The Creation of a Permanent International Criminal Court

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> "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[2]

I. Introduction

Against the background of this determination by the Nuremberg International Military Tribunal, an attempt will be made to outline the current status of the negotiations on the creation of a Permanent International Criminal Court (ICC)[3]. Given the fact that the Rome conference, at which

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1 The following remarks by the author, who since February 1997 has been a member of the German delegation participating in the work of the Preparatory Committee on the Establishment of an International Criminal Court, are purely his personal ones and do not reflect the opinion of the German Government.

2 Judgment of the International Military Tribunal of 1 October 1946, Vol. 1, 249.

3 See also the overview by H.-P. Kaul, "Towards a permanent International Criminal Court – Some Observations of a Negotiator", *HRLJ* 18 (1997), 169 et seq. As to the developments up to 1996 see K. Ambos, "Establishing an International Criminal Court", *EJIL* 7 (1996), 519 et seq., as well as H. Roggemann, "Auf dem Weg zum ständigen Internationalen Gerichtshof", *ZRP* 29 (1996), 388 et seq. As to the historical developments, see in particular the overview by M. Cherif Bassiouni, "Establishing an International Criminal Court: Historical Survey", *Mil. L. Rev.* 149/50 (1995), 44 et seq. as well as the overview of relevant literature by

the statute of the ICC is supposed to be adopted, has – at the time of writing – not yet taken place, the following remarks must necessarily be tentative[4]. Given the further fact that the Preparatory Committee on the Establishment of an ICC has, however, now referred a consolidated draft statute to the diplomatic conference to take place in June and July 1998 in Rome, a first preliminary analysis and stocktaking is both possible and useful[5].

The following remarks will mainly focus on the most crucial issues, which were not only politically the most sensitive ones, but which also involved the most difficult legal questions. First, it was doubtful, what crimes should come within the jurisdiction of the ICC. Second, the question arose, which conditions had to be fulfilled in order for the Court to be able to exercise its jurisdiction. This question also involved the issue of what role the Security Council of the United Nations should eventually play. Furthermore, a third problem involved the question of who could trigger the jurisdiction of the Court, i.e. could refer to situations before the Court. In addition, the relationship between national criminal jurisdiction on the one hand, and the proposed ICC on the other, will be addressed. Finally, some selected procedural issues will be also dealt with, which – as is demonstrated by the experiences of the International

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M. Cherif Bassiouni (ed.), *The International Criminal Court: Observations and issues before the 1997-98 Preparatory Committee: and Administrative and Financial Implications*, 1997, 33 et seq.

4 The manuscript was finalised by the beginning of May 1998, thus taking into account the Draft Statute submitted by the Preparatory Committee to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Therefore, unless otherwise indicated, the numbering of the respective provisions refer to the text of this Draft Statute to the Diplomatic Conference by the Preparatory Committee, see Doc. A/CONF.183/2/Add.1 of 14 April 1988.

5 As to the work of the Preparatory Committee, see the survey by C. Hall, "The First Two Sessions of the UN Preparatory Committee on the Establishment of an ICC", *AJIL* 91 (1997), 177 et seq.; C. Hall, "The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an ICC", *AJIL* 92 (1998), 124 et seq.; C. Hall, "The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court", *AJIL* 92 (1998), 391 et seq. and lastly C. Hall, "The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Tribunal", *AJIL* 92 (1998), forthcoming; V.P. Nanda, "The Establishment of a Permanent International Criminal Court: Challenges Ahead", *HRQ* 20 (1998),413.

Criminal Tribunal for the Former Yugoslavia — are also of major importance.

II. Jurisdiction Ratione Materiae of the Future ICC

Until the very end of the work of the Preparatory Committee it remained doubtful, which crimes should come within the jurisdiction of the Court. On the one hand, a consensus had emerged that at the very least genocide, crimes against humanity and war crimes, commonly referred to as core-crimes, should be included in the statute and that the ICC should therefore be competent to deal only with those crimes. One question that was not solved by the Preparatory Committee and thus left to the Rome conference was the question whether the crime of aggression, as originally proposed by the ILC in article 22 of their Draft statute for an ICC[6], should also be included in the statute.

1. Genocide

The inclusion of the crime of genocide into the statute of the future permanent ICC was, as a matter of principle, agreed upon by all states participating in the work of the Preparatory Committee. Accordingly, the Preparatory Committee had already in February 1997 proposed the inclusion of the crime of genocide into the future statute of the Court. The definition of that crime will be identical to arts II and III of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[7]. In accordance with article I of the Genocide Convention, under the statute of the ICC, genocide might be committed in times of war as well as in time of peace[8]. The text elaborated by the Preparatory Committee contains, however, a reference to the fact that the killing of a small number of members of a group might not be sufficient to be considered a crime of genocide[9]. It might be doubted whether this proposed limitation, which is based on a declaration made by the United States when ratifying the convention, correctly circumscribes the content of the Genocide Convention. Since the wording of the Genocide Convention,

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6 Doc. A/CN.4/L. 532 of July 8, 1996; Text to be also found in *HRLJ* 18 (1997), 96 et seq.

7 See article 5 (Crime of Genocide) Draft Statute.

8 See also N. Robinson, *The Genocide Convention — It's Origins and Interpretation*, 1949, 13.

9 Article 5 Draft Statute, 11, note 1.

while using the term members in the plural, does not specify the necessary number of possible victims[10], the current practice of the Yugoslavia Tribunal demonstrates, however, that in order to commit the crime of genocide, it is sufficient that the offender kills a larger number of members of the group in a given geographic area[11].

Additional problems arise from the fact that the current draft for the statute of the ICC, similar to the parallel provisions of the statutes of the Yugoslavia and the Rwanda Tribunal, is based on article III of the Genocide Convention. Accordingly, apart from genocide itself, conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide and complicity to commit genocide, are also made punishable crimes. That creates the necessity to make this provision conform with the parallel provisions in the part dealing with the general principles of criminal law, which contain general provisions of aiding and abetting and related issues[12]. In particular, the question arises as to whether, with regard of other crimes, too, an attempt to commit a crime shall be made punishable.

2. Crimes against Humanity[13]

Similar to the crime of genocide, it is uncontroversial that crimes against humanity, too, shall be included in the statute. In contrast to the crime of genocide, the Preparatory Committee could not reach complete consensus as to the exact definition of crimes against humanity. Furthermore, there was no consensus as to the question whether the Court should have jurisdiction only in those cases in which the individual crimes against

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10 But cf. Robinson, see note 8, 17, who states, that there must be a substantial number of victims. But see also for a contrary position, referring to the identical Section 220 a of the German Criminal Code, A. Eser, in: A. Schönke/H. Schröder, *Strafgesetzbuch-Kommentar*, 25th edition, 1997, § 220a, Mn. 4 as well as H.-H. Jeschek, "Die internationale Genocid-Konvention vom 9.12.1948", *ZStW* 78 (1966), 193 et seq. (213).

11 See *inter alia* the indictment confirmed by a judge of the Yugoslavia Tribunal against Elijko Meaki and others (text to be found at http://www.un.org/icty/13-02-95.htm confirmed on 13 February 1995) as well as the act of indictment against Dusko Sikirica a/k/a Sikira and others (IT-95-I, wording at http://www.un.org/icty/210795A.htm).

12 See arts. 21 et seq.

13 As to the notion of crimes against humanity see the comprehensive work by M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 1992, in particular 236 et seq., as well as A. Becker, *Der Tatbestand des Verbrechens gegen die Menschheit — Überlegungen zur Problematik eines völkerrechtlichen Strafrechts*, 1996, 176 et seq.

humanity have been committed as part of a widespread *and* systematic commission of such acts. Finally it still has to be decided, whether the crimes under consideration can be only committed against the civilian population and whether crimes against humanity *per definitionem* can be only committed in times of armed conflict.

A. The Notion of Crimes against Humanity

a) General Questions

The notion of crimes against humanity was first used in article 6 lit. (c) of the statute of the International Military Tribunal at Nuremberg[14], respectively in article 5 lit. (c) of the Tokyo Charter[15]. In that context murder, extermination, slavery, deportation and other inhuman acts committed against the civilian population before and during World War II, as well as acts of persecution based on political, racial or religious grounds were considered to be crimes against humanity, regardless of whether the act under consideration was committed in violation of the domestic law of the country on the territory of which it had been committed.

In contrast thereto, the statute of the International Criminal Tribunal for the Former Yugoslavia[16] as well as that of the International Tribunal for Rwanda [17] have also considered imprisonment, torture, rape and other inhuman acts to fulfill the notion of crimes against humanity. Within the framework of the work of the Preparatory Committee, there is a clear tendency to even extend the list of crimes against humanity beyond those contained in the Nuremberg Charter and eventually even go beyond the statutes of the two *ad hoc* tribunals. Apart from this question of whether specific crimes should be included in the list of crimes against humanity, there are also some more general issues to be addressed.

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14 As to the historical development of that term see the Decision of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the Case against Tadic IT-94-1-T of 7 May 1997, para. 618.

15 Text to be found *inter alia* at B. Röling, *The Tokyo Judgment — The Military Tribunal for the Far East*, Vol. III, Annex A-5, 1977.

16 The text of S/RES/827 (1993) of 25 May 1993 can be found *inter alia* at V. Morris/M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia — A Documentary History and Analysis*, Vol. 2 , 1995, 177 et seq.; the preparatory report of the Secretary-General containing the statute (Doc.S/25704 of 3 May 1993 and Doc.S/25704/Corr.1 of 30 July 1993) can be found ibid., 3 et seq.

17 Text to be found in S/RES/955 (1994) of 8 November 1994.

aa) Necessary Involvement of State Organs?

Within the context of World War II, the US-American military tribunals established under Control Council Law No. 10[18] took the view that the participation of state organs is a necessary requirement of every crime against humanity[19]. In contrast, the ILC in its Draft Code of Crimes against the Peace and Security of Mankind[20], took the view that even acts committed by members of a group *not* acting on behalf of a State can also be considered crimes against humanity as long as they otherwise fulfill the other necessary requirements of such crimes[21]. Similarly, national courts and tribunals have confirmed that view and have accordingly *inter alia* denied persons refugee status on the basis of article 1 F of the Convention Relating to the Status of Refugees since they had committed crimes against humanity as part of a group of insurgents[22]. Furthermore, it is also worth mentioning that the International Criminal Tribunal for the Former Yugoslavia, has also taken that very same view[23]. Accordingly, the draft for the statute of the future ICC does not contain any such requirement, as to the involvement of state organs, either.

bb) Crimes against Humanity as being committed as Part of an Overall Situation of Persecution

The draft which evolved from the work of the Preparatory Committee prescribes that it is mandatory, that the single crimes against humanity must have been committed as part of a widespread attack or as part of a

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18 Wording to be found *inter alia* at T. Taylor, *Die Nürnberger Prozesse*, 1951, 146 et seq.

