilateral treaties in the absence of unanimous consent of the other state parties. Moreover, the delegates at the conference in San Francisco understood that no reservations would be permitted.[62] However, in 1951, the International Court of Justice in the *Reservations to Convention on the Prevention and Punishment of the Crime of Genocide Case* held that in the absence of a prohibition of reservations in a multilateral treaty it was presumed that reservations were permitted, unless they would defeat the object and purpose of the treaty,[63] and in 1969, the Vienna Convention on the Law of Treaties, codified this new rule.[64] Although it seems clear that any reservations to the statute of the permanent international criminal court would defeat its object and purpose,[65] it would be better to have a provision expressly excluding reservations to avoid any doubt.

The statute should expressly state that no reservations are permitted.

C. Withdrawal

[62] Simma, *supra*, n. 12, p. 164 (". . . there was a general assumption that applications had to be unconditional and without reservations."); Schwelb, *supra*, n. 13, p. 94.

[63] 1951 ICJ Rep., pp. 22-24.

[64] Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27, *done at* Vienna, 23 May 1969, *entered into force* 27 January 1980, Art. 19 provides:

> "A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> (a) the reservation is prohibited by the treaty;
>
> (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
>
> (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

[65] As one leading authority has stated with respect to the UN Charter, "It is difficult to imagine a workable rule which admits of reservations and which could be elaborated without throwing into confusion the whole structure of the Charter". Schwelb, *supra*, n. 13, p. 95.

It is to be hoped that no state party will ever find it necessary to withdraw from the statute. Indeed, it is extremely rare for states to withdraw from membership in intergovernmental organizations. If it is decided, however, that that withdrawal should be permitted in exceptional circumstances, then the statute should have a withdrawal provision spelling out the procedure for withdrawal and the obligations of the withdrawing state to avoid ambiguities concerning the obligations of the withdrawing state.[66] One very pragmatic reason which has been advanced for including a withdrawal provision is that it will be seen as a safety valve which will make it easier for some national legislatures to approve ratification. If the amendment provisions of the statute provide, as do the UN Charter and many constituent instruments of other intergovernmental organizations, that amendments adopted by the requisite super-majority are binding on all states parties, states may wish to have a provision expressly recognizing their right to withdraw in certain extreme and unusual circumstances which significantly change the nature of their obligations.

Strictly speaking, an article expressly preserving the right of a state party to withdraw from the statute may not be necessary, as this could be done by a memorandum of the drafters.[67] There is no such provision in the UN Charter, but it was expressly recognized by the drafters "that 'exceptional circumstances' would justify a withdrawal".[68] Such exceptional circumstances would include an amendment which imposed major new obligations on states parties. To justify withdrawal, the amendment "must be of such a nature as to substantially infringe their rights and obligations as members and they must be unwilling to accept it. A mere organizational or other minor change in the provisions would certainly not justify withdrawal."[69] However, the absence of any express provision leaves unclear the circumstances when withdrawal would be permissible, leaving this question largely a political rather than a legal one,[70]

[66] According to Article 54 of the Vienna Convention on the Law of Treaties, "the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty, or

(b) at any time by consent of all the parties after consultation with the other contracting states."

[67] Article 56 (1) of the Vienna Convention on the Law of Treaties provides:

"A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty."

[68] Simma, *supra*, n. 12, p. 1176. The Plenary of the San Francisco Conference approved an Interpretative Declaration stating that no Member of the UN would be compelled to remain in the organization: ". . . if its rights and obligations as [a Member] were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept". *Quoted in id.* According to a leading commentary on the UN Charter: "Even though the legal scope of this declaration is controversial it is generally considered to be authoritative." *Id.*

[69] Simma, *supra*, n. 12, p. 1176; see also Schwelb, *supra*, n. 13, pp. 72-73.

[70] Simma, *supra*, n. 12, p. 1176.

and leaving unclear the obligations of the withdrawing state with regard to the amount of notice required and the effect of withdrawal on existing obligations.[71]

[71] According to some commentators, "it seems that withdrawal is not subject to a specific period of notice but can be effected immediately through notification. Conversely, the right of withdrawal cannot continue to exist indefinitely but ought to be exercised within a reasonable period." Simma, *supra*, n. 12, p. 1176. See also D.W. Bowett, *The Law of International Institutions* (London: Stevens & Sons 4th ed. 1982), p. 391, noting problems caused by absence of a withdrawal clause.

It would be far better for the statute to follow the practice of some other intergovernmental organizations which specify the circumstances when withdrawal is permitted, the amount of notice required and the obligations of the state party before and after the effective date of the withdrawal. There are at least four types of conditions imposed in withdrawal provisions, some of which should be incorporated in any withdrawal provision in the statute. International financial institutions require written notice, but allow withdrawal to take place immediately,[72] which would be unacceptable for an international criminal court statute. Some intergovernmental organizations do not permit withdrawal "during an initial period, so as to allow the organisation time to become established",[73] which would be a useful restriction on the right to withdraw from the statute. A third type of condition is a requirement of a certain period between the notice and the date the withdrawal goes into effect. Among the purposes of such delays are to permit "a kind of 'cooling-off' period to allow for reconsideration (and possibly a change of government) or even necessary budgetary readjustments".[74] Under Article 56 (2) of the Vienna Convention on the Law of Treaties, in the absence of an express treaty provision, a one-year notice is required for withdrawal.[75] Although the Vienna Convention on the Law of Treaties is largely reflective of customary law, the exact extent of the convention which reflects customary law is not entirely clear and not all states are parties; therefore, the statute should contain an express withdrawal provision, with a lengthy notice requirement, to avoid any doubt. A fourth condition, which should be included in any withdrawal provision, is a requirement that all outstanding obligations be fulfilled before the withdrawal takes effect.[76] These obligations should include not only

[72] Bowett, *supra*, n. 71, p. 390.

[73] Bowett, *supra*, n. 71, p. 390 (noting range from four years in the case of the Food and Agricultural Organization (Art. 19) to 50 years in the European Coal and Steel Community (Art. 97)) Other treaties establishing judicial bodies or treaty monitoring bodies have similar restrictions on withdrawal during an initial period: European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Art. 65 (1) (five years); American Convention on Human Rights, Art. 78 (1) (five years).

[74] Bowett, *supra*, n. 71, p. 390 (citing notice periods of one year in the World Meteorological Organization (WMO) and two years in the ILO and a requirement that a notice of withdrawal from the Council of Europe take effect only "at the end of the financial year" (Art. 7)) Such notice periods are required in numerous multilateral treaties establishing judicial institutions or treaty monitoring bodies: Racial Discrimination Convention, Art. 21 (one year); International Convention on the Suppression and Punishment of the Crime of *Apartheid*, GA Res. 3068 (XXVIII), 30 November 1973, Art. XVI (one year); Convention on the Rights of the Child, Art. 52 (one year); European Convention on Human Rights, Art. 65 (1) (no denunciation for an initial five-year period, six months' notice thereafter); American Convention on Human Rights, Art. 78 (1) (no denunciation for an initial five-year period, one-year notice thereafter).

[75] Article 56 (2) states: "A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1 [of Article 56]".

[76] Article 70 of the Vienna Convention on the Law of Treaties establishes the general principle that a state withdrawing from a multilateral treaty remains bound by obligations existing prior to the effective date of the withdrawal:

> "1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
> . . . .
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
>
> 2. If a state denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that state and each of the other parties to the treaty from the date when such denunciation

any financial obligations,[77] which may be minimal if, as recommended by Amnesty International, the court is financed directly through the regular UN budget (see Section II.A above), but also any obligations to cooperate with the permanent international criminal court in any proceedings concerning any crimes which occurred before the date of the notice. These obligations could also include the payment of reparations awarded against the citizen or resident of a state party, such as a state official or member of the armed forces, for example, when that person is unable to pay the amount of the judgment.[78] Treaties establishing judicial or treaty monitoring bodies often have clauses providing that the denunciation is without prejudice to obligations with regard to pending proceedings.[79] Humanitarian law treaties have similar provisions requiring the fulfilment of obligations under the treaty before the denunciation takes effect.[80]

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or withdrawal takes effect."

[77] See Bowett, *supra*, n. 71, pp. 390-391, and Schwelb, *supra*, n. 13, p. 68, for a brief descriptions of some of these clauses.

[78] The first proposal for a permanent international criminal court, by Gustave Moynier in 1872, would have imposed such an obligation on states when members of their armed forces who had been ordered to pay compensation to victims lacked the financial resources to do so. See Moynier, *supra*, n. 18, p. 122. He explained that it would be proper to impose this obligation on states parties to the statute since they all had an interest in ensuring that the Geneva Convention of 1864 was respected.

[79] See, for example, Optional Protocol to the ICCPR, Art. 12 (2) ("Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 [of the Protocol] before the effective date of the denunciation."); European Convention on Human Rights, Art. 65 (2) ("Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective."); American Convention on Human Rights, Art. 78 (2) ("Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.").

[80] For example, the four Geneva Conventions of 1949 contain identical provisions requiring a one-year notice and, if the state party is involved in a conflict, fulfilment of all obligations under the conventions until the end of the conflict and repatriation: "The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated." Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31, Art. 63; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85, Art. 62; Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135, Art. 142; Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 USTS 3516, 75 UNTS 287, Art. 158.