19 See e.g. the Decision in the so called "Juristenprozeß", Nuremberg Military Tribunal, Vol. 10, 401.

20 See article 18 of the Draft Code, Doc.A/CN.4/L.532; for a detailed analysis of the Draft Code see M. Ortega, "The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind", *Max Planck UNYB* 1 (1997), 283 et seq.

21 In that regard, the ILC refers to the fact that the acts under consideration "[were] instigated or directed by a Government *or by any organization or group*". (Emphasis added).

22 See *inter alia* the Canadian Decision Sevakumar v. Canada (Minister of Employment and Immigration) (1993), quoted by J. Rikhof, "Crimes against Humanity, Customary International Law and the International Tribunals for Bosnia and Rwanda", *NJCL* 7 (1996), 233 et seq., (254–256).

23 Decision in the Case against Tadic of 7 May 1997, IT-94-1 (Trial Chamber II), para. 655.

systematic attack[24]. While neither the statute of the Nuremberg International Military Tribunal nor the statute of the International Criminal Tribunal for the Former Yugoslavia had *expressis verbis* contained such a requirement, it still is in accordance with current customary international law. In particular, one has to mention that the Nuremberg Military Tribunal had on several occasions referred to the fact that the crime against humanity under consideration had specifically targeted certain groups of the overall population[25]. In the case of the statute of the International Criminal Tribunal for the Former Yugoslavia, the Tribunal took the view that article 5 of the statute of the tribunal presupposes that the crimes under consideration are more than pure singular acts completely unrelated to each other[26]. This view is further confirmed by the fact that article 3 of the statute of the International Tribunal for Rwanda expressly contains the requirement that the respective act under consideration must have been committed as part of a widespread commission of such acts or as part of a systematic attack. Within the framework of the Preparatory Committee, it is however still debated whether the two elements just mentioned, i.e. the requirement of a widespread commission of such crimes or of a systematised commission, must be fulfilled in a cumulative or rather in an alternative way. It seems that the better arguments militate in favour of considering that these two requirements are alternatives. This view is in line with current customary international law and also formed the basis of the report of the United Nations Secretary-General leading to the creation of the International Criminal Tribunal for the Former Yugoslavia[27]. Besides, both the statute of the International Tribunal for Rwanda as well as the relevant texts agreed upon by the ILC[28] expressly state that we are

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24 Article 5 (Crimes against Humanity), 25–26.

25 See the reference in the above mentioned Decision, note 23, para. 646; see also the Decision of the Dutch Hooghe Raad in the Case of the Public Prosecuror v. Menten, *ILR* 75 (1987), 331 et seq., (362–363), which stated that "(...) the crimes in question form a part of a system based on terror or constitute a link to a consciously directed policy against a particular group of people (...)".

26 Decision on the Form of the Indictment, quoted in the Decision at note 23, para. 644. Once this requirement is fulfilled, however, even a single act may be considered to constitute a crime against humanity.

27 Report of the Secretary-General persuant to para.2 of S/RES/ 808 (1993) of 22 February 1993. Text to be found at Morris/ Scharf, see note 16, para. 48.

28 See *inter alia* article 18 of the Draft Code of Crimes against the Peace and Security of Mankind as well as the Report of the ILC of its work during the 49th period, GAOR 49th Sess., Suppl. No. 10, Doc.A/49/10, 76.

dealing here with two possible alternatives. This view has now been also expressly confirmed by the International Criminal Tribunal for the Former Yugoslavia[29]. Thus, it would be a retrograde step, if the statute of the future ICC contained the requirement that the crimes under consideration must have been part of both an overall attack and have been also committed in a systematic manner[30].

cc) Must Crimes against Humanity be committed with a Specific Intent?

Among the states participating in the work of the Preparatory Committee it remains controversial whether crimes against humanity must necessarily be committed on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds[31]. Those states which would require such a specific motivation can rely on article 3 of the statute of the International Tribunal for Rwanda, which indeed stipulates in its article 3 that any crime against humanity must be committed on national, political, ethnic, racial or religious grounds. On the contrary, however, the statute for the International Criminal Tribunal for the Former Yugoslavia does not contain any such requirement. Within the framework of the statute of the Nuremberg International Military Tribunal such a specific motivation was similarly only necessary in regard of acts of persecution, but not in relation to murder or other forms of crimes against humanity. Besides, one has also to take into account the fact that persecution — which also forms part of the list of crimes against humanity — necessarily presupposes a specific motivation. Thus, including a *general* requirement of motivation for all crimes against humanity would make no sense since it would thereby impose a double requirement of discriminatory motives for acts of persecution[32].

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29 See the Decision in the Case against Tadic of 7 May 1997, IT-94-1 (Trial Chamber II), para. 648. In contrast thereto, the Tribunal, when dealing with a proceeding under article 61 of its Rules of Procedure (Prosecutor v. Nikoli, IT-94-2-61, Decision of 20 October 1995, para. 26) still seems to have taken a different view. It stated: "(...) [Crimes against Humanity] must, to a certain extent, be organized and systematic. (...) [In addition] the crimes, considered as a whole, must be of a certain scale and gravity".

30 Accordingly, only a rather limited number of states have supported the requirement of such a cumulation.

31 Article 5 (Crimes against Humanity), para. 1, 26, Draft Statute.

32 Amnesty International, *The International Criminal Court: Making the Right Choices-Part I*, 1997, 41.

dd) Can Crimes against Humanity only be committed in Times of War?

In particular, both the Russian Federation and the Peoples Republic of China have taken the view that any acts committed outside of the context of an armed conflict can not *per se* constitute crimes against humanity. Introducing any such limitation would however be a backward step in the development of international law. It is true, that both, the statute of the Nuremberg International Military Tribunal in its article 6 as well as article 5 lit. (c) of the statute of the Criminal Tribunal for the Far East had foreseen that only acts committed in connection with war crimes or crimes against peace should come within the jurisdiction of the respective tribunal. However, even this provision was interpreted by the Nuremberg Tribunal in a way that acts committed before 1 September 1939 are included in the definition of crimes against humanity[33].

Besides, this nexus between crimes against humanity and the existence of an armed conflict no longer existed in Control Council Law No. 10. That lead US military Courts, acting on the basis of this law, to explicitly state that "(...) crimes against humanity are in international law, completely independent of either crimes against peace or war crimes."[34] This separation of crimes against humanity on the one side and the existence of an armed conflict on the other is further confirmed by the fact that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, by now ratified by more than 40 states, explicitly stipulates, that crimes against humanity may be also committed in times of peace[35]. Similarly, the parallel limitation in the statute of the International Criminal Tribunal for the Former Yugoslavia cannot be taken as a confirmation of such a restrictive view. First, such a limitation cannot be found in the statute of the International Tribunal for Rwanda. Furthermore, it was the Secretary-General who stated in his report[36] that this limitation is not in line with current customary interna-

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33 See the quotation to be found in K. Heinze/K. Schilling, *Die Rechtsprechung der Nürnberger Militärtribunale*, 1951, 208.

34 See in particular the Decision in the Case of United States v. Ohlendorf, Trials of War Criminals before the Nuremberg Military Tribunal, Vol. 4, 49.

35 Furthermore, it has to be noted that the Convention on the Suppression and Punishment of the Crime of Apartheid, which beyond doubt also applies in times of peace, defines apartheid as constituting a crime against humanity.

36 Report of the Secretary-General pursuant to para. 2 of S/RES/808 (1993) of 22 February 1993, Doc.S/25704 of 3 May 1993, text to be found in Morris/Scharf, see note 16 para. 47.

tional law[37]. In particular, one has to also take account of the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case against Tadic, where the court explicitly stated that under current customary international law, crimes against humanity do not necessarily have a nexus to other crimes, such as war crimes, and that therefore the Security Council, by incorporating such a restrictive formula in article 5 of the statute of the International Criminal Tribunal for the Former Yugoslavia, had defined the notion of crimes against humanity more narrowly than necessary[38].

ee) Can Members of Armed Forces be Victims of Crimes against Humanity?

The question, of whether members of foreign troops can also be victims of crimes against humanity, or whether instead the relevant rules of international humanitarian law must be considered as exclusively regulating their legal status, is a very difficult issue[39]. One has to take first into account the fact that this limitation, contained in the statute of the Nuremberg International Military Tribunal, according to which the crimes under consideration must have been committed against the civilian population, were not contained in the parallel provision of the Tokyo statute[40]. Furthermore, both the US American Military Courts as well as the Supreme Court for the British Zone after World War II have taken the view that members of the military, too, can be victims of crimes against humanity[41]. A similar determination has been made by the French *Cour de Cassation*, which unlike the first instance *Cour d'Assises* in the case against Barbie,

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37 As to the similar viewpoint of the ILC see article 18 of its Draft Code of Crimes against the Peace and Security of Mankind, (see note 20), which does not contain any such requirement.

38 The Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal, IT-94-1-AR72, Judgment of 2 October 1995, para. 141.

39 Some delegations want to include such a limitation by stating that only attacks against any civilian population should constitute crimes against humanity, see article 5 (Crimes against Humanity), 26, Draft Statute.

40 See D. Röling, "Tokyo Trial", *EPIL* 4 (1982), 242 et seq., (243).

41 Thus, the judgment against members of the high command of the German army *inter alia* stated that plans to instigate the German population to lynch allied pilots constituted a crime against humanity, text to be found at Heinze/ Schilling, see note 33, 212. As to the relevant practice of the Supreme Court for the British Zone (OGHZ 1, 228), see H. Meyrowitz, *La représsion par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi no. 10 du Conseil de Contrôle Allié*,1960, 281–282.

shared the view that members of the French résistance movement can similarly be victims of crimes against humanity[42].

In order to avoid any contradiction, however, one must start from the assumption that acts which are not prohibited by relevant rules of international humanitarian law can not constitute crimes against humanity. This is confirmed by the jurisprudence of the Tokyo International Military Tribunal for the Far East which correctly stated that even in a war waged in violation of international law, the general rules of humanitarian law remain applicable. Against this background the tribunal took the view that a punishment for committing crimes against humanity simply because of the killing of enemy combatants is inadmissible and has accordingly dismissed those parts of the prosecution[43]. The approach must be different, however, in those cases in which the acts under consideration were prohibited by humanitarian law without being as such punishable as war crimes as such or in which the victims were members of the same army as the offender[44], which are not protected by relevant rules of international humanitarian law.

b) Specific Categories of Crimes against Humanity

aa) Murder, Extermination and Enslavement

During the work of the Preparatory Committee, consensus has been reached that at least murder, extermination and enslavement should be incorporated into the notion of crimes against humanity. This is further confirmed by the fact that all relevant international documents, including along with the instruments, already mentioned, the resolution of the General Assembly of the United Nations of 11 December 1946, Concerning the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (A/RES/95 (I) of 11 December 1946) and the ILC's Draft Code of Crimes against the Peace and Security of Mankind[45], all consider such acts to constitute crimes against humanity. In addition, all national laws which have incorporated the notion of crimes against humanity into their domestic law have always included murder,

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42 *ILR* 78 (1988), 125 et seq. (140).

43 Judgment of the International Military Tribunal for the Far East of 1 November 1948, for the text see B. Röling/C. Rüter, *The Tokyo Judgment*, Vol. 1, 1977,1 et seq., (32–33).