The Additional Protocols have similar restrictions on denunciation, but the notice period in Additional Protocol II is six months. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 99 ("In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. If, however, on the expiry of that year the denouncing Party is engaged in one of the situations referred to in Article 1 [an international armed conflict as defined in that article], the denunciation shall not take effect before the end of the armed conflict or occupation and not, in any case, before operations connected with the final release, repatriation or re-establishment of the persons protected by the Conventions or this Protocol have been terminated."); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed

Conflicts (Protocol II), Art. 25 (1) ("In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect six months after receipt of the instrument of denunciation. If, however, on the expiry of six months, the denouncing Party is engaged in the situation referred to in Article 1 [a non-international armed conflict, as defined in that article], the denunciation shall not take effect before the end of the armed conflict. Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release.").

Paragraph 1 of Article H of the Secretariat's Draft Text (Zutphen text, Art. 98) requires written notification to the Secretary-General of intention to withdraw and Paragraph 2 provides in part that "[w]ithdrawal shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations". Article H could be strengthened to require an initial period of several years before a notice of withdrawal could be given. Paragraph 2 also states that "[t]he withdrawal shall not affect any obligations of the withdrawing State under the Statute." This provision could be improved by making clear that the withdrawing state remains under an obligation to cooperate with the permanent international criminal court with respect to any crime committed before the date of the notification and to any investigation or proceeding concerning such a crime at any time in the future, not just pending proceedings. This would reduce the incentive to denounce the statute to avoid investigations of concealed crimes on the verge of discovery.

If withdrawals is to be permitted, the statute should contain a provision permitting withdrawal only after an initial period of several years, upon a notice of at least one year, provided that such withdrawal may not take effect with respect to any crimes within the jurisdiction of the international criminal court which were committed before the date the notice was given and that the withdrawing state remains bound to cooperate with the court concerning investigations or proceedings of any such crimes, at any time after the date of the notice, no matter when begun.

D. Other clauses

1. Settlement of disputes

Disputes between states parties concerning the interpretation or application of the statute should be resolved by the permanent international criminal court itself in a concrete case, not, as provided in Article A of the Secretariat's Draft Text (Zutphen text, Art. 91), by arbitration or by another court, such as the International Court of Justice. In certain narrowly defined circumstances, perhaps, the permanent international criminal court could give an advisory opinion. Permitting another judicial body or arbitral tribunal to resolve such questions , however, would be inefficient, would risk conflicting interpretations of the statute and would undermine the authority of the permanent international criminal court.

Provisions in certain human rights treaties for referring disputes between states parties to the International Court of Justice are not useful models. In general, the treaty monitoring bodies established under these treaties are not judicial bodies able to give binding judicial decisions, [81] even though they are able to issue authoritative interpretations of the meaning of treaty provisions.[82] It would not have been appropriate

[81] Provisions in treaties establishing non-judicial treaty monitoring bodies which permit states to refer disputes concerning the interpretation of the treaty to arbitration, to the International Court of Justice or another international judicial procedure include: ICCPR, Art. 44; Racial Discrimination Convention, Art. 22; *Apartheid* Convention, Art. XII; Women's Convention, Art. 29; Convention against Torture, Art. 30.

[82] For example, both the Human Rights Committee and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) have issued a series of general comments providing authoritative interpretations of the ICCPR and the Women's Convention.

to designate the International Court of Justice as the body to interpret the treaties establishing international judicial institutions such as the Permanent Court of Arbitration, the European Court of Justice, the European Court of Human Rights or the Inter-American Court of Human Rights or to give that body the responsibility to interpret the proposed amendment to the African Charter on Human and Peoples' Rights establishing an African Court of Human and Peoples' Rights.[83]

It is understandable that Article IX of the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) provides for reference of disputes between states parties to the International Court of Justice.[84] As a result of the defeat of the French-led initiative to establish an international criminal court as part of the Genocide Convention,[85] Article VI of that treaty simply provides that persons charged with genocide or ancillary crimes may be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". Therefore, there was no international judicial body which could give an authoritative interpretation of the Genocide Convention other than the International Court of Justice. Now, there are two *ad hoc* international criminal tribunals which can do so in the context of criminal cases and the permanent international criminal will also be able to do the same.[86]

The statute should provide that any disputes between states parties concerning the interpretation or application of the statute should be resolved by the permanent international criminal court.

2. Signature, ratification, acceptance, accession

[83] The Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, OAU/LEG/EXP/AFCHPR/PROT(III), adopted by the First Council of Ministers of Justice, Human Rights and/or Attorneys-General of the OAU, 12-13 December 1997, Addis Ababa, Ethiopia. The OAU Council of Ministers has recommended the adoption of the Draft Protocol by the 34th Assembly of Heads of State and Government of the Organization of African Unity in July 1998 in Ouagadougou, Burkina Faso. Draft Rapporteur's Report of the Sixty-Seventh Ordinary Session of the Council of Ministers, CM/Plen/Draft/Rapt/Rpt (LXVII), 25-27 February 1998.

[84] Genocide Convention, 78 UNTS 277, 9 December 1948, Art. IX.

[85] In May 1947, France proposed the establishment of a permanent international criminal court with jurisdiction over crimes against humanity and war crimes. Draft proposal for the establishment of an international criminal court, Memorandum submitted to the Committee on the Progressive Development of International Law and its Codification by Henri Donnedieu de Vabres, representative of France, UN Doc. A/AC.10/21, 15 May 1947, *reprinted in* Historical Survey of the Question of International Criminal Jurisdiction, Memorandum submitted by the Secretary-General, UN Doc. No. A/CN.4/7/Rev.1, p. 119, Appendix 11 (1949). One month later, in June 1947, Henri Donnedieu de Vabres, representative of France, and Vespasian Pella, Chair of the International Penal Law Association, as members of the working group established by the Secretary-General pursuant to ECOSOC Res. 47 (IV) of 28 March 1947 to prepare a draft convention on genocide, proposed that an international criminal court be established with jurisdiction over this crime. See generally, Historical Survey, *supra*, pp. 30-31.

[86] Both requests by states parties for interpretation of the Genocide Convention occurred before the establishment of the two tribunals. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, filed 20 March 1993; *Case Concerning Trial of Pakistani Prisoners of War (Pakistan v. India)*, Request for the Indication of Interim Measures of Protection, Order, 1973 ICJ Rep. 328.

Article F of the Secretariat's Draft Text (Zutphen text, Art. 96) spells out the procedure for signature, ratification, acceptance, approval or accession, which is similar to those in other modern multilateral treaties.[87] The date of 20 July 1998 chosen in Article F (1) for opening the statute for signature allows three days for correcting any errors in the text which is to be adopted on 17 July 1998, but the diplomatic conference could modify that date, if necessary. Ideally, the treaty should be open for signature on the last day when all the plenipotentiaries are present, for maximum public impact, but, in any event, the date should be as close as possible to the end of the diplomatic conference to permit the maximum number of signatures before the General Assembly begins drafting a resolution at its 53rd session in September 1998 requesting states to ratify the statute as promptly as possible. Providing in Article F (2) and (3) that the UN Secretary-General is to be the depositary of the instruments of ratification, acceptance, approval and accession is consistent with the practice with contemporary treaties and establishes another link with the UN.

Translations. Similarly, paragraph 2 of Article H of the Secretariat's Draft Text (Zutphen text, Art. 99), providing that "[t]he original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States" is consistent with contemporary practice.[88] The availability of the text in the six UN languages will make it much easier for the statute and the work of the court to be widely known. Nevertheless, to increase the educational and deterrent value of the new court, the statute should provide that states parties should, in cooperation with the court, translate the statute as promptly as possible into the other major languages of the world,[89] emulating the program under the auspices of the UN Centre for Human Rights (now the Office of the High Commissioner for Human Rights) which led to the translation of the Universal Declaration of Human Rights into more than 100 languages. Although, for practical reasons, priority should be given to the languages spoken in the states parties, the more widely the statute is available in non-states parties, the more likely that those states will ratify the statute and the more likely that the statute will deter crimes.

The statute should provide that states parties should translate the statute, in cooperation with the court, into the languages spoken in their territories as a matter of priority and should assist the court in translating the statute into the other major non-UN languages as soon as possible.

[87] See, for example, ICCPR, Art. 48; ICESCR, Art. 26; Racial Discrimination Convention, Arts 17 & 18; Women's Convention, Art. 25; Convention against Torture, Arts 25 & 26; Convention on the Rights of the Child, Arts 47 - 48. The minor differences are not particularly significant.

[88] See, for example, Women's Convention, Art. XI; Convention against Torture, Art. 33. Some omit the requirement of transmittal of certified copies of the treaty to all states, such as the Convention on the Rights of the Child, Art. 54.