44 Such a situation formed the core of the just mentioned Decision of the Supreme Court for the British Zone, see note 41.

45 See article 18 of the Draft Code of Crimes, see note 20.

extermination and enslavement[46], so that there can be no doubt that these crimes form the undeniable core of the notion of crimes against humanity.

bb) Torture

Notwithstanding Control Council Law No. 10 and the Draft Code of Crimes against the Peace and Security of Mankind elaborated by the ILC[47], torture was first mentioned in the statute of the International Criminal Tribunal for the Former Yugoslavia as constituting a crime against humanity. Regardless of this question, there can be no doubt, however, that in the meantime torture is prohibited by customary international law, that this provision even forms part of the existing rules of *jus cogens*[48] and that torture already *de lege lata* also entails individual criminal responsibility[49].

Within the framework of the Preparatory Committee, however, it still remains doubtful whether the statute of the ICC should contain a precise definition of torture and if so, how it should eventually be framed. Militating in favour of the inclusion of such a definition is the fact that thereby the content and limits of the crime would be circumscribed exactly. On the other hand, one cannot deny that both article 15 para. 2 of the International Covenant on Civil and Political Rights as well as article 7 para. 2 of the European Convention on Human Rights contain exceptions as to the strict application of the role of *nullum crimen sine lege* for those cases in which the act under consideration is punishable according to general principles of law recognized by civilized nations. Thus, it is permissible to make acts punishable crimes by relying on existing rules of customary international law. This result is further confirmed by the fact that both within the framework of article 15 of the International Covenant on Civil and Political Rights as well as in the framework of article 7 of the European Convention on Human Rights, it was considered sufficient that individual criminal responsibility was based on unwritten common law

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46 See *inter alia* Sec. 1 (b) of the Israeli Nazi and Nazi Collaborators (Punishment) Law as well as Sec. (3.76) of the Canadian Criminal Code.

47 See article 18 lit. (c) of the Draft Code of Crimes submitted by the ILC, see note 20.

48 See the extensive discussion in: L. Hannikainen, *Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status*, 1988, 499 et seq.

49 See e.g. article 4 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that each contracting party shall ensure that acts of torture are punishable under its respective national criminal law.

principles[50]. On the other hand one should not overlook the problem that according to article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment only acts committed by state organs fulfill the notion of torture. Contrary to this definition, acts also emanating from non-state perpetrators are considered to be torture under article 2 of the Inter-American Convention to Prevent and Punish Torture[51]. Given this background and taking into account the fact that up to now only the prohibition of torture emanating from state organs is securely rooted in customary international law[52], it seems to be advisable that an express definition of the notion of torture, e.g. by making a reference to article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment should be introduced into the statute of the future ICC. Such a limitation is also warranted since at least in the past only those acts were considered to be crimes against humanity, which were committed within the context of a general policy. Besides, only in such cases would, at least as a matter of principle, the general criterium be fulfilled that the ICC should only have jurisdiction for those crimes which are of relevance for the international community as a whole and which are not yet prosecuted effectively by national courts.

cc) Imprisonments

Similar problems as to the precise definition of crimes also arise in the context whether, and if so in which form, unjustified imprisonments should fall within the jurisdiction of the future ICC. Both Control Council Law No. 10 as well as the statutes of the two *ad hoc* tribunals have provided

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50 See as to the Covenant on Civil and Political Rights, M. Nowak, *U.N. Covenant on Civil and Political Rights — CCPR Commentary*, 1993, article 15, Mn. 5 and as to the European Convention on Human Rights — J. A. Frowein/W. Peukert, *Europäische Menschenrechtskonvention — EMRK-Kommentar*, 2nd edition, 1996, article 7, Mn.4 with further references as to the practice of both the European Commission and the European Court of Human Rights.

51 Article 2 of the Convention reads: "For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. (...)".

52 As to the relevance of torture not emanating from state organs within the framework of article 3 of the European Convention on Human Rights see the Decisions of the European Court of Human Rights in the Cases of Ahmed v. Austria and H.L.R. v. France.

respectively that imprisonment, too, could be considered a crime against humanity. The problem arises, however, that it is evident that prison sentences duly pronounced by national courts do not constitute violations of international law and still less do they constitute crimes which should be within the jurisdiction of the ICC. Accordingly, it was the ILC, which in its Draft Code of Crimes against the Peace and Security of Mankind only provided that *arbitrary* imprisonments should be considered crimes against humanity[53]. In particular, the ILC took the view that enduring imprisonments as they took place in the camps on the territory of the former Yugoslavia should be encompassed by this notion[54]. This notion of arbitrariness has up to now, however, not entered into the discussion of the Preparatory Committee. Instead, it was proposed that only imprisonments constituting blatant violations of international law or committed in violation of fundamental legal norms should qualify as crimes against humanity or that even any such qualification should be left aside.

First, it seems that there is a need for qualifying the notion of imprisonments since — as mentioned — imprisonments as such are not prohibited by international law. Besides among the two formula just mentioned, the second one seems to be more advisable since it clearly provides which norms of international law have been breached. It seems that the first formula could also encompass violations of treaty obligations. Thus it would eventually entail divergent standards for different contracting parties of the statute. On the contrary, if one chooses the second alternative, the imprisonment must have taken place in violation of fundamental legal norms which either are part of universal customary international law or form general principles of law as contained in article 38 lit. (c) of the statute of the ICJ.

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53 See article 18 lit. lit. (h) of the Draft Code of Crimes, see note 20.

54 See para. 14 of the Commentary of the ILC as to article 18 of its Draft Code of Crimes against the Peace and Security of Mankind, see note 20.

dd) Rape[55]

Both, the Inter-American Commission on Human Rights[56] as well as the European Court of Human Rights[57] have determined that rape of women by state organs constitutes a specific form of torture[58]. Already this reason alone is sufficient to argue that rape also constitutes a crime against humanity provided that the other requirements of such crimes are fulfilled. Besides, both Control Council Law No. 10 as well as the statute of the International Criminal Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda have considered rape as constituting a crime against humanity. Furthermore both these *ad hoc* tribunals have confirmed accusations for crimes against humanity by persons who had committed rape[59] [60].

According to the current discussion within the Preparatory Committee, however, not only rape as such but also other forms of sexual violence including enforced prostitution should be considered crimes against humanity[61]. Given the fact that enforced prostitution entails an enduring violence against the woman concerned, such enforced prostitution can also

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55 See in particular S. Healey, "Prosecuting Rape under the Statute of the War Crimes Tribunal for the former Yugoslavia", *Brookl.J.Int.L.* 21 (1995), 327 et seq., (352 et seq.).

56 See Fernando and Raquel Meija v. Peru, Report No. 5/96, Case 10970, Annual Report of the Inter-American Commission on Human Rights 1995, 157.

57 European Court of Human Rights, Aydin v. Turkey, Judgment of 25 September 1997, para. 86.

58 See also the report of the Special Rapporteur of the Commission on Human Rights, Doc. E/CN.4/1995/34, para. 18, where the Special Rapporteur refers to the fact that rape constitutes a specific traumatic form of torture.

59 See *inter alia* Prosecutor v. Dragan Gagovi *et al.* ("foka"). The General Assembly of the United Nations in 1995 has similarly confirmed that view, see A/RES/50/192 of 22 December 1995, para. 3.

60 This view is shared *inter alia* by T. Meron, "Rape as a Crime under International Humanitarian Law", *AJIL* 87 (1993), 424 et seq., (426–427) as well as by M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 1996, 589–590.

61 According to the formula contained in article 5 (Crimes against Humanity) lit. (g) of the Draft Statute, "(...) rape or other sexual abuse [of comparatible gravity,] or enforced prostitution" shall be considered crimes against humanity. Given that only the terms "of comparatible gravity" remain in square brackets, it is obvious that only this part is still disputed.

be considered as constituting a specific form of rape[62]. Moreover given recent developments in several national jurisdictions similar sexual acts of comparatible gravity must be considered as forming part of the notion of rape, since both in common law countries[63] as well as in several civil law jurisdictions[64], acts which traditionally had not be considered to constitute rape are now subsumed under this notion. If one does not want, however, to go beyond the notion which currently forms part of customary international law, it seems to be strongly advisable that the statute contains a qualification according to which only sexual violence which is of comparatible gravity to rape should come within the jurisdiction of the ICC.

ee) Persecution of Parts of the Population

The statutes of the Nuremberg and the Tokyo Tribunals, Control Council Law No. 10, the statutes of the Yugoslav and Rwanda Tribunals and finally the ILC Draft Code of Crimes against the Peace and Security of Mankind had already considered that prosecution of specific parts of the population form part of the notion of crimes against humanity[65]. Similarly, during the work of the Preparatory Committee, it was agreed that the willful and severe deprivation of fundamental rights contrary to international law shall fulfill the notion of crimes against humanity[66]. In that regard the text currently adopted is in line with the commentary of the ILC to its Draft Code of Crimes against the Peace and Security of Mankind, which had in particular referred to the protection of generally recognized human rights,

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62 See also the report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, text to be found in: *AJIL* 14 (1920), 95 et seq. established by the Allied Powers after World War I, according to which the enforced prostitution of women constituted a violation of the elementary laws of humanity, *ibid.*, 114–115.

63 As to the legal situation in the United Kingdom see e.g. the Decision of the European Court of Human Rights in the Case of C.R. v. United Kingdom, Ser. A, No. 335-C.

64 As to the legal situation in Germany see the definition of rape in the amended Section 177 para. 3 No. 2 of the German Criminal Code (BGBl. 1997 I, 1607) according to which not only sexual intercourse but also similar sexual acts of comparatible gravity are considered to constitute rape.

65 But see also article 20 lit. (d) of the draft statute prepared by the ILC, which had not attempted a definition of crimes against humanity; see generally as to the draft statute of the ILC, J. Crawford, "The ILC Adopts a Statute for an International Criminal Court", *AJIL* 89 (1995), 404 et seq.

66 Article 5 (Crimes against Humanity), para. 2 lit. (d) Draft Statute.

reference to which is also made in Arts 1 and 55 of the Charter of the United Nations. One must mention, however, that the list of relevant criteria varied. For example, in the statute of the Military Tribunal for the Far East only a persecution based on political or racial grounds could have lead to a conviction for having committed crimes against humanity[67]. In all other documents, however, a persecution based on religious grounds was also considered to constitute such a crime. The current status of the negotiations in the Preparatory Committee indicates that the statute of the ICC might even go beyond these criteria. It seems that a consensus has now been reached, that for the purposes of the statute, persecutions based on ethnical, national or cultural grounds shall also constitute crimes against humanity. In that regard persecution based on ethnic grounds should be understood as being synonym with the notion of persecution based on racial grounds. On the other hand, persecution based on national grounds, however, seems to enlarge the definition of crimes against humanity since thereby persecutions based on a specific origin would also be encompassed[68]. This is even more true for the possible inclusion of the crime of persecution based on cultural grounds, given the fact that not even the Convention on the Elimination of all Forms of Racial Discrimination contains a similar prohibition. Finally it still remains doubtful, whether persecutions against any identifiable group or based on gender or other similar grounds should also come within the notion of crimes against humanity. While the criminalization of the persecution based on gender could at least be based upon on article 2 of the Convention on the Elimination of all Forms of Discrimination against Women, the further proposed General Clause seems to lack the required specificity needed for a criminal statute.

ff) Forced Disappearance of Persons

Some delegations also want to include the forced disappearance of persons in the list of crimes against humanity. Regardless of the severity of such acts, there are doubts as to the customary law nature of such a criminal norm. While it is true that both the ILC and the General Assembly of the United Nations have taken the view that such forced disappearance of

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67 See Article 5 lit. (c) of the Tokyo Charter.