[89] According to one source, among the non-UN languages in the world today spoken by more than 50 million people are: Hindi (437 million); Bengali (200 million); Malay-Indonesian (159 million); Japanese (126 million); German (123 million); Urdu (103 million); Punjabi (95 million); Korean (76 million); Telugu (74 million); Tamil (71 million); Marathi (71 million); Vietnamese (66 million); Javanese (64 million); Italian (63 million); Turkish (60 million); Tagalog (55 million); and Thai (51 million). Dominque & Michèle Frémy, eds, *Quid 1997* (Paris: Robert Lafont 1997), p. 126. Reportedly, there are more than 200 other non-UN languages spoken by more than one million people. *Id.*

Ensuring a complete historical record. Part II of the Secretariat's Draft Text (Zutphen text, Part III.A) describes the contents of a final act, which would not be part of the statute, but would contain a summary of the background and proceedings of the diplomatic conference. The summary would include an introduction tracing the developments which led to the diplomatic conference, a list of participants, the officers and structure of the diplomatic conference, a summary of its organization, rules of procedure and proceedings and, possibly, any other resolutions or decisions of the diplomatic conference, either in the main text or in annexes. To be consistent with the decision of the General Assembly to guarantee an important role to persons other than government representatives, the list of participants should be expanded to include a list of all observers from intergovernmental organizations, such as the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees, UNICEF and representatives of the two international criminal tribunals, as well as representatives of non-governmental organizations.[90]

To ensure that the *travaux préparatoires* are readily and quickly available to assist states during the national debates concerning ratification, the diplomatic conference should include as annexes to the final act the following:

1. Summary records of the proceedings of the diplomatic conference;

2. All working papers submitted to the diplomatic conference by governments, intergovernmental organizations and non-governmental organizations;

3. All records of the 1995 Ad Hoc Committee on the Establishment of an International Criminal Court and the 1996-1998 Preparatory Committee on the Establishment of an International Criminal Court, including all reports of working groups and working papers, and all publications of non-governmental organizations distributed at sessions of these two committees.

This should not entail a great expense since the summary records of the diplomatic conference and the working papers submitted to the conference would be official documents of the conference which would be available in all six working languages of the UN. Most of the records, working group reports and working papers of the Ad Hoc Committee and the Preparatory Committee would be available in all six UN languages. Moreover, the International Institute of Higher Studies in the Criminal Sciences has offered to publish the records of these two committees, including the publications of non-governmental organizations distributed at sessions of the committees.

The final act of the diplomatic conference should be as comprehensive as possible and include as annexes all reports and working papers and relevant publications of non-governmental organizations.

E. Review of statute and amendments

"The primary objective to be sought in framing such a constitution should be to combine flexibility in respect of variables, and particularly in respect of questions of

[90] GA Res. 52/160, 15 December 1997 (see discussion in Section IV.A).

structure and procedure, with forthrightness in respect of the powers conferred and the obligations accepted by States, in such manner as to afford a foundation for the development of institutions which are capable both of acquiring real authority and of adapting themselves to changing circumstances as they arise."

C. Wilfred Jenks, "Some Constitutional Problems of International Organizations", 22 Brit. Y.B. Int'l L. (1945), p. 16 (footnote omitted)

The international criminal court will be a permanent institution, but it will be essential to provide ways to permit it to adapt to change when necessary:

> "The constitutive instrument of an international organization provides the constitutional and organic framework that governs the orderly deployment of its activities. Normally, these provisions allow enough latitude for development and change. Sometimes, however, the constitutive instrument becomes a strait-jacket that hampers further progress and makes it impossible to take account of unforeseen requirements or new ideas. Inevitably, either sooner or later, the need for adaptation of the constitutive instrument will be felt."[91]

In determining the methods for amending the statute, it will be essential to balance carefully the requirements of a judicial institution in stability as well as flexibility:

> "Amendment clauses are supposed to reconcile the conflicting demands of flexibility and stability. On the one hand, it should be possible to adopt necessary or desirable amendments even against the will of some of the member states; on the other hand, the risk must be avoided that the constitution of an organization falls prey to accidental and ever-changing majorities."[92]

[91] Simma, *supra*, n. 12, p. 1164. See also Bowett, *supra*, n. 71, p. 408 ("The essentially dynamic character of a constitutional text, as opposed to the normal multilateral treaty, has led to a general recognition of the need for a specific clause envisaging revision or amendment of the text.").

[92] Simma, *supra*, n. 12, p. 1165.

It will help to ensure careful balancing of the competing needs to balance stability and flexibility to permit the court itself, which is best placed as the interpreter of its powers under the statute to determine when an amendment is necessary, in addition to states, to initiate proposals for amendment. These could be presented by anyone of the organs of the court (judicial chambers, prosecutor or registrar), or by the president on behalf of the entire court after consultation with all organs. The International Court of Justice has the power to initiate proposals for amendment of its Statute.[93] The secretariats and component organs and bodies of many intergovernmental organizations, as well as member states, are able to propose amendments of the constituent instruments.[94] In many cases, the plenary body of UN-related agencies ask the council and director to draft amendments on particular subjects.[95] Similarly, to ensure thorough consideration of amendments proposed by other bodies than the court, the statute should require that all such proposals be reviewed by the court in the light of its experience before consideration and that the comments of the court be considered before adoption. The Presidents of the Yugoslavia and Rwanda Tribunals proposed amendments of their statutes to increase the flexibility of assignment of judges of the two tribunal to help address the increasing caseloads.[96] At least one of the UN specialized agencies permits national institutions to propose amendments.[97] In addition, the meeting of states parties should adopt a procedure for considering amendments to the statute proposed by intergovernmental organization bodies and non-governmental organizations in the same manner as suggested above for proposals for amendment of the rules (see Section I.C above). Another important way to ensure that there is a proper balance in the statute between stability and flexibility is to ensure that matters of fundamental principle are located in the statute and methods of implementing them left largely to the rules of the court.

The statute should provide three methods for amendment: a speedy system to make minor, technical amendments which do not change the basic obligations of states

[93] Statute of the International Court of Justice, Art. 70 ("The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69."). Article 69 provides that the procedure for amendment of the Statute shall be essentially the same as for the UN Charter, but the General Assembly may adopt procedures permitting non-UN Members to participate.

[94] The UN Secretary-General and any one of the other principal organs of the UN may propose amendments to the UN Charter. General Assembly Rules of Procedure, Rules 13 (c), (d), (e) and (g); Simma, *supra*, n. 12, p. 1168. For example, the Council of the Food and Agriculture Organization (FAO), a Governor or Executive Director of the four UN financial agencies (International Bank for Reconstruction and Development (World Bank), the International Development Association, the International Finance Corporation and International Monetary Fund (IMF)), may propose amendments. Lester H. Phillips, "Constitutional Revision in the Specialized Agencies", 62 Am. J. Int'l L. (1968), p. 663. The Director General and the Executive Board of the ILO and the Executive Board of the World Health Organization (WHO) have proposed amendments to the constitutions of those organizations. *Id.*, p. 664.

[95] These UN-related agencies have included the International Atomic Energy Agency (IAEA), the International Civil Aviation Organization (ICAO), WHO and WMO. Phillips, *supra*, n. 94, pp. 663-664.

[96] Letter dated 13 February 1996 from the Presidents of the International Criminal Tribunals for the former Yugoslavia and Rwanda addressed to the President of the Security Council, UN Doc. S/1996/475 (1996).

[97] The Constitution of the Universal Postal Union permits postal administrations of any member state, some of which are now privately owned, to propose amendments to that instrument. Phillips, *supra*, n. 94, p. 663.

parties, a system with a super-majority requirement for important amendments and a review conference or similar procedure to propose major changes in the statute. Articles C to E of the Secretariat's Draft Text (Zutphen text, Arts 93-95) provide for each of these three methods, but as explained below, each of these articles could be improved. In particular, the methods must be transparent, allow full consultation with experts and the public and permit sufficient time for deliberation, but without lengthy delays.

Fast-track amendment procedure. The absence of a speedy system for making minor technical amendments to the UN Charter has meant that the Charter is "rather rigid".[98] In contrast, a number of the UN agencies have speedy procedures for making minor technical amendments which do no change the basic obligations of states parties. There is a pressing need to include a similar procedure in the statute which would permit fast-track amendments for such matters as a temporary expansion of the number of judges or chambers to meet a sudden increase in the caseload caused, for example, by the referral of a situation threatening international peace and security by the Security Council.

Article D (a) and (b) of the Secretariat's Draft Text (Zutphen text, Art. 94 (a) and (b)) provides that either a state party or the president of the permanent international criminal court may submit proposals for modifying certain articles or parts of the statute to the registrar, who shall circulate them to all states parties for consideration. Two options for approval follow. The first alternative Article D (c) of the Secretariat's Draft Text (Zutphen text, Art. 94 (c)) provides that within in a specified period (five or ten months are the suggested choices) after the proposed modifications are circulated, "they shall be deemed to have been adopted and the provisions amended accordingly unless within that period one third of the States Parties have objected thereto. The proposals shall then come into effect 30 days after their adoption." This first alternative has several weaknesses. It does not require review and commentary by the court of proposals by states. It also does not provide for discussion by the states parties, intergovernmental organizations, non-governmental organizations, independent experts and the general public of the proposed amendments. Such discussion could identify problems with the proposals and ways they could be solved.