68 See as to the similar situation in regard to the Convention on the Elimination of all Forms of Racial Discrimination, N. Lerner, *The UN-Convention on the Elimination of all Forms of Racial Discrimination*, 1980, 30–31.

persons should be qualified as crimes against humanity[69], the only legally binding text which obliges states to punish such acts is the Inter-American Convention on the Forced Disappearance of Persons, which only entered into force in 1996 and which by now has only been ratified by a small number of states.

gg) Other Inhumane Acts

It remains still doubtful whether the statute for the future ICC – similar to the statute of the Nuremberg and the Tokyo Tribunals, article 5 lit. (i) of the statute of the International Criminal Tribunal for the Former Yugoslavia and article 3 lit. (i) of the International Tribunal for Rwanda – will contain a general clause according to which other inhumane acts would also constitute crimes against humanity. One has to first note *inter alia* that the Convention against Torture refers to other forms of inhumane treatment only in its preamble and not in its operative part. Besides, adding a similar provision referring to other inhumane acts could only be justified, in its vagueness, if it was to be combined with a qualifying formula as was indeed proposed by the ILC, i.e. that only similar severe acts which have lead to significant bodily or mental harm are considered to be crimes against humanity[70].

3. War Crimes

A. General Questions

It was only in December 1997 that significant steps towards a definition of war crimes could be taken. Until February 1997, there had been rather incompatible positions which were enshrined on the one hand in a proposal made by the International Committee of the Red Cross[71] and, on

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69 See article 18 lit. (e) of the Draft Code of Crimes against the Peace and Security of Mankind as well as the preamble to A/RES/47/133 of 18 December 1993.

70 It has to be noted that within the framework of the work of the Preparatory Committee no serious attempts have been made to include a criminal norm on apartheid or similar institutionalized forms of racial discrimination; but see article 18 lit. (f) of the Draft Code of Crimes against the Peace and Security of Mankind of the ILC.

71 The proposition of the ICRC was formally tabled by the delegations of Switzerland and New Zealand, see Doc.A/AC.249/1997/WG.1/DP.2.

the other hand, in a proposal submitted by the United States[72]. That situation has to be seen against the background that until that time neither the United States, France nor India, Indonesia, Israel, Pakistan, Turkey as well as the United Kingdom had ratified the two Additional Protocols of 1977 to the Geneva Conventions of 1949[73].

Furthermore, the United States, in particular had taken the position that the statute should contain a threshold clause according to which the future ICC should be only able to exercise its jurisdiction in regard of war crimes, if such violations of international humanitarian law were committed as part of a plan or systematic policy or as part of a widespread occurrence of such acts. In that regard it is worth mentioning that while it is true that such a massive committing of the crimes under consideration is a constituent element of the notion of crimes against humanity, it would constitute a novel element within the definition of war crimes. It is for that reason that a relatively high number of delegations spoke against the inclusion of any such threshold clause. On the other hand, it has to be noted that this threshold clause as currently drafted would only limit the jurisdiction of the ICC but would leave the characterization of the individual crime untouched. The background of this proposal is the fact that the ICC might otherwise eventually exercise its jurisdiction as to individual war crimes even if not committed within a context of a massive violation of the rules of warfare and thereby interfere with the military justice system of a given state. But even taking into account this intention, the necessity for such a threshold clause must be still questioned. This is due to the fact that in line with the principle of complimentarity as provided for in the statute of the ICC[74], the future Court will be only competent to act if the respective national jurisdiction is either unwilling or unable to genuinely prosecute itself a person who has committed a war crime, thereby sufficiently protecting legitimate concerns for the integrity of national systems of military justice.

B. War Crimes Committed in International Armed Conflicts

Right from the beginning of the work of the Preparatory Committee, a general consensus had been reached, that all grave breaches of the Geneva Conventions of 1949[75] should be considered war crimes for the purposes of the statute. This is not at all surprising given the fact that by now more

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72 Doc.A/AC.249/1997/WG.1/DP.1.

73 France has, however, ratified the Second Additional Protocol. The United Kingdom has in the meantime adhered to the two additional protocols.

74 As to this principle see below V.

75 See now article 5 (War Crimes), part A of the Draft Statute.

than 185 states have ratified the Geneva Conventions and that the ICJ in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons has confirmed the customary international law nature of the content of these conventions[76].

In order to avoid the question, whether and if so, to what extent, the further grave breaches contained in article 11 para. 4 and article 85 para. 3 of the First Additional Protocol of 1977 have yet become part of customary international law – a question that has been left open by the ICJ in its above mentioned Advisory Opinion[77] – the other provisions dealing with international armed conflicts are to be found under the heading of "serious violations of the laws and customs of war". This is particularly important since the reference to rules of customary international law might make it possible to invoke the notion of reprisals in order to justify otherwise prohibited means and methods of warfare. In that regard it has to be noted, however, that almost all of the prohibitions contained in this part are nowadays no longer subject to reprisals[78].

Against the background of the dispute as to the customary international law status of at least some provisions of the two Additional Protocols of 1977, the statute will contain a provision which stipulates that the definition of crimes shall not be interpreted as limiting or prejudicing in any way existing or developing rules of international law[79] as they derive from customary or treaty law. One has to also note that in the case of overlapping between provisions of Convention (IV) respecting the Laws and Customs of War on Land of 1907 (Hague Rules) and the provisions of the two Additional Protocols of 1977, in almost all cases reference is made to the respective provisions of the Hague Rules. This should, however, not be

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76 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 66 et seq., (82). But see also article 85 para. 5 of the First Additional Protocol of 1977 according to which all the grave breaches contained in the four Geneva Conventions of 1949 as well as those contained in the First Additional Protocol itself constitute war crimes.

77 In para. 84 of the above mentioned Advisory Opinion, the ICJ only stated that "(...) Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat (...)".

78 As to the extent of customary prohibitions of reprisals see in particular, F. Kalshoven, "Belligerent Reprisals Revisited", *NYIL* 21 (1990), 43 et seq. Apart from prohibitions of reprisals as they exist under customary international law, those states bound in respect of a specific armed conflict by the Geneva Conventions and the First Additional Protocol respectively have to abide by the treaty-based prohibitions of reprisals contained therein.

79 Article Y, 25 Draft Statute.

taken to indicate any substantive difference. To the contrary, this is purely based on the fact that certain states, which so far have not yet ratified the two Additional Protocols of 1977 where unwilling to use language contained therein. Furthermore any reference to language derived from the two Additional Protocols would have necessitated cross references to other provisions thereof which would have further complicated the drafting of the text.

The following discussion will now analyse in more detail some of the more problematic provisions of the draft which are applicable to international armed conflicts[80].

a) Attacks on the Civilian Population

A core provision of the draft statute submitted to the Rome conference — the customary law nature of which has been confirmed by the ICJ[81] — provides that the civilian population as such should not form the object of an attack. Notwithstanding France — taking into account its strategy of nuclear deterrence which does not exclude the possibility of directly attacking population centers — seriously opposed the inclusion of this provision. This is even particularly surprising as the ICJ in the above mentioned Advisory Opinion unanimously stated that the use of nuclear weapons is also subject to the general rules and customs regulating warfare[82]. Besides, one should also mention that the International Criminal Tribunal for the Former Yugoslavia has stated that even in the case of

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80 See also article 5 (War crimes), part B., lit. (e) Draft Statute which, on the basis of article 23 para. 1 lit. (f) of the Hague Rules respecting the Laws and Customs of War on Land, makes perfidy a punishable crime. However, contrary to the Hague Rules, the unauthorized use of the flag of the United Nations is also made a punishable crime.

81 ICJ Reports 1996, 66 et seq. In para. 78 of its Advisory Opinion, the Court stated expressly: "States must *never* make civilians the objects of attack and must consequently *never* use weapons that are incapable of distinguishing between civilians and targets" (emphasis added). For a more thorough analysis of the Advisory Opinion of the court see *inter alia*, K. Oellers-Frahm/T. Marauhn, "Atomwaffen, Völkerrecht und die internationale Gerichtsbarkeit — Anmerkungen zur Spruchpraxis internationaler Organe hinsichtlich der völkerrechtlichen Zulässigkeit von Atomwaffentests, der Drohung mit oder des Einsatzes von Atomwaffen", *EuGRZ* 24 (1997), 221 et seq., (234–235).

82 See paras. 85–86 of the Advisory Opinion.

non-international armed conflicts this prohibition forms part of customary international law[83].

b) Prohibition of Causing Excessive Collateral Damages

The question to what extent the causation of collateral damages constitutes a war crime also created significant problems within the framework of the work of the Preparatory Committee[84]. First, it has to be stated, that it was again the French delegation which as a matter of principle opposed the inclusion of such a provision. Otherwise consensus had been reached that — going further, in that respect, than the respective provision of the First Additional Protocol — apart from the killing of civilians and damage to civilian objects, widespread, long-term and severe damage to the natural environment, may also constitute prohibited collateral damages. On the other hand, no consensus could be reached whether the proportionality clause, contained in article 51 para. 5 lit. (b) of the First Additional Protocol, should also be included in the statute of the future court or whether instead a provision should be included according to which only those damages not justified by military necessity shall be illegal. A compromise proposal put forward by Switzerland and the United Kingdom, which is partly based upon a declaration made *inter alia* by Germany when it ratified the First Additional Protocol[85], provides that the proportionality

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83 Prosecutor v. Tadic, Appeals Chamber IT-94-1-AR72, Judgment of 2 October 1995, paras. 100 et seq. It seems to be doubtful, however, whether the request to also criminalize attacks upon civilian objects is appropriate. It is true that such attacks, even if they cannot be criminalised can, nevertheless be considered attacks upon the civilian population, and are prohibited by virtue of article 52 of the First Additional Protocol. However, such attacks do not constitute — unlike attacks upon the civilian population (see in that regard article 85 para. 3 lit. (a) of the First Additional Protocol) — grave breaches of the Additional Protocol.

84 As to the wording of the relevant provision as elaborated by the Preparatory Committee see article 5 (War crimes), part. B, lit. (b) Draft Statute.