It would be better to provide that the proposals be made readily available to the general public (and the court, when they are state proposals) for comment. The failure of most states parties to draft and make objections to reservations to human rights treaties which clearly defeat the object and purpose of the treaties (although such reservations are publicly available, they are not widely known) suggests that not many states would draft and file objections to amendments which would be inconsistent with the object and purpose of the statute.[99] To address this problem, the statute should provide that after the proposals were formally circulated, they would have to be discussed at the meeting of states parties within 30 days and if one third of the states parties objected at that meeting, then the proposal would not be adopted. This would ensure careful - but still expeditious - deliberation, in consultation with intergovernmental organizations, non-governmental organizations and independent experts. This proposed change would

[98] Simma, *supra*, n. 12, p. 1165.

[99] In 1959, after an unsuccessful attempt to approve amendments by a postal ballot, the Congress of the WMO decided that approval of amendments by correspondence was "neither permissible nor desirable". Phillips, *supra*, n. 94, p. 669.

still, however, avoid the danger that technical amendments which were essential to the court's effectiveness, but not a priority for states, would not fail for lack of sufficient political interest, as has occurred with proposed amendments to the Convention against Torture and the Racial Discrimination Convention (see Section II.D above). The limitation of the fast-track approach to certain articles or to certain parts of the statute would not prevent the adoption of far-reaching amendments without adequate public deliberation which could fundamentally change the nature of the statute and the obligations of states parties. It would be better to adopt a functional approach limiting the fast-track procedure to amendments which would not change the fundamental nature of the statute, would not add new crimes and would not increase the obligations of states parties.

The second alternative Article D (c) of the Secretariat's Draft Text (Zutphen text, Art. 94 (c)) only partially addresses the concerns mentioned above. It provides that the proposal by a state party or by the president shall be referred to a standing committee of the meeting of states parties of only five states, which "shall make a recommendation after having considered the proposals". The recommendation is then to be circulated by the registrar to all states parties and then, five or ten months after the proposals have been circulated, "they shall be deemed to have been adopted and the provisions amended accordingly, unless within that period one third of the States Parties have objected thereto". This alternative at least ensures some prior discussion, but suffers from the same lack of transparency and absence of a role for the court (when a state's proposal is involved), intergovernmental organizations, non-governmental organizations, independent experts and the general public. In contrast to Article 108 of the UN Charter and provisions of a number of UN specialized agencies,[100] both alternatives fail to state that the amendments are to be binding on all states parties. Any amendment should be binding on all states parties, otherwise the statute would have an unworkable two-tier system with two or more sets of obligations. States parties to the statute would have the option of withdrawal if the amendment substantially infringed their rights and obligations (see Section III.C above). Past practice demonstrates that states are unlikely to force through amendments which would be likely to lead to the withdrawal of a significant number of objecting states, particularly powerful states, and, thus, risk seriously weakening the institution.[101]

Normal amendment procedure. For other amendments, which change the basic nature of the statute, add entirely new crimes or change the basic obligations of states parties, the method should require a super-majority of all states parties, perhaps two thirds of all states parties. Approval could take place in two stages, first, by the meeting of states parties and, second, thorough ratification by individual state parties, as provided in the constitutions of many international organizations. Such amendments should be binding on all states parties, unless they exercised their option to withdraw. The possibility of withdrawal by a significant minority of states or by one or two large states would be an effective deterrent against amendments which did not command overwhelming support.

[100] For example, the Articles of Agreement of the World Bank, the International Development Association, the International Finance Corporation and IMF, the Constitutions of WHO, ILO (by implication) and FAO and the Convention of the WMO provide that amendments are binding on all member states. Phillips, *supra*, n. 94, p. 671.

[101] Phillips, *supra*, n. 94, pp. 677-678.

Article C (1) - (3) of the Secretariat's Draft Text (Zutphen text, Art. 92 (1) - (3)) provides that any state party may propose an amendment by submitting it to the registrar, "who shall promptly circulate it to all States Parties" for consideration at a meeting of states parties at least three months later and adoption by two thirds or three fourths of all states parties or those present and voting. Article C (4) - (5) of the Secretariat's Draft Text (Zutphen text, Art. 92 (4) - (5)) provides that the registrar shall transmit the amendment after adoption to the UN Secretary-General for circulation to all states parties; the amendment "shall enter into force for all States Parties [60] days after instruments of acceptance have been deposited with the Secretary-General of the United Nations by [2/3] [3/4] of [all the States Parties] [those present and voting]". A second stage of approval by state ratification, after approval by a vote within the organization, would be required under the constitutions of certain states if the amendment imposed fundamentally new obligations.[102] The minor increase in expenses caused by the expansion of one of the bodies of an intergovernmental organization or a structural change in one of those bodies would not involve a new obligation for member states or involve a fundamental change in the aims of the organization.[103]

The proposed normal amendment procedure fails to provide that the court, intergovernmental organizations and non-governmental organizations may propose amendments. It has the advantage of requiring discussion by states, but does not provide for publication and consultation with the court, intergovernmental organizations, non-governmental organizations, independent experts and the general public. The alternative of requiring super-majorities of three fourths, both with respect to approval by the meeting of states parties and ratifications, is too high; the normal amount for amendment of the constituent instruments of intergovernmental organizations is two thirds. However, the requirement that the super-majority be based on the number of states parties (as with amendment of the UN Charter) rather than those present and voting (as in most UN specialized agencies)[104] ensures that the amendment will command a sufficient degree of support. There is an advantage in having the same super-majority at each stage of the process. As one observer has stated in the context of amendment of the UN Charter, the larger the number required at the first stage, "the more likely it is that an amendment will finally become effective by obtaining the required number of ratifications", and this approach "strengthens the integrity of the Charter and gives amendments a stronger democratic legitimation than otherwise".[105]

Review conference. In addition, a provision in the statute calling for a review conference or similar procedure for reviewing the statute as a whole or to add entirely new crimes within a fixed number of years, as suggested by Denmark and other states, would be desirable, both practically and to facilitate adoption and ratification by states which wish to include certain crimes or provisions but are unable to muster a sufficient number of votes in favour of these proposals. Article 109 (3) of the UN Charter

[102] This was the reason that President Woodrow Wilson of the United States insisted that the Covenant of the League of Nations require ratification by members of the League of amendments approved by the Council and Assembly. See Schwelb, *supra*, n. 13, p. 83.

[103] Schwelb, *supra*, n. 13, pp. 56-57.

[104] See Phillips, *supra*, n. 94, p. 666.

[105] Simma, *supra*, n. 12, p. 1169.

provided for a proposal to conduct such a review conference if one had not been held before the tenth annual session of the General Assembly, but no such review conference ever took place. [106] To some extent the functions of a review conference could be performed better by frequent, regular meetings of states parties. A special committee could be appointed, like the *Ad Hoc* Committee on the Charter of the United Nations and the Strengthening of the Role of the Organization, charged with keeping the statute under constant review, provided that it operates in accordance with the principles of transparency and broad consultation outlined above.

Article E of the Secretariat's Draft Text (Zutphen text, Art. 95) provides that at any time after the entry into force of the statute, the meeting of states parties "may decide, by a two-thirds majority [of those present and voting], to convene a special Meeting of States Parties to review the Statute" and that any amendment proposed at such a special meeting would be subject to paragraphs 3 to 5 of Article C of the Secretariat's Draft Text (Zutphen text, Art. 93)). This draft article should be amended as suggested above to permit the court, intergovernmental organizations and non-governmental organizations to propose to the meeting of states parties that it decide to convene a special meeting to review the statute.

The statute should permit each of the organs of the court, as well as states parties, intergovernmental organizations and non-governmental organizations, to propose amendments to the statute. There should be a speedy method for making minor amendments which do not fundamentally alter state obligations, add new crimes or change the fundamental nature of the permanent international criminal court. Other amendments should require a super-majority of ratifications by states parties before entering into force. Under each method, amendments should be binding on all states parties.

F. Preparation for the entry into force of the statute

Perhaps the most effective way to ensure the establishment of the permanent international criminal court as rapidly as possible after the statute enters into force is to begin the preliminary work immediately after the statute is opened for signature. One way that this could be done is to establish a preparatory commission after a certain number of states have signed or acceded to the statute. The proposal in Part III of the Secretariat's Draft Text (Zutphen text, Part III.B) for a resolution to be incorporated in the final act calling for the establishment of a preparatory commission is a positive step, but it could be improved in a number of respects.

1. Establishment without delay.

The preamble of the draft final act states that the diplomatic conference has decided "to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions" and that "a preparatory commission should be established for the fulfilment of these purposes". As the first operative paragraph provides that the UN Secretary-General is to convene the preparatory commission as soon as 40 states sign or accede to the statute, the preparatory commission could begin

[106] *Id.*, p. 1180.

work almost immediately. If the diplomatic conference is successful in adopting a statute that is just, fair and effective, it is likely that most of the states participating in the diplomatic conference will sign the statute on the day it is open for signature.

2. Continuing the essential participation of the tribunals and non-governmental organizations.

The second operative paragraph provides that the preparatory commission "shall consist of representatives of States which have signed the Statute or have acceded to it. The representatives of other signatories of the Final Act may participate fully in the deliberations of the Commission as observers". This paragraph is a major disappointment as it fails to ensure that some of the most important contributors to the drafting of the statute continue to have a formal role in the process and is at odds with the resolutions of the General Assembly formally guaranteeing that these contributors continue to play an important role in the drafting of the statute.