85 For the wording see BGBl. 1991 II, 968–969, (969), No. 5. This declaration stipulates: "In applying the rule of proportionality (...) 'military advantage' is understood to refer to the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack". Similar declarations have been made by Australia, Belgium, Italy, Canada, New Zealand, the Netherlands as well as Spain, when they ratified the First Additional Protocol.

of eventual collateral damages caused shall be judged in relation to the concrete and direct *overall* military advantage anticipated[86].

c) Prohibition of Transfer of Population into Occupied Territories

During the negotiations, the provisions on the transfer of population into occupied territories brought about major political problems. At the same time, it cannot be doubted that these provisions are of particular importance, given the practice of so-called "ethnic cleansings" as they have in particular been taking place within the framework of the military conflict in the former Yugoslavia. In this regard, it is first important to note that the prohibition of unlawful deportations or transfers or unlawful confinements, as contained in article 49 para. 1 in connection with article 147 of the Fourth Geneva Convention, was uncontroversial. On the contrary, however, the question whether a provision, which — in line with article 49 para. 6 of the Fourth Geneva Convention — would also make it a war crime for nationals of the occupying power to transfer parts of its own civilian population into the territory it occupies, should be included in the statute, brought about a massive dispute[87]. This conflict had the effect that further options apart from the formula contained in article 49 para. 6 of the Fourth Geneva Convention were added to the draft statute. In particular, one now also finds a reference to article 85 para. 4 lit. (a) of the First Additional Protocol respectively an express prohibition as to the establishment of settlers in an occupied territory and changes to the demographic composition of such occupied territory.

The argument, mainly brought forward by Israel, that even the inclusion of a provision based on article 49 para. 6 of the Fourth Geneva Convention is not warranted, since this provision does not constitute a grave breach of the Fourth Geneva Convention, seems not to be convincing. First, one has to mention that this provision has, by virtue of article 85 para. 4 lit. (a) of the First Additional Protocol, gained the status of a grave breach. Furthermore, notwithstanding its contractual origin, the customary international law nature of this prohibition can, now, no longer be seriously doubted[88].

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86 Wording to be found in article 5 (War crimes), part. B, lit. (b), Option II of the Draft Statute.

87 The political background to this dispute was in particular, the Israeli policy within regard to Israeli settlements in the occupied territories, and also the situation as it exists in Cyprus since 1974.

88 See *inter alia* H.-P. Gasser, in: D. Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, 1995, 241: "(...) Arts. (...) 47 ff. G.C. IV are now seen to be a codification of the rights and duties of the occupying power".

d) Use of Prohibited Weapons

Even more important is the provision on the use of prohibited weapons[89] which again brought to surface the longstanding dispute as to the legality of the use of nuclear weapons. On the one hand, a group of Western countries had proposed to include an exhaustive enumeration of those weapons which are calculated to cause superfluous injury or unnecessary suffering[90]. In that regard it is important to note that the inclusion of both biological and chemical weapons in the list of prohibited weapons was undisputed. Further proposals were, however, directed to also include in any such list also antipersonnel landmines, laser-blinding weapons and nuclear weapons.

The inclusion of a criminal law norm prohibiting the use of antipersonnel mines, even if one takes the view that such a general prohibition would be advisable *de lege ferenda* would clearly go beyond current customary international law since the relevant treaty has, to date, been ratified only by a small number of states. The same is true for laser-blinding weapons since the respective additional protocol (Protocol IV) was adopted pursuant to article 8.3 lit. (b) by the Conference of the States parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, at the 8th plenary meeting on 13 October 1995 and has, to date been ratified only by 15 states.

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89 See article 5 (War crimes), part. B, lit. (o) Option I-IV of the Draft Statute.

90 Based upon article 23 lit. (e) of the Hague Rules only employing those weapons "(...) which are *calculated to cause* unnecessary suffering" (emphasis added) shall be punishable. But see to the contrary the formula contained in article 35 para. 2 of the First Additional Protocol of 1977 which speaks of weapons "*of a nature to cause* superfluous injury or unnecessary suffering" (emphasis added). The ICRC rightly pointed out, that the first formula is derived from an incorrect translation of the sole authentic French text of the Second and Fourth Hague Conventions which speak of weapons "propre à causer des maux superflus", which however, only in the case of the Second Hague Convention was translated as "(...) of a nature to cause (...)". In the meantime new treaty texts, such as article II para. 1 lit. (b) of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, article 1 para. 1 of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) and article 1 of the above mentioned Protocol IV, and finally article 2 para. 1 of the Treaty on the Ban of Landmines, basing itself upon the formula contained in article 3 of the Second Additional Protocol, normally use the term "designed to cause (...)".

Given the fact that the ICJ in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons has not generally excluded their use[91], even the inclusion of a provision on nuclear weapons seems to be problematic. On the other hand, the question as to the individual criminal liability for the use of nuclear weapons — despite its obvious major political importance — seems to be more of a theoretical nature. If any state were ever to seriously consider using nuclear weapons, such a step would, under all imaginable scenarios, involve such a military threat in which possible criminal consequences of any such use would be of little if any relevance.

As an alternative to an enumerative list of prohibited weapons, the proposal was made to repeat in the statute of the ICC the more general formula already contained in article 35 of the First Additional Protocol of 1977, according to which any use of weapons which cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, is prohibited. In that case, however, as in the case of the First Additional Protocol, the question would arise which weapons would fall under such a prohibition[92] and whether nuclear weapons would be covered or not.

Finally, a Canadian proposal[93] might lead the way for a possible compromise. Under that proposal, besides an enumerative list of prohibited weapons, the use of such weapons that have become the subject of a comprehensive prohibition pursuant to customary or conventional national law[94] would also be subject to the jurisdiction of the ICC. This

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91 Para. 97 of the Advisory Opinion stipulates: "(...) [I]n view of the present state of international law viewed as a whole (...) the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake".

92 Even for those states which do not preclude the use of their own nuclear weapons or which, like Germany, might eventually participate in the use of foreign nuclear weapons, this formula might eventually still be acceptable against the background of the practical irrelevance of the question of the use of nuclear weapons since they would always retain the possibility to make a declaration similar to the one made in relation to the First Additional Protocol according to which from their point of view, nuclear weapons do not fall within the realm of that prohibition. As to the wording of the declaration of Germany which was made on the occasion of the ratification of the First Additional Protocol, see BGBl.1991 II, 968–969.

93 Article 5 (War crimes), part. B, lit. (o), Option 2, (vi) of the Draft Statute.

94 However, if one includes, as proposed by Canada, weapons which are only prohibited pursuant to a treaty, the problem of a split legal regime

proposal entails the problem however, that it somewhat lacks the specificity and predictability needed for a criminal norm.

e) Rape and Other Forms of Sexual Violence as Constituting War Crimes

Taking into account the recent experiences of both the conflict in the former Yugoslavia as well as those of the conflict in Rwanda[95], it is not surprising that the current draft for the statute of the ICC now contains a provision which no longer considers rape and similar forms of sexual violence as constituting outrages upon personal dignity, but that it created a specific provision[96]. In particular, not only rape as such but also sexual slavery, enforced sterilisation, enforced prostitution and enforced pregnancy would under the current proposal be considered to constitute war crimes. In accordance with the practice of the International Criminal Tribunal for the Former Yugoslavia[97], that provision indicates that such forms of sexual violence at the same time constitute grave breaches of the Geneva Conventions. In particular one might consider them to fall under the categories of torture or willfully causing great suffering according to article 32 of the Fourth Geneva Convention. The current provision, as drafted, underlines, at the same time, however, that forms of sexual violence other than rape, sexual slavery, enforced sterilisation and enforced prostitution would only come within the jurisdiction of the future ICC if and to the extent that they also constitute grave breaches of the Conventions[98].

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depending on whether the respective national state of the offender is bound by a given treaty or not, arises.

95 See in particular T. Meron, "Rape as a Crime under International Humanitarian Law", *AJIL* 87 (1993), 424 et seq., (in particular 426–427) as well as S. Healey, see note 55, in particular 334 et seq. as to the question whether rape constitutes a grave breach of the Geneva Convention.

96 It is interesting to note that the proposal by the Republic of South Africa to also include, in line with article 85 para. 4 lit. (c) of the First Additional Protocol, a provision under which apartheid and similar practices would constitute a war crime was only supported by the other member states of the South African Development Community.

97 See in particular the indictments in the Cases against Gagovic and others (IT-96-23) "Foca" and Deliacic and others (IT-96-21) "Celibici", in which rape is considered to constitute torture.

98 This interpretation of the relevant formula is confirmed by the use of the term "also" as well as in the fact that the second alternative "any other form of sexual violence" is separated by a comma from the other alternatives, thus making it clear that the additional formula "constituting a grave

Finally, it should be noted that the Holy See spoke out against the inclusion of enforced pregnancy into the statute of the ICC since it considered that it might be understood as undermining the legitimacy of national legislation prohibiting or regulating the availability of abortions[99].

f) Protection of Children in Times of Armed Conflict

Given the fact that the United States is one of the very few states which, so far, has neither ratified the First Additional Protocol to the Geneva Conventions[100] nor the Convention on the Rights of the Child[101], it was almost the only State to oppose generally any inclusion of provisions which would make the use of children in armed conflict a crime[102]. Within the large group of States which generally favour such a clause, it is, however, still disputed which behaviour exactly should be made a criminal offence. Consensus seems to have been reached, however, as to the question that children up to the age of fifteen should be protected.

A proposal put forward that already *allowing* children under the age of fifteen years to take part in hostilities shall constitute a war crime gives rise to serious doubts. Both, the First Additional Protocol of 1977 as well as the rights of the Convention on the Rights of the Child only oblige contracting parties to take *all feasable measures* to avoid that children participate in hostilities. Thus, both treaties do not oblige state parties to reach a specific goal, i.e. to avoid under all circumstances that children participate in an armed conflict, but only to undertake *bona fide* efforts in that regard[103]. Given this fact, it seems to be unreasonable to go even further and provide for individual criminal responsibility for such omissions. On the contrary, it seems advisable to limit the individual criminal

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breach of the Geneva Conventions" has to be understood in that regard as a qualifying element.

99 See the proposal submitted by the Holy See as contained in Doc.A/AC.249/1998/DP.13.

100 As to the protection of children under the First Additional Protocol, see article 77 para. 2.

101 See in that regard article 38 para. 2 and 3 of the Convention on the Rights of the Child.

102 See generally as to the legal norms governing the protection of children in times of armed conflict T. Marauhn, "Die Rechtsstellung von Kindern in bewaffneten Auseinandersetzungen", *HuV* 8 (1995), 64 et seq.

103 It has to be noted, however, that there exists in that regard a distinction, since article 4 para. 3 lit. (c) of the Second Additional Protocol also provides that allowing children to take part in hostilities is prohibited.

responsibility of individuals — notwithstanding more far-reaching state obligations — to the most problematic situations, i.e. those cases where children are specifically recruited or forced to take part directly in hostilities. This is due to the fact that these cases circumscribe the core dangers for children and that in these cases, there will be also the least problems to prove the necessary criminal intention of the offender.