For more than a century, the key role in the drafting of the statute of a permanent statute has been played, with only a few rare exceptions, not by states, but by non-governmental organizations and independent experts.[107] Moreover, since the adoption of the draft statute by the International Law Commission in 1994, more than 316 non-governmental organizations, as part of the NGO Coalition for an International Criminal Court, and independent experts, joined by representatives from the two *ad hoc* tribunals, have played a crucial role during the sessions of the Sixth Committee, the Ad Hoc Committee and the Preparatory Committee.[108] This contribution demonstrates the

[107] For some of the accounts of the leading role of non-governmental organizations and independent experts in the drafting of the statute of the international criminal court since 1872, see M. Cherif Bassiouni, *Draft Statute: International Criminal Tribunal* (1983); Benjamin Ferencz, *An International Criminal Court: A Step Toward World Peace - A Documentary History and Analysis* (1980), Christopher Keith Hall, "The first proposal for a permanent international criminal court", Int'l Rev. Red Cross (1998) (forthcoming); Timothy L.H. McCormack, "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime", *in* Timothy L.H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes: National and International Approaches* (1997), pp. 31-63; Memorandum by the Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction, UN Doc. A/CN.4/7/Rev.1, 1949; Vespasian Pella, "Towards an International Criminal Court", 44 Am. J. Int'l L. (1950), p. 37.

[108] For regular news on the role of non-governmental organizations, see *The Monitor*, which is published by the NGO Coalition for an International Criminal Court and available on its World Wide Web site: < http: // www.igc.apc.org/icc >. In the past three and a half years, non-governmental organizations have distributed dozens of detailed and comprehensive commentaries on various aspects of the ILC draft statute. In addition to Amnesty International's first public commentary on the ILC draft statute in October 1994 (updating an earlier memorandum to the International Law Commission), *Establishing a just, fair and effective international criminal court* (AI Index: IOR 40/05/94), the organization has published a short paper entitled, *Challenges ahead for the United Nations Preparatory Committee drafting a statute for a permanent international criminal court* (AI Index: IOR 40/03/96), the current four-part series of papers submitted to the Preparatory Committee and a number of shorter papers for the general public. Publications of other non-governmental organizations include: Association of the Bar of the City of New York, Committees on International Law and Human Rights, *Report on the Proposed International Criminal Court* A.B.N.Y.C. Record, January-February 1997, p. 79; Association Internationale de Droit Pénal *et al*, *1994 ILC Draft Statute for an International Criminal Court with Suggested Modifications (Updated Siracusa Draft)* (1996); Human Rights Watch, *Commentary for the Preparatory Committee on the Establishment of an International Criminal Court* (1996), *Commentary for the February 1997 Preparatory Committee on the Establishment of an International Criminal Court* (1997), *Human Rights Watch Commentary for the December 1997 Preparatory Committee Meeting on the Establishment of an International Criminal Court* (1997), *Non-Governmental Organization Action Alert (No. 3)* (February

necessity for their continued involvement. Indeed, the General Assembly has repeatedly recognized the contribution of the two *ad hoc* tribunals and non-governmental organizations. In December 1997, it expressly requested the Secretary-General

> "to invite to the Conference representatives of organizations and other entities that have received a standing invitation from the General Assembly pursuant to its relevant resolutions to participate, in the capacity of observers, in its sessions and work, on the understanding that such representatives would participate in the Conference in that capacity, and to invite, as observers to the Conference, representatives of interested regional intergovernmental organizations and other interested international bodies, including the International Tribunals for the Former Yugoslavia and Rwanda[.]"[109]

In the same resolution, the General Assembly also requested the Secretary-General:

> "to invite non-governmental organizations, accredited by the Preparatory Committee with due regard to the provisions of section VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Preparatory Committee, on the understanding that participation means attending meetings of its plenary and, unless otherwise decided by the Conference in specific situations, formal meetings of its subsidiary bodies except the drafting group, receiving copies of the official documents, making available their materials to delegates and addressing, through a limited number of their representatives, its opening and/or closing sessions, as appropriate, in accordance with the rules of procedure to be adopted by the Conference[.]"[110]

1998); International Commission of Jurists, *ICJ Campaign for the Establishment of the International Criminal Court: Update* (February 1995), *The International Criminal Court: Third ICJ Position Paper* (1995); International Federation of Human Rights Leagues, *Justice for Humanity: Towards the Creation of a Permanent International Criminal Court*, La Lettre Hebdomadaire de la FIDH (Special Issue, Int'l Fed. Hum. Rts. Leagues, Paris) (November 1995); Lawyers Committee for Human Rights, *Establishing an International Criminal Court* (1996), *Fairness to Defendants at the International Criminal Court* (1996), *Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute* (August 1996); *Crimes within the ICC's Jurisdiction and Essential Elements of their Definitions* (1997), *The International Criminal Court Trigger Mechanism and the Need for an Independent Prosecutor* (July 1997), *Compliance with ICC Decisions* (1997), *The Accountability of an Ex-Officio Prosecutor* (February 1998); Redress, *Promoting the Right to Reparation for Survivors of Torture: What Role for a Permanent International Criminal Court?* (1997); Women's Caucus for Gender Justice in the International Criminal Court, *Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court* (1997), Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court (1997); World Federalist Association, *Recommendations and Commentary for December 1997 Preparatory Committee on the Establishment of an International Criminal Court* (1997).

[109] GA Res. 52/160, 15 December 1997 (footnote omitted). A footnote lists the relevant General Assembly resolutions: 253 (III), 477 (V), 2011 (XX), 3208 (XXIX), 3209 (XXIX), 3237 (XXIX), 3369 (XXX), 31/3, 31/152, 33/18, 35/2, 35/3, 36/4, 42/10, 43/6, 43/177, 44/6, 45/6, 46/8, 47/4, 48/2, 48/3, 48/4, 48/5, 48/237, 48/265, 49/1, 49/2, 50/2, 51/6 and 51/204. See also GA Res. 50/46 of 11 December 1995 (deciding that the work of the Preparatory Committee "should take into account . . . , as appropriate, contributions of relevant organizations"); GA Res. 51/207, 16 December 1996 (recalling this request).

[110] *Id*., para. 9.

The resolution in the final act should include a provision guaranteeing that non-governmental organizations and intergovernmental organizations, including the two *ad hoc* tribunals, which have contributed so much to the process so far, can continue to participate in the process in the same way they have been able to participate in the Preparatory Committee and they are guaranteed at the diplomatic conference. In addition, the resolution should invite intergovernmental organizations (including the two *ad hoc* tribunals), non-governmental organizations and independent experts to submit suggestions concerning preliminary matters and draft texts to the preliminary commission as soon as it is established.

3. Work program

The third operative paragraph provides that the preparatory commission "shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work". As part of its work program, the preparatory commission, in cooperation with the host state and International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, which has played such an important role in the drafting of the statute over the past two decades, [111] could host an international conference open to states, intergovernmental organizations (including the two *ad hoc* tribunals), possibly as part of the series of non-governmental and governmental meetings which will, in effect, constitute the Third Hague Peace Conference of 1999, to discuss these suggestions.[112]

The fourth operative paragraph provides that the preparatory commission "shall:

[111] These activities have included organizing the following conferences, seminars and workshops in Siracusa: The Draft International Criminal Code and Draft Statute for the Creation of an International Criminal Court, 17-23 May 1981, International Criminal Policy for the Prevention and Control of Transnational and
International Criminality and for the Establishment of an International Criminal Court, 24-28 June 1990; Questions concerning the Draft Code of Crimes against the Peace and Security of Mankind and the Nature and Structure of an International Criminal Court, 26-28 March 1992; The Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights, 2-5 December 1992; International Criminal Justice: Historic and Contemporary Perspectives, 4-8 December 1994; First Meeting of Committee of Experts on the International Criminal Court, June 1995; Second Meeting of Committee of Experts on the International Criminal Court, 3-8 December 1995; Meeting of Experts on the Establishment of a Permanent International Criminal Court, 10-14 July 1996; Informal Inter-Sessional Group of Experts Meeting on Rules of Procedure and Evidence, 29 May-4 June 1997; Informal Inter-Sessional Meeting on the International Criminal Court on International Cooperation, 17-22 November 1997.

[112] These events in 1999 are, in effect, the follow-up conference to the Hague Peace Conferences of 1899 and 1907 which codified the laws of war in the series of Hague Conventions and led to the establishment of the Permanent Court of Arbitration. A third conference was scheduled to take place 1915, but indefinitely postponed with the advent of the First World War. The 1999 events will be devoted to three themes: human rights and humanitarian law, the peaceful settlement of international disputes and disarmament. There will be a series of meetings throughout the year, opening with a week-long conference of non-governmental organizations conducted by the Hague Appeal for Peace 1999 in May at The Hague. This conference will be followed by a centennial commemoration from 17 to 19 May at The Hague of the 1899 conference featuring discussions at the level of legal advisers of foreign ministries of all states with a view to making recommendations for action; a conference in St. Petersburg focussing on the implementation of international law developed from the 1899 conference; a celebration in Geneva in August marking the 50th anniversary of the 1949 Geneva Conventions; the 27th International Conference of the Red Cross and Red Crescent in Geneva in November; and conclude with a ceremony marking the end of the United Nations Decade of International Law at the General Assembly in New York.

(a) Make practical arrangements for the establishment and coming into operation of the Court;

(b) Prepare a relationship agreement between the [International Criminal] Court and the United Nations;

(c) Prepare a Headquarters Agreement;

(d) Prepare draft rules of procedure of the Court;

(e) Prepare staff regulations;

(f) Prepare financial regulations;

(g) Prepare an agreement on the privileges and immunities of the [International Criminal] Court;
(h) Prepare a budget for first year(s);

(i) Prepare the rules of procedure of the Meeting of States Parties [and of any other organ established by the Statute]."

Each of these activities is, of course, important, but there are a number of aspects of this agenda which should be modified. Sub-paragraphs (b), (c), (e), (f), (g) and (h) appear to envisage that the preparatory commission would prepare instruments which would be binding on the new court, in contrast to sub-paragraph (d), which requires preparation of draft rules of procedure of the court. A major omission from this list is the preparation of provisional guidelines for national implementing legislation. Such guidelines would help to speed ratification by giving legislators some direction concerning the essential elements of such legislation. Such guidelines have been of great assistance to states in preparing national legislation on cooperation with the Yugoslavia and Rwanda Tribunals and the guidelines prepared by the President of the Yugoslavia Tribunal could provide the preparatory commission with a useful foundation for developing such provisional guidelines.[113]

The final act should make clear that each of these instruments would be either draft instruments or instruments subject to revision, if necessary, by the court as soon as it is established. The Security Council followed a similar approach in Article 14 of the Statute of the Rwanda Tribunal, which states that the judges of that tribunal shall adopt the rules of procedure and evidence of the Yugoslavia Tribunal "with such changes as they deem necessary". Each of these instruments will require modification in the light of experience and should be provisional, pending necessary revision by the court itself.

[113] Tentative Guidelines for National Implementing Legislation of United Nations Security Council resolution 827 of 25 May 1993, sent by the President of the Yugoslavia Tribunal to Members of the United Nations on 15 February 1995, *reprinted in* Amnesty International, *The international criminal tribunals: Handbook for government cooperation - Supplement One* (AI Index: IOR 40/08/96), Part V.

Moreover, each of these draft instruments will necessarily draw heavily upon the experience of the two *ad hoc* tribunals, which have had to adopt instruments covering the same matters. Thus, the preparatory commission will need to consult closely with personnel of all organs of both *ad hoc* tribunals, with lawyers who have practised before them and with non-governmental organizations, as well as independent experts, in the preparation of these draft instruments to ensure that they incorporate the best aspects of the instruments adopted by the tribunals and solve some of the problems which have arisen with existing arrangements. For example, the experience of the two *ad hoc* tribunals with their agreements with the host states will be particularly relevant in preparing a draft headquarters agreement. It will be essential to permit the court to develop its own staff regulations which permit the rapid selection of the most qualified staff from all regions, and facilitate the nomination and appointment of women with a view to achieving gender balance in all organs and at all levels of the court.[114] The unhappy experience of the two *ad hoc* tribunals with lengthy and cumbersome UN recruitment procedures demonstrates that current UN staff regulations are not adequate to this task.[115] It will also be essential, if the court is to carry out its work, to have financial regulations which include effective and continuous internal and external financial oversight and which are more effective than the UN financial regulations applicable to the two *ad hoc* tribunals.[116]

It is essential that the relationship agreement prepared by the preparatory commission between the UN and the permanent international criminal court be provisional only. The relationship between the two organizations will need to be developed in the light of experience on a basis of equality to ensure that the court is able to maintain its independence, as required by the UN Basic Principles on the Independence of the Judiciary.

All instruments drafted by the preparatory commission should be provisional only, subject to revision by the court. The preparatory commission should consult intergovernmental organizations, including the two international tribunals, non-governmental organizations and independent experts as an integral part of its work program.

4. Privileges and immunities

"In the light of experience it appears desirable that the constitutions of all the new international organizations should embody general principles which guarantee effectively the independence of the organization and its agents by the grant of appropriate immunities and ensure that the organization will enjoy all the facilities in regard to communications, exchange arrangements, travel arrangements and

[114] For further explanation of the necessary qualifications and recruitment policy for staff in all three organs of the permanent international criminal court, see *Part I*, pp. 9-12, 26-29, 35.

[115] Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, Report of the Secretary-General on the activities of the Office of Internal Oversight Services, UN Doc. A/51/789 (1997) (advance copy), para. 52 (noting "the length of time the UN recruitment process requires").

[116] *Id.*

similar matters which governments customarily extend to each other to facilitate the conduct of official business."

C. Wilfred Jenks, "Some Constitutional Problems of International Organizations", 22 Brit. Y.B. Int'l L. (1945), p. 11

Although the privileges and immunities of the permanent international criminal court have so far received little discussion, it will be crucial to the success of the court to ensure that they are adequately protected. The current structure of and scope of Article 40 of the Zutphen text (based on Article 16 of the ILC draft statute) must be revised before the preparatory commission can draft appropriate agreements concerning privileges and immunities, whether in the form of headquarters agreements with host states, a supplementary convention on privileges and immunities or *ad hoc* arrangements with states parties and non-states parties. The privileges and immunities regime which will ensure the effective functioning of the court should protect four categories of institutions and persons: (1) the court itself, (2) the judges, prosecutors and deputy prosecutors and the registrar and deputy registrar, (3) the staff of the court and (4) other persons, including victims, their families, witnesses, suspects, accused and counsel. Although to some extent these matters will be addressed in the host state agreement (see above), that will be of limited geographic scope, making other systems of protection necessary. Indeed, the Prosecutor of the Yugoslavia and Rwanda Tribunals has offices outside the two host states and the Yugoslavia Tribunal has held hearings outside the host state through video conferencing facilities.

The current scheme of protection in Article 40 of the Zutphen text is seriously flawed and needs to be significantly strengthened if the permanent international criminal court is to be an effective complement to national criminal justice systems. This article fails to protect the privileges and immunities of the court itself. In this respect, it differs from Article 19 of the Statute of the International Court of Justice and Article 30 of the Yugoslavia Tribunal Statute, on which it appears to be based.[117] The privileges and immunities of both the International Court of Justice and the Yugoslavia Tribunal are those of the UN itself, which are set forth in Article 105 of the UN Charter and the Convention on the Privileges and Immunities of the United Nations.[118] As the principal judicial organ of the UN,[119] the International Court of Justice enjoys the same immunities as the UN. Similarly, the Yugoslavia and Rwanda Tribunals, as subsidiary organs of the Security Council, enjoy the same immunities as the UN.[120]

[117] 1994 ILC report, *supra*, n. 3, p. 62.

[118] 21 UST 1418, TIAS No. 6900, 1 UNTS 15 (1946).

[119] Statute of the International Court of Justice, Art. 1.

[120] Morris & Scharf, *supra*, n. 33, p. 317; Simma, *supra*, n. 12, p. 1140. Article 30 (1) of the Yugoslavia Tribunal Statute expressly provides: "The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff f, and the Registrar and his staff." Article 29 (1) of the Rwanda Tribunal Statute is virtually identical.

The court. Article 105 (1) of the UN Charter provides that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." As a leading commentary on the UN Charter has explained, "In order to create a reasonable balance of conflicting interests, Art. 105 of the Charter established the principle of the functional necessity of privileges and immunities, which was later introduced into all major status conventions and has since become a fundamental rule of the whole system of international privileges and immunities."[121] These privileges and immunities are spelled out in more detail in the Convention on the Privileges and Immunities of the United Nations, adopted pursuant to Article 105 (3) of the UN Charter, which has achieved the status of customary law.[122] These immunities, which are essential to the effective functioning of the UN, are considerable. They include absolute immunity from national legal proceedings; inviolability of UN premises and property, whether owned or rented; inviolability of UN archives and documents; exemptions from taxation and customs duties; the right to use codes and send its correspondence and documents by courier or diplomatic bags; and freedom from censorship.[123] As a leading commentary on the UN Charter has explained, the inviolability of UN premises is essential and without any exceptions, apart from waiver by the UN itself; " . . . every exception to inviolability would permit host states to exercise pressures on the organizations and thus compromise their independence".[124]

The statute of the permanent international criminal court should expressly provide that the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the court.

Judges, the prosecutor and deputy prosecutors and the registrar and deputy registrar. Judges, the prosecutor and deputy prosecutors and the registrar and deputy registrar should enjoy the privileges and immunities of diplomatic envoys. As the International Law Commission commentary on Article 16 of the draft statute said, "the need for free exercise of their functions is very great." The first alternative provision in Article 40 (1) of the Zutphen text, which is unbracketed and reproduces Article 16 (1) of the ILC draft statute, provides that "[t]he 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." Article 40 (1) provides a greater scope of protection than the equivalent provision in the Yugoslavia and Rwanda Tribunals by including the deputy prosecutors and staff of the office of the prosecutor and the deputy prosecutor, which may not be necessary. The scope of protection accorded diplomatic envoys includes absolute immunity for them and their families, whether acting on official business or in a private capacity, from arrest and criminal prosecution and absolute inviolability for their residences.[125] This protection should be reinforced by the

[121] Simma, *supra*, n. 12, p. 1139.