C. Provisions Governing Non-International Armed Conflicts

During the deliberations of the Preparatory Committee, many delegations took the view that the part on non-international armed conflicts should contain a general provision which, in accordance with article 1 para. 2 of the Second Additional Protocol of 1977, would generally exclude situations of internal disturbances and tensions such a riots, isolated and sporadic acts of violence or other acts of a similar nature from the applicability of rules governing international armed conflicts[104]. Since the formula, as proposed, makes no reference to article 1 para. 1 of the Second Additional Protocol, conflicts between several insurgent groups would be still covered by the statute. Thus, in practice there would be no significant distinction to the formula already contained in common article 3 of the Four Geneva Conventions which, similarly, is applicable only in situations of armed conflict[105]. That means that the proposed threshold clause would, by and large, only restate a limitation already existing under current customary international law.

a) Violations of Common Article 3 of the Four Geneva Conventions

The inclusion of violations of common article 3 into the statute was only opposed by a few states, namely China, India, Indonesia, Pakistan and also Turkey. This is surprising since this provision according to the ICJ,

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104 Notwithstanding this proposed provision, criminal liability for crimes against humanity or for acts of genocide would remain untouched; see generally as to the applicability of rules in armed conflicts below the threshold of a civil war A. Eide/A. Rosas/T. Meron, "Combating Lawlessness in Grey Zone Conflicts through Minimum Humanitarian Standards", *AJIL* 89 (1995), 215 et seq.

105 See generally as to the question of the existence of an armed conflict in the meaning of common article 3, CICR (ed.), *La Convention de Génève Relative à la Protection des Personnes Civiles en Temps de Guerre*, 1956, 40 et seq., (in particular 42), where the ICRC takes the position that the conflict under consideration must have lead to combat and to the use of armed forces.

contains a minimum yardstick in cases of civil strife[106]. Furthermore, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has explicitly confirmed that under current existing rules of customary international law, there is already an individual criminal responsibility for violations of common article 3 even in internal armed conflicts[107].

b) Other Norms Governing Non-International Armed Conflicts

The inclusion of further crimes which would be applicable in cases of non-international armed conflicts was, apart from those states just mentioned which already spoke out against the inclusion of common article 3, also opposed by more states such as *inter alia* the Russian Federation[108]. Apart from those provisions which were already disputed in relation to international armed conflicts[109], it was also disputed whether in relation to situations of non-international armed conflicts, too, there should be a provision on prohibited weapons. Taking into account the determination by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case against Tadic[110], that also in cases of civil strife, customary rules have developed which prohibit the use of specific weapons[111], it seems appropriate to also include in that part a list of

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106 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, 14 et seq., (114).

107 Prosecutor v. Tadic (IT-94-1-AR72), Judgment of 2 October 1995, paras. 128 et seq. The relevant part of the judgment explicitly stipulated that "(...) customary international law imposes criminal liability for serious violations of common article 3".

108 It is important to note that a rather large majority of states did not oppose the inclusion of further crimes beyond those mentioned in common article 3. In particular there was a general agreement within that group to include a prohibition of plundering, a norm on sexual violence parallel to the one applicable in international armed conflicts, perfidy, the killing or wounding treacherously of combatants, subjecting persons to physical mutilation or to medical or scientific experiments as well as practices of so-called ethnic cleansing, see in particular article 5 (War crimes), part. D., lit. (d), (e), (e bis), (g), (h), (i), (j), and (k) of the Draft Statute.

109 See already above II.3.B.

110 Prosecutor v. Tadic (IT-94-1-AR 72), Judgment of 2 October 1995, paras. 127 et seq. (127 and 134).

111 See in particular para. 124 of the above mentioned judgment which stipulated that "(...) there undisputedly emerged a general consensus in the international community on the principle that the use of those

prohibited weapons, which might, however, be shorter than the one which is applicable to international armed conflicts given the specific characteristics of such internal conflicts.

While such a proposal to include a provision of prohibited weapons into the draft statute still found relatively broad support, only very few delegations seriously proposed further extensions to the criminal provisions governing internal armed conflict[112]. In particular, it seems problematic to include provisions similar to those governing international armed conflicts where the behaviour in question is not even prohibited under the Second Additional Protocol of 1977. This determination would, for example, be true as far as the protection of the natural environment, or attacks on installations containing dangerous forces are concerned.

4. Crime of Aggression

The most difficult issues, both politically and legally have arisen in relation to the definition of the crime of aggression. That is not only due to the fact that up to now only in one case, namely in the context of the Nuremberg trials, has there been international judicial practice as to the crime of aggression, but also that only very few states have, like Germany, provided in their respective national criminal laws for the prosecution of the crime of aggression[113]. Besides, every discussion relating to the definition of the individual criminal liability for the crime of aggression is necessarily overshadowed by the general debate on the definition of aggression. Finally, it is the crime of aggression, which also entails most the difficult problems as to the relationship between the ICC and the Security Council.

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weapons (the Court here refers to chemical weapons, the author) is also prohibited in internal armed conflicts".

112 As to details see article 5 (War crimes), part. D, Opt. II, 24 of the Draft Statute.

113 Section 80 of the German Criminal Code provides that preparing a war of aggression is a criminal offence but even this norm has so far been dealt with by German courts quite infrequently, for an example see Landgericht Köln, *Neue Zeitschrift für Strafrecht* 1 (1981), 261. The Court however only stated that any war of aggression in the meaning of Section 80 of the German Criminal Code means every armed aggression prohibited by public international law. It thus left the question undecided when exactly such an armed aggression exists.

A. Development of the Discussion relating to the Crime of Aggression

Among the five permanent members of the Security Council, the United States in particular have fiercely opposed the introduction of the crime of aggression into the statute of the future ICC[114]. The four other permanent members of the Security Council have shown more flexibility as to the possible inclusion of this crime. *Condicio sine qua non* for all of them, however, is that the responsibilities of the Security Council under the Charter of the United Nations remain untouched[115]. The ILC in its turn had left the question of the definition of the crime of aggression open, since — while providing for the inclusion of the crime of aggression into the proposed draft statute of the future ICC — it had made no attempt towards a workable definition of this crime[116].

Both the first principle of the so called Friendly Relations Declaration of the General Assembly as well as article 5 para. 2 of A/RES/3314 (XXIX) of 14 December 1974, by which the General Assembly undertook an attempt to define aggression, provides that the waging of a "war of aggression" constitutes a crime which entails responsibility in accordance with international law. Even if one considers that these two documents thereby refer to the criminal responsibility of individuals[117]and notwithstanding the fact that this formula is based on article 6 lit. (a) of the statute of the Nuremberg Military Tribunal[118], it still does not contain a workable definition since it defines the notion of aggression with the very same term, i.e. the notion of a war of aggression. Given this fact, it seems to be more advisable to rely on language contained in the Charter of the United Nations and base oneself on either Article 2 para. 4 of the Charter, i.e. the use of force, or on Article 51 of the Charter, i.e. the existence of an armed attack. Within the Preparatory Committee, there was a general consensus

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114 On the contrary, Germany has on several occasions pleaded for the inclusion of such a crime, see in particular the article by the German Minister of Foreign Affairs K. Kinkel, "Für einen funktionsfähigen Weltstrafgerichtshof", *NJW* 50 (1997), 2860–2861 (2861).

115 For a more thorough discussion of this question see under II.4.B.

116 ILCYB 1995 Vol.II, Part 2, 38–39.

117 But see also the Commentary of the ILC in regard of article 20 of its Draft statute, ibid., 39.

118 Article 6 lit.(a) stipulated: "Crimes Against Peace: namely planning, preparation, initiation or waiting of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".

that the pure threat of force, notwithstanding the fact that Article 2 para. 4 of the Charter of the United Nations also outlaws such behaviour, shall not lead to individual criminal responsibility. This is supported by the fact that if there has been a pure threat of force which did not lead to the actual use of force, the general prohibition of the use of force has been still able to fulfill its function within the international legal order, i.e. guarantee the maintenance of international peace and security[119].

It seems to be appropriate and in accordance with relevant historic precedences to limit the individual criminal responsibility for the crime of aggression to those cases in which there has been a massive violation of the prohibition of the use of force. Thus, it seems to be advisable — instead of using the relatively broad term of "use of force" which incidentally would also include the pure support of insurgents[120] — to rely on the notion of an armed attack as contained in Article 51 of the Charter of the United Nations[121]. Such a narrow definition of the crime of aggression would only encompass massive uses of armed force leading to negative consequences for the attacked states and would *inter alia* exclude pure border incidents[122]. It might be doubted whether adding the words "against the territorial integrity or political independence" to the definition would further limit the scope of application of the crime of aggression since it seems to be generally accepted that this part of Article 2 para. 4 of the Charter of the United Nations does not, as such, limit the prohibition

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119 C. Tomuschat, "Die Arbeit der ILC im Bereich des materiellen Strafrechts", in: G. Hankel / G. Stuby, *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen*, 1995, 270 et seq., (279). Against this background, the definition of the crime of aggression should make sure that any planning, preparation or ordering of an aggression shall be only punishable if *in concreto* such a behaviour has led to an attack being undertaken, see in this regard the German proposal contained in article 5 (Crime of aggression), Option 3, para. 2 of the Draft Statute.

120 See the judgment of the ICJ in the Nicaragua Case, ICJ Reports 1986, 14 et seq., (101), para. 191, where the Court makes reference to the 8th and 9th paragraph of the first principle of the so called Friendly-Relations Declaration.

121 See *ibid.*, where the Court stated, that an armed attack constitutes the *most grave form of the use of force*.

122 Against the inclusion of such border incidences Tomuschat, see note 119, 279; see also ICJ Reports 1986, 14 et seq., (103), para. 195 as well as A. Randelzhofer, "On Article 51", 662 et seq., Mn.4, 19, in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 1994.

of the use of force as contained therein[123]. This result would be reversed, however, if there was a further requirement that the attack *was directed* against the territorial integrity or political independence of a State, since the ICC would then have to prove that the offender in question indeed had such a specific intention[124].

Some States have proposed that all acts contained in article 3 of Resolution 3314 should at the same time also constitute acts involving an individual criminal responsibility. This seems to be problematic, however, since it is already doubtful whether all of the elements contained in Resolution 3314 can now be considered as forming part of customary international law[125]. This is even more true, since Resolution 3314 itself was only drafted in order to serve as a guiding instrument for the Security Council[126]. But even if one was to assume *arguendo* that this provision reflects customary international law, it still would be doubtful, whether all those acts contained therein already *de lege lata* involve individual criminal responsibility. On the other hand, at least the occupation of the territory of another State or the annexation by the use of force of another State or part thereof, as enshrined in article 3 lit. (a) of Resolution 3314 would constitute the core element of the crime of aggression, which already within the framework of the Nuremberg Charter, formed the basis for individual criminal responsibility. Thus, it seems to be advisable to limit the criminal responsibility of individuals for the crime of aggression to those very specific cases of the use of armed forces.

Finally, it seems to be necessary, be it only as a matter of clarification, that only those armed attacks, which occur in violation of the Charter of the United Nations can bring about the individual criminal responsibility of a person. Any such addition would also underline that acts which are themselves based on either Article 51 of the Charter of the United Nations or which occur within the framework of a mandate of the Security Council can by no means lead to criminal responsibility.