[122] Statement of the UN Legal Adviser, on 6 December 1967 to the Sixth Committee, AJNU, 1967, p. 346, *quoted in* Cot & Pellet, *supra*, n. 12, p. 1398.

[123] Convention on the Privileges and Immunities of the United Nations, 21 UST 1418, TIAS 6900, 1 UNTS 15 (1946), Arts II and III; Cot & Pellet, *supra*, n. 12, pp, 1398-1402; Simma, *supra*, n. 12, pp. 1140-1142.

[124] Cot & Pellet, *supra*, n. 12, p. 1399.

[125] Vienna Convention on Diplomatic Relations, 500 UNTS 95, TIAS 7502, 23 UST 3227 (1961), Arts 29-37.

protection in the Convention on the Privileges and Immunities of the United Nations, as that protection encompasses not only the physical premises of the UN, but also its officials. This Convention not only provides functional immunity for almost all UN staff (see discussion of privileges and immunities of court staff below), but also provides that senior UN officials, including the Secretary-General, Under-Secretaries-General and Assistant Secretaries-General and their spouses and minor children, enjoy diplomatic privileges and immunities.[126] One serious gap in this protection, however, which should be remedied in the statute of the permanent international criminal court is that some states do not recognize that these privileges and immunities apply to their own nationals who are UN officials when they re-enter their state of nationality.[127]

The alternative, bracketed text in Article 40 (1), which is based on Article 19 of the Statute of the International Court of Justice, is unacceptable. It would limit protection to judges of the court and only when engaged on official business. The scope of activities of the judges (who are likely to be full-time at an early stage of the court's history), prosecutor and deputy prosecutors and the registrar and deputy registrar, as well as the staff of the court, are likely to be far greater and involve far more travel, as well as risk disagreements and misunderstandings with national authorities on a wide range of matters, than the work of the International Court of Justice.

The judges, prosecutor and deputy prosecutors and the registrar and deputy registrar should enjoy the privileges and immunities of diplomatic envoys, reinforced by the protection provided by the Convention on the Privileges and Immunities of the United Nations. This protection should apply irrespective of nationality and include the same protection accorded other officials of the court in the state of the officials' nationality.

[126] Convention on the Privileges and Immunities of the United Nations, Art. V (19); Simma, *supra*, n. 12, p. 1143.

[127] See Simma, *supra*, n. 12, p. 1143.

Court staff. All staff of the court, whether they work for the judges, in the office of the prosecutor or the registrar and whether they are temporary employees or consultants or permanent employees, should, at least, enjoy the functional privileges and immunities guaranteed under Articles V and VII of the Convention on the Privileges and Immunities of the United Nations. The unbracketed text of Article 40 (2) of the Zutphen text, based on Article 16 (2) of the ILC draft statute, provides functional immunity only for the staff of the registrar and does not spell these out in any detail. It simply says that they "shall enjoy the privileges, immunities and facilities necessary to the [independent] performance of their functions". If Article 40 (1) of the Zutphen text, which provides diplomatic privileges and immunities for the staff of the prosecutor's office, is retained, then there is probably no need to amend Article 40 (2) to cover the staff of the prosecutor's office, since diplomatic protection is generally broader than functional immunity. If, however, Article 40 (1) is amended to delete diplomatic protection to the staff of the prosecutor's office, then Article 40 (2) should be expanded (as in the bracketed alternative) to give them such functional immunity. In addition, it should expressly provide that the functional privileges and immunities defined in the Convention on Privileges and Immunities of the United Nations (described below), which are now part of customary law, apply to the staff. In any event, staff of the judges, who may have sensitive information concerning the status of cases before the court, should receive such protection.[128]

[128] The failure of the Yugoslavia and Rwanda Tribunal Statutes to provide such protection is a serious flaw. Two leading commentators argue that Article 30 (3) of the Yugoslavia Tribunal Statute "is sufficiently broad to cover all staff members of the International Tribunal, including law clerks as staff members of the Registry or the Chambers. Moreover, there is no reason to distinguish between the staff members of the various organs of the International Tribunal in this respect." Morris & Scharf, *supra*, n. 12, p. 318. This interpretation has never been tested, however, and it would be better to avoid any ambiguity by expressly providing such protection. The entire staff of the Yugoslavia Tribunal may also be protected under Article 30 (1) of the Yugoslavia Tribunal Statute, which provides that the Convention on the Privileges and Immunities of the United Nations shall apply to the tribunal, even though only the staff of the Prosecutor and Registrar are expressly mentioned, as this list may be illustrative only. Articles 29 (1) and (3) of the Rwanda Tribunal Statute are identical to the corresponding provisions in the Yugoslavia Tribunal Statute.

Such functional immunities include immunities from arrest and legal proceedings for acts performed in an official capacity.[129] These functional privileges and immunities should be strengthened, however, to provide that they apply to all staff, regardless of nationality, including locally recruited staff. The court, not states, should decide whether such privileges and immunities apply in a particular case. As a leading commentary on the UN Charter has stated, "Immunity of the UN would be jeopardized if precedence of scrutiny and decision had to be left to national courts."[130]

All staff of the court should enjoy, at a minimum, the functional privileges and immunities of staff of the UN under the Convention on Privileges and Immunities of the United Nations.

Other persons. Other persons who must appear before the permanent international criminal court, including victims, their families, witnesses, suspects, accused and their counsel must enjoy the immunity necessary for the proper functioning of the court so that it can render justice. Article 40 (3) of the Zutphen draft (based on Article 16 (3) of the ILC draft statute) falls short of this requirement by expressly providing only that "[c]ounsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties." This provision slightly expands the list of categories of persons appearing before the International Court of Justice who enjoy such privileges and immunities.[131] However, the list in Article 40 (3) provides no protection for other persons who have to appear before a criminal court, including suspects and accused. The permanent international criminal court must protect suspects and accused, as well as witnesses and counsel, if it is to be able to ensure justice.

Such protection could be better assured if Article 40 (3) were amended along the lines of Article 30 (3) of the Yugoslavia Tribunal Statute and Article 29 (3) of the Rwanda Tribunal Statute, which protect persons whose presence is required at the tribunal: "Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal."[132] As leading commentators on the work of the two tribunals have explained, Article 30 (3)

[129] Convention on the Privileges and Immunities of the United Nations, Art. V (18). Such protection applies to all UN staff, except locally recruited staff on hourly rates. GA Res. 76 (I) of 7 December 1946.

[130] Simma, *supra*, n. 12, p. 1142.

[131] Article 42 (3) of the Statute of the International Court of Justice provides protection only for agents of states appearing before that court and lawyers for those states: "The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties." There is no express protection for witnesses. Privileges and immunities of persons appearing before that court are further regulated by an exchange of notes between the President of the International Court of Justice and the Minister for Foreign Affairs of the Netherlands of 26 June 1946, as approved and slightly modified with the consent of the Netherlands by the General Assembly in Resolution 90 (I) of 11 December 1946. See Rosenne, *supra*, n. XXX, p. 77.

[132] Yugoslavia Tribunal Statute, Art. 30 (3). Article 29 (3) of the Rwanda Tribunal Statute is identical.

> "would require a State, for example, to allow the accused to be transported through its territory to the International Tribunal for trial, notwithstanding an arrest warrant issued by the national authorities. This would also be true for a witness (who may be wanted by the national authorities for questioning, testimony in a national proceeding, or trial) while travelling to The Hague to testify before the International Tribunal. It may also be necessary for a State to make special security arrangements to ensure the safe passage of such persons. As a consequence of its primacy, the International Tribunal's proceedings should not be delayed because a witness or an accused is detained for questioning regarding a national criminal proceeding in a transit state."[133]

The statute should provide that other persons, including victims, their families, witnesses, suspects, accused and counsel, should be accorded such treatment as is necessary for the proper functioning of the court.

Waiver. To ensure against abuse of privileges and immunities, the court should be able to waive them on its own initiative. However, to ensure the court's independence of political pressure, only the court itself should be able to waive its privileges and immunities. The first bracketed alternative Article 40 (4) of the Zutphen text, which reproduces the text of Article 16 (4) of the ILC draft, provides that an absolute majority of the judges may revoke a privilege or waive an immunity, other than the immunity of a judge, prosecutor or registrar "as such", which, according to the International Law Commission's commentary on this article means that the waiver "does not apply to acts or omissions of a judge, the Prosecutor or Registrar as such, that is to say, while acting in the performance of their duties". Such limited absolute immunity will help to ensure that the court itself will not be under undue political pressure. The first bracketed paragraph also protects staff by ensuring that even a majority of the court cannot waive the immunity of a member of the staff of the office of the prosecutor or registrar without their consent.

The second bracketed alternative Article 40 (4) of the Zutphen text, which is new, would remove some of these protections by permitting a majority of the general assembly of judges to revoke privileges or waive immunities for the staff of the registrar without the registrar's consent. Staff of the prosecutor would have absolute immunity, which may not be necessary. This second bracketed alternative requires a secret ballot, which could help to insulate the judges from political or popular pressures.