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123 *Id.*, "On Article 2", 80 et seq., Mns. 34-35 with further references, in: Simma, see above.

124 See the proposal made by Germany as contained in article 5 (Crime of aggression), Option 3, para. 1 of the Draft Statute.

125 But see ICJ Reports 1996, 14 et seq., (103), para. 195, where the Court stated that article 3 lit. (g) of Resolution 3314 "(...) may be taken to reflect customary international law".

126 See e.g. C. Lerche, *Militärische Abwehrbefugnisse bei Angriffen auf Handelsschiffe*, 1992, 131 et seq.

B. Role of the Security Council in Regard of the Crime of Aggression

The ILC had proposed in its Draft statute for an ICC to include in the statute a provision under which any proceeding dealing with an act of aggression or connected therewith shall not be started unless the Security Council had previously made a determination that the State in question had indeed committed such an act of aggression. Going even further, it was the United States that proposed to include in the definition of the crime itself a formula according to which the illegality of the act under consideration would be determined by the Security Council[127]. When analysing these different proposals as to the role of the Security Council in regard to the crime of aggression, one has to start from the legal situation as it currently exists under the Charter of the United Nations. Under Article 24 of the Charter, the Security Council has the "primary responsibility for the maintenance of international peace and security", a responsibility which it exercises on behalf of the member States of the organisation. At the same time, Article 39 of the Charter grants the Security Council the competence to determine whether a given State has committed a breach of the peace or an act of aggression. Still, this does not preclude the ICJ, from giving decisions as to acts which also fulfill the notion of an act of aggression under Article 39 of the Charter of the United Nations[128]. Thus, while this might lead, at first glance, to allow the ICC to act independently of the Security Council with regard to the crime of aggression, a better view confirms that the situation with regard to the ICC has to be distinguished in several regards.

First, the statute of the ICC will – unlike the statute of the ICJ – not form an integral part of the Charter of the United Nations. Accordingly, the statute of the ICC will be subject to the limits and obligations which are contained in Article 103 of the Charter. That means that – whatever the contracting parties of the statute of the ICC agree on – their obligations under the Charter and thus, in particular, their obligations under Arts. 24 and 39 of the Charter will always prevail. Thus, if the General Assembly, being another principal organ of the organisation is, at least as a matter of principle, prevented from acting if the Security Council is exercising its functions under Chapter VII, this must be even more so for an organisation created by way of a separate treaty.

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127 See the proposals contained in Doc. A/AC.249/1997/L.8/Rev.1 of 14 August 1997, 7.

128 See e.g. the Decision of the ICJ in the Teheran Hostages Case, ICJ Reports 1980, 3 et seq., (19 and 21) as well as the one in the Nicaragua Case, ICJ Reports 1984, 392 et seq., (433–435).

Secondly, there is a clear danger that any investigation undertaken by the ICC for an act of aggression without prior authorisation by the Security Council might bring about an escalation of the situation which could make it significantly harder for the Security Council to fulfill its duties under Chapter VII of the Charter of the United Nations. Thus, it seems that the proposal originally made by the ILC must generally be considered as being a correct description of the legal situation as it currently exists under the UN-Charter[129].

If, indeed, one does take the view that the inclusion of the crime of aggression also necessitates the inclusion of a provision on the role of the Security Council as to this crime, the further problem arises, as to what legal consequences would then follow from such a determination by the Council for an eventual criminal proceeding taking place before the ICC. In that regard it has been proposed that such a determination made by the Security Council should bind the ICC. This seems to be also in line with the system of the Charter since the contracting parties to the statute of the ICC could not — by creating a specific organ such as the ICC — deviate from the binding effects of resolutions enacted by the Security Council acting under Chapter VII. But since it would already amount to a violation of the obligations of member States of the United Nations under the Charter, if a national tribunal punished a specific person for the crime of aggression even if the act under consideration had been ordered beforehand by the Security Council, or even where the other party has been qualified by the Security Council as aggressor, this must be also true for an international criminal tribunal such as the ICC to be created by a number of member States of the organization.

On the other hand, any determination by the Security Council can be only binding insofar and to the extent that it reaches a determination on the merits of the act of aggression subject to the jurisdiction of the ICC. Thus, the ICC itself would eventually have to consider and determine all those elements of the crime which are not already contained in the determination made by the Security Council under Article 39 of the Charter. This means that the ICC would first have to prove the individual

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129 On the other hand, this might not be true for the formula used by the ILC "(...) or directly related to an act of aggression". While it is true that the Security Council has under Article 39 of the Charter the sole competence to decide whether an act of aggression under Chapter VII has been committed or not, it does not under the Charter possess the sole competence to also determine whether, in the context of such an armed attack, other crimes such as genocide, crimes against humanity or war crimes have also been committed. Accordingly adding the words "or directly related to an act of aggression" is not necessitated by the Charter.

criminal responsibility of a given individual and in particular his or her specific intent. Furthermore, if one takes the view that the notion of aggression, as contained in Article 39 of the Charter and the notion of armed attack do not completely overlap, the ICC would have to eventually prove on its own whether all elements of an armed attack, not already contained in the notion of aggression, are fulfilled in a given case[130].

To summarize one might say that the introduction of the crime of aggression into the statute of the ICC brings with it the most serious problems both as to its acceptability as well as to its definition. Given this fact, one might wonder whether it will indeed be possible to bring about a situation in which the crime will be finally contained in the statute of the future ICC.

5. Treaty-based Crimes

In the beginning of the project on the creation of a future ICC, treaty-based crimes formed the vocal point of the discussions[131]. Now, however, this approach finds less and less support among the States participating in the work of the Preparatory Committee. Instead, a large majority of States want to limit the jurisdiction of the ICC to the above mentioned core crimes of genocide, crimes against humanity, war crimes and eventually the crime of aggression. This is mainly due to the fact that not all of the conventions, the violation of which would form the basis for treaty-based crimes have so far found sufficient worldwide acceptance and thus cannot be considered as reflecting current customary international law. However,

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130 On the other hand one should not overlook the fact that the Security Council has even in the case of the invasion of Kuwait not made a determination that Iraq had committed an act of aggression. On the other hand, the Security Council had on several occasions characterized certain military actions by Israel, Indonesia, and certain acts by South Africa and Angola as *"acts of armed aggression"*, or *"acts of aggression"* respectively. For details see J.A. Frowein, "On Article 39", 605 et seq., Mn.12, in: Simma, see note 122.

131 As to the list of possible treaty-based crimes which were discussed during the work of the Preparatory Committee see Doc.A/AC.249/1997/L.5, 16–17; see also article 20 lit. (e) of the Draft statute of the ILC, ILCYB 1994, Vol. II, Part 2, 38 as well as the Annex, *ibid.*, 70 et seq. It was Trinidad and Tobago, which in 1989, was asking for the creation of an international criminal court to punish the large-scale commission of drug-related crimes. For further details see C. Tomuschat, "Sanktionen durch internationale Strafgerichtshöfe", Verhandlungen des 60. DJT, Vol. II/1, Q 53 et seq., (57–58).

if one was to include the notion of treaty-based crimes into the jurisdiction of the ICC, it would necessarily follow that only crimes committed on the territory of the respective contracting parties of a given convention could be made punishable. Furthermore, it would be also necessary that these very same states would also be among the contracting parties to the statute of the ICC. Such an approach would then necessarily result in a weakening of the concept of an inherent and universal jurisdiction of the ICC[132].

III. Preconditions for the Exercise of Jurisdiction by the ICC

With regard to of the question under what conditions the ICC should be in a position to exercise its jurisdiction there are three main models opposed to each other. The first group of countries, which includes *inter alia* Germany, takes the position that the ICC, once established, should be able to exercise *ipso facto* and without any further requirement its jurisdiction for all of the above-mentioned core crimes, committed worldwide and regardless of whether the State on the territory of which the crime was committed, the custodial State, the State of the victim of the crime, or the country of origin of the offender or even some of them cumulatively have consented to the exercise of jurisdiction by the court[133]. In contrast thereto a second group of States would like to make the exercise of jurisdiction by the ICC dependant on the fact that some or all of the above mentioned States have either by ratifying the statute[134], or by accepting the jurisdiction of the Court in a manner similar to article 36 of the statute of the ICJ[135], consented to the exercise of jurisdiction by the ICC. Finally, a third group of States, which includes France, would require that with regard to of each and every individual investigation, all or some of the States

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132 It is against this background that Denmark proposed a compromise formula which suggested including in the statute a review clause according to which, after a given time a review of the crimes to be included in the statute should take place, for details see article 111, Option 2 of the Draft Statute.

133 This approach is most clearly contained in the further option to article 9, para. 1, 33 of the Draft Statute according to which "[a] State that becomes a party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5 (paragraphs (a) to (d))".

134 See article 9, Option 1, para. 1 of the Draft Statute.

135 See article 9, Option 2, para. 1 of the Draft Statute.

concerned must *ad hoc* consent to the exercise of jurisdiction by the ICC[136].

It seems safe to assume that first and foremost the first model would guarantee the creation of an effective ICC since, in particular, those States, the nationals of which are most likely to commit one of the above mentioned core crimes will be rather reluctant to submit themselves to the jurisdiction of the ICC. Besides, a system of individual declarations in parallel to article 36 of the statute of the ICJ — and even more so a model of an *ad hoc*-consent to be given in each individual case — would not only lead to practical problems but also would leave large lacuneae. This would even be more true, if one considers the possibility that a declaration by which the jurisdiction would be accepted could be — similar to the system of the ICJ — limited to one or more of the core crimes or to a certain specific period of time, or could explicitly exclude certain specific conflicts.

Regardless of the question which of the three models just outlined or a combination thereof will eventually become part of the statute of the ICC, the first and most far-reaching model that provides for an inherent and universal jurisdiction of the ICC would be only in line with customary international law if the contracting parties of the statute would not thereby exercise jurisdiction in violation of the sovereign rights of third States, not parties to the statute. Thus, it has to be demonstrated that the contracting parties to the statute of the ICC are indeed in a position to exercise, be it either individually or collectively, universal criminal jurisdiction for all of the core crimes to be included in the statute and thus could also by the same token by way of a treaty create an international criminal tribunal which would exercise such universal criminal jurisdiction on their behalf[137].

1. Genocide

The exercise of universal criminal jurisdiction for acts of genocide seems to be unproblematic, given the fact that article I of the Convention on the Prevention and Punishment of the Crime of Genocide, which by now has

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136 See article 7 Option 2 of the Draft Statute. Besides, even if one was to adopt this model, the question would arise, who would consent to the exercise of jurisdiction in the case of a failed State, where there is no effective government anymore which could express the consent on behalf of the State concerned.