The court should be able to revoke privileges and waive immunities for its staff, with the consent of the prosecutor or registrar, when it involves one of their staff, but judges, the prosecutor and deputy prosecutor and the registrar and deputy prosecutor should retain absolute immunity for their official acts.

5. Other matters

[133] Morris & Scharf, *supra*, n. 33, p. 319.

Preparing the first budgets for the court. Among the serious problems which the Yugoslavia Tribunal faced when it was first established was that the initial budgets were prepared by persons who had little or no experience with the management of large criminal justice systems. This lack of experience led to significant underestimates of amounts needed for investigation, documentation, victim and witness protection and legal aid for defence attorneys.[134] Some of these problems could have been minimized by broader and more open consultation with criminal justice experts and non-governmental organizations. It will also be necessary to ensure that the court has adequate funding to begin work immediately, even in temporary quarters, and adequate internal and external budget monitoring.

The preparatory commission should consult with the two *ad hoc* international criminal tribunals, defence lawyers who have practised before the two tribunals, non-governmental organizations (particularly those with experience in working with victims and witnesses and in providing defence lawyers) and the general public in drafting the initial budgets for the court. The budgets should be subject to revision as soon as the court is established.

Drafting rules of procedure for the meeting of states parties. The rules of procedure for the meeting of states parties which the preparatory commission drafts should be provisional only and subject to revision by the meeting. As indicated above in the discussion of the procedure for amendment of the statute, to ensure that this important body is effective, the procedure should be transparent and guarantee that intergovernmental organizations and non-governmental organizations should be able to participate in much the same way as guaranteed by the General Assembly at the diplomatic conference. Representatives of the court should be able to participate in the meeting on a non-voting basis and the court should be consulted in preparing the agenda for each meeting.

The rules of procedure for the meeting of states parties should permit the speedy convening of meetings when necessary. The court should be able to participate. The rules should provide the same degree of access for intergovernmental organizations and non-governmental organizations as the General Assembly has required at the diplomatic conference. They should require prompt public reports of their sessions.

Location of meetings, secretariat services and public reporting. The fifth operative paragraph states that the preparatory commission "shall meet at the Headquarters of the United Nations". Although there is an advantage in having the

[134] Thomas S. Warrick, "Organization of the International Criminal Court: Administrative and Financial Issues", *in The International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee; and Administrative and Financial Implications* (Chicago: International Human Rights Law Institute, DePaul University 1996), pp. 43-44 ("Initial budgets for the ICTY prepared at United Nations headquarters allocated most of the budget - roughly two-thirds - to judges, administration and overhead and only $562,300 to the expenses of investigations over a two-year period. In part, this was due to inexperience in managing an enterprise like a tribunal. Later budgets, prepared in The Hague, had more balanced allocations between the expenses of investigations, salaries, and the other costs of operating a court."). This study, although based on assumptions of a significantly different court from that reflected in the Zutphen text, contains a number of interesting suggestions concerning how an international criminal court could be established quickly.

meetings take place in New York, since the preparatory commission will be able to use the facilities of the Secretariat, including the Office of Legal Affairs, it would be better to give the preparatory commission the flexibility of being able to meet in the host state or elsewhere, when necessary, so that it can better make the practical arrangements required. The other operative paragraphs concerning the termination of the preparatory commission, filing a report, provision of secretariat services and informing the General Assembly address essential matters. The preparatory commission should publish frequent interim reports on its work to ensure transparency and to facilitate the broadest possible consultation on matters of the greatest concern to the entire international community.

The preparatory commission should have the flexibility to meet in the host state or other locations, such as at the seat of the two *ad hoc* international criminal tribunals. It should publish frequent interim reports on its work.

IV. PREPARING FOR THE DIPLOMATIC CONFERENCE

"For the past three years a global partnership of progressive actors - non-governmental organizations, led by the NGO Coalition for an International Criminal Court, 'like-minded' governments, and representatives of international and regional organizations, including the ad hoc International Tribunals, the Caribbean Community (CARICOM), the European Union, the Rio Group in Latin America, the Southern African Development Community (SADC) and, more recently, the League of Arab States - have been leading a quiet, but determined effort to create a permanent international criminal court.

If this progressive partnership, dubbed by the Canadian Foreign Minister as the 'new diplomacy' during the signing ceremonies for the Convention to Ban Landmines - succeeds in the quest to have an international criminal court statute adopted during the next year, the new world court will be the last major international organization established during the Twentieth Century, described by historians as the bloodiest, most war-ridden century in all history, and could be one of the most important in history."

William Pace, Convenor of the NGO Coalition for an International Criminal Court, 2 March 1998

A. Role of non-governmental organizations and international criminal tribunals

As stated above, the General Assembly has recognized the vital role played by non-governmental organizations in the effort to establish a permanent international criminal court in a number of resolutions (see Section III.F.2 above) and has spelled out detailed rules guaranteeing their participation in the diplomatic conference. Therefore, it is disappointing that the Draft Provisional Rules of Procedure for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Draft Provisional Rules)[135] do not fully implement the letter or spirit of the General Assembly resolutions. The 1997 General Assembly resolution expressly provided that certain non-governmental organizations could "participate in the Conference, along the lines followed in the Preparatory committee, on the understanding that participation means attending meetings of its plenary and, unless otherwise decided by the Conference in specific situations, formal meetings of its subsidiary bodies except the drafting group".[136] Thus, non-governmental organizations are entitled to attend meetings of the plenary, the credentials committee (Rule 4), the committee of the whole (Rule 48), the general committee (Rules 11 to 13) and working groups (Rule 50), "unless otherwise decided by the Conference in specific situations".

Although Rule 63 (a) provides that non-governmental organizations may attend plenary meetings of the diplomatic conference and, "unless otherwise decided by the Conference in specific situations, formal meetings of the Committee of the Whole", it provides that non-governmental organizations may attend other subsidiary bodies only "as appropriate". This could be read restrictively to permit a blanket exclusion from meetings of subsidiary bodies, such as the credentials committee, the general committee and working groups, instead of a case by case determination by the entire Conference.

[135] Draft Provisional Rules, Preliminary Version, 3 February 1998 (no UN document number).

[136] GA Res. 52/160, 15 December 1997.

The General Assembly resolution also provides that non-governmental organizations may participate in the diplomatic conference by "making available their materials to delegates".[137] Rule 64 provides:

> "Written statements submitted by the designated representatives referred to in rules 60 to 63 shall be made available by the secretariat to delegations in the quantities and in the language or languages in which those statements are made available to it at the site of the Conference, provided that a statement submitted on behalf of a non-governmental organization is related to the work of the Conference and is on a subject in which the organization has a special competence. Written statements shall not be made at United Nations expense and shall not be issued as official documents."

This rule is in similar to the rules for distribution of written statements at the UN Commission for Human Rights, except with regard to translations.[138] Nevertheless, in the light of the value of the comprehensive and detailed commentaries on the International Law Commission's draft statute submitted by non-governmental organizations and intergovernmental organizations to the Ad Hoc Committee and the Preparatory Committee, it would be useful to have all such documents distributed at the diplomatic conference to be listed in the final act and maintained in a central location after the conference, perhaps at the seat of the court when it is established, as part of the records of the conference.

The rules of the diplomatic conference should guarantee the same level of participation for non-governmental organizations as required by the General Assembly.

B. Voting and other requirements

Since the diplomatic conference will have only five weeks to reduce the 175 pages of the Zutphen text to a manageable size for a statute, the rules concerning voting should permit rapid decision-making. Although there are some advantages in achieving decisions by consensus, since the resulting text will then have broad support, there is a danger that this method could lead in some cases to a text embodying the lowest common denominator rather than the most effective solution.[139] In addition, to avoid endless delays, if not paralysis, there will need to be a speedy procedure to force a vote to reach decisions, when necessary.

Although there is now widespread support for an effective court, the Draft Provisional Rules may impede rapid decision-making when it proves difficult to reach a consensus concerning effective provisions, even when those provisions are supported by an overwhelming majority of states. Rule 34 (1) provides that the diplomatic conference "shall make its best endeavours to ensure that the work of the Conference is

[137] *Id*.

[138] See Commission on Human Rights Res. 1296 (XLIV), 23 May 1968, as amended by Res. 1996/31 and Dec. 1996/297.

[139] For an analysis of the increasing problems posed in drafting international human rights treaties and other instruments by consensus, see Nicholas Howen, "International Human Rights Law-Making - Keeping the Spirit Alive", Eur. Hum. Rts L. Rev. (1997), pp. 566-584.

accomplished by general agreement", in other words, by consensus. If it is not possible to reach a decision by consensus on a matter of substance, despite "all efforts", Rule 43 (2) provides that then "the President of the Conference shall inform the General Committee that efforts to reach general agreement have failed. The General Committee shall thereupon consider the matter and recommend steps to be taken." The general committee is not, however, under any obligation to put the matter to a vote. Thus, there is a danger that a small number of states could obstruct the adoption of provisions which received widespread support by the diplomatic conference.

The rules of the diplomatic conference should have a mechanism to ensure prompt decision-making, by voting where necessary, to ensure that a small number of states cannot obstruct proposals which receive widespread support.