137 See generally as to that problem R. Wolfrum, "The Decentralized Prosecution of International Offences Through National Courts", in: Y. Dinstein/M.Tabori, *War Crimes in International Law,* 1996, 233 et seq.

been ratified by more than 120 states, already provides for individual criminal responsibility for the crime of genocide. Besides it was the ICJ, which in its Advisory Opinion of 1951 confirmed the customary international law character of the principles contained in the Convention[138]. The Secretary-General of the United Nations, too, in its reports to the Security Council, which formed the basis for the creation of the statute of the International Criminal Tribunal for the Former Yugoslavia and which was accepted by the Security Council in S/RES/827(1993) of 25 May 1993[139] also confirmed that the relevant provisions of the Convention now form part of customary international law[140]. Besides, both a trial chamber as well as the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia have stated in the case against Tadic that the crimes listed in the statute of the tribunal and thus also the crime of Genocide had already *ex ante* created individual criminal responsibility by virtue of customary international law[141]. Finally, it was the ILC which both in its Draft Code of Crimes against the Peace and Security of Mankind as well as in its Draft statute for a future ICC[142] took the view that the crime of Genocide is punishable according to general customary international law.

Furthermore, it seems to be unproblematic to enable the ICC to also punish those crimes of genocide which neither have a personal nor territorial link to one of the contracting parties of the statute. At first glance, such an approach seems to be contradictory to article VI of the Genocide

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138 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 1951, 15 et seq., (22); see also the Separate Opinion of Judge Lauterpacht in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures), ICJ Reports 1993, 407 et seq., (439–440), para. 100.

139 For the wording of the relevant report by the Secretary-General see Doc. S/25704 and Add. 1 of 3 May 1993, text to be also found at Morris/ Scharf, see note 16, Vol. 2, 3 et seq.

140 See in particular *ibid.*, 9, where the United Nations Secretary-General stated, that the Convention "(...) has beyond doubt become part of international customary law".

141 Decision of the Appeals Chamber on the jurisdiction of the ICTY of 2 October 1995, The Prosecutor v. Tadic, IT-94-1-AR 74, 74, para. 143; see also the Decision of the Trial Chamber on the merits of the Case of 7 May 1997, IT-94-1-T, para. 5, where the Trial Chamber, in accordance with the above-mentioned report of the Secretary-General, takes the view that all of the crimes listed in article 2 through 5 of the Statute of the ICTY "(...) are beyond any doubt part of customary international law", see also *ibid.*, para. 622.

142 ILCYB 1994 Vol.II, Part 2, 20 et seq., (36).

Convention according to which persons who have committed genocide shall be put on trial by an international world court which was already provided for in the convention itself, only if one of the contracting parties has accepted its jurisdiction[143]. Developments since 1948 confirm, however, that it is now generally accepted that by virtue of customary international law, *every* state can exercise universal criminal jurisdiction for acts of genocide, i.e. can punish such acts regardless of the nationality of the offender, the nationality of the victims and the question of where the genocidal acts under consideration were committed. If this is true, it must be even more true that several states can transfer their national criminal jurisdiction to a future ICC, which in turn would then be able to exercise jurisdiction regardless of the consent of any of the states just concerned.

It is true that under article VI of the Genocide Convention, only those contracting parties on the territory of which an act of genocide was committed are under an obligation to punish these crimes. On the other hand, the *travaux préparatoires* of the Convention confirm that questions of jurisdiction reaching beyond this obligation of the respective territorial state were not dealt with at all by this provision. [144] Indeed, it is against this background that several states saw the necessity to make reservations as to article VI of the Genocide Convention according to which foreign tribunals may not exercise jurisdiction over offences committed on a territory of other state parties[145]. Besides, several states had considered the

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143 Article VI of the Convention stipulates: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a component tribunal of the state in the territory of which the act was committed, *or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction*" (emphasis added).

144 See the detailed description of the *travaux préparatoires* in: Robinson, see note 8, 30 as well as M. Lippmann, "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later", *Temple Int. and Comp. L.J.* 8 (1994), 1 et seq., (57 et seq.).

145 See e.g. the reservation of Algeria ["(...) no provision of article VI (...) shall be interpreted (...) as conferring (...) jurisdiction on foreign tribunals"]; Morocco ["(...) Moroccan courts and tribunals alone have jurisdiction with respect of acts of genocide committed within the territory of the Kingdom of Morocco"] and Myanmar ["(...) nothing contained in the said article shall be construed (...) as giving foreign courts and tribunals jurisdiction over any case of genocide (...) committed within the union territory"]. On the other hand, the United States declared that article VI does not limit the right of states to punish at least their own nationals for acts of genocide committed by them abroad; all quotations to be found

possibility of enacting an additional protocol to the Genocide Convention by which a treaty based basis for universal criminal jurisdiction for national courts would have been created even if any such additional protocol would obviously not have reached universal ratification[146]. Indeed more and more national laws either provide for universal criminal jurisdiction for the crime of genocide[147] or national courts and tribunals exercise *de facto* universal criminal jurisdiction in such cases. This is *inter alia* true for the decisions of Israeli courts in the proceedings against *Adolf Eichmann*, where both the District Court of Jerusalem as well as the Israeli Supreme Court took the position that there is universal criminal jurisdiction for the crime of genocide[148]. This position was later confirmed in the proceedings leading to the extradition of John Demjanjuk to Israel by the United States Court of Appeals for the 6th Circuit, which similarly acknowledged the legality of the extradition of an individual by relying on the fact that Israel could, in conformity with customary international law, exercise universal criminal jurisdiction against the person who allegedly had committed acts of genocide in Lithuania[149].

Finally, it was the German Bundesgerichtshof which determined that prosecuting the Bosnian-Serb Dusko Tadic[150] for genocide on the basis of

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in: *United Nations, Multilateral Treaties Deposited with the Secretary-General as of 31 December 1996*, 1997, 86 et seq.

146 See, *inter alia* the statements made by Algeria, Canada, Finland, the Netherlands, Romania, Ecuador and Oman, all to be found in: N. Rohashyankiko, "Study on the Question of the Prevention and Punishment of the Crime of Genocide", Doc.E/CN.4/Sub.2/416, 52–53.

147 See *inter alia* Section 220 a of the German Criminal Code in connection with Section 6 para. 1 of the German Criminal Code as well as Section 65 para. 1 No. 2 in connection with Section 321 of the Austrian Criminal Code.

148 "Attorney General of the Government of Israel v. Adolf Eichmann, Decision of the District Court of Jerusalem of 12 December 1961", *ILR* 36 (1968), 5 et seq., (26 et seq.) as well as the Decision of the Israeli Supreme Court of 29 May 1962, *ibid.*, 277 et seq., (287 et seq.).

149 J. Demjanjuk v. J. Petrovsky et al., 776 F2nd 571 (1985), 582. The Court quotes affirmatively Section 404 of the Restatement Third of the Foreign Relations Law of the United States, 254, which stipulates that "(...) [a] state has jurisdiction to define and prescribe punishment for certain offences recognised by the community of nations as of universal concern such as (...) genocide, war crimes (...) even where none of the basis of jurisdiction (...) is present".

150 *Neue Zeitschrift für Strafrecht* 14 (1994), 232–233; see also the note by D. Oehler, *ibid.*, 485 as well as H. Roggemann, "Strafverfolgung von Balkankriegsverbrechen aufgrund des Weltrechtsprinzips — ein Ausweg?",

universal jurisdiction, as provided for in the German Criminal Code, is in conformity with customary international law[151]. This determination, that every state is competent to punish acts of genocide on the basis of universal jurisdiction similarly enables the contracting parties to the statute of the ICC to endow the ICC with jurisdiction without presupposing any further requirements[152].

NJW 47 (1994), 1436 et seq. and finally D. Fürth, "Die Verfolgung von Völkermord durch deutsche Gerichte aufgrund des Weltrechtsprinzips", *HuV* 10 (1997), 38 et seq.

151 The Court stated, however, that in order to be able to exercise universal criminal jurisdiction for acts of genocide, there is a need for some kind of nexus with Germany, e.g. by the fact that the accused was living in the state of the forum or was apprehended therein, see *Neue Zeitschrift für Strafrecht* 14 (1994), 232–233 (233).

152 This is even true in regard to those states which — when ratifying the Convention on the Prevention and Punishment of the Crime of Genocide — made a reservation according to which either only their national courts should be dealing with crimes of genocide committed on their territory or that the action by an international criminal court should be subject to an express consent by the territorial state. Such reservations have been made *inter alia* by Algeria ("International tribunals may, as an exceptional measure, be recognized as having jurisdiction, in cases in which the Algerian Government has given its express approval") and Venezuela ("With reference to article VI, notice is given that any proceedings to which Venezuela may be a party before an international penal tribunal would be invalid without Venezuela's prior express acceptance of the jurisdiction of such an international tribunal"), text to be found in: *United Nations, Multilateral Treaties Deposited with the Secretary-General as of 31 December 1996*, 1997, 86 and 88.
This is due to the fact that, in accordance with article 21 of the Vienna Convention on the Law of Treaties, any such reservation could only modify and limit the treaty-based rights and obligations of the contracting parties. In that regard reference has to be made to the holding of the ICJ in the Case Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, 14 et seq., (93–94) according to which customary law rules and treaty-based rules can coexist with regard to those states which are bound by a given agreement. This is even more true where — as in the case of the rules governing the exercise of criminal jurisdiction — the customary law rules are not completely identical to otherwise existing treaty-based rules. In particular, one cannot take the view that a partial codification, as the one contained in the above mentioned Convention, has completely overshadowed pre-existing and developing customary rules, see for the respective approach of the ICJ, *ibid.*, 94–95, where the Court relies on its previous

2. Crimes against Humanity

As to crimes against humanity, the applicability of universal criminal jurisdiction by now seems to be accepted beyond doubt. In that regard one might not only rely on the practice of the Nuremberg Military Tribunal[153] and judgments by other military tribunals,[154] but also on the fact that by now a certain number of states exercise universal criminal jurisdiction with regard to crimes against humanity[155]. Furthermore, any such exercise of universal criminal jurisdiction can be based on the fact that prohibitions against crimes against humanity possess a character *erga omnes*, as already indicated by the judgment of the ICJ in the Barcelona Traction Case[156]. If this is true, then, as a matter of principle, the rights of *all* states are violated when any such crimes are committed and they are thereby also in a position to punish such crimes[157].

Apart from this basis to be found under customary international law for the exercise of universal criminal jurisdiction in relation to crimes against humanity, some specific crimes against humanity, such as torture or apartheid are subject to a treaty regime which, likewise, embodies the

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Decision in the North Sea Continental Shelf Case, ICJ Reports 1969, 3 et seq., (39), para. 63.

153 The Nuremberg Tribunal stated at one point that the Allied Powers, by setting up the Tribunal, "(...) have done together what anyone of them might have done singly; for it is not to be doubted that *any nation* has the right to set up special courts to administer law", Trial of the Major War Criminals, Vol. 22, 461; also reproduced in M. Bassiouni, *Crimes against Humanity in International Criminal Law*,1992, 521.

154 See *inter alia* the Decision based on Control Council Law 10 in the case of List, partly reproduced in Bassiouni, *ibid.*, 522.

155 This is e.g. true for Israel and the United States (see note 148,148, as well as Bassiouni, see note 153, 524 note 166) as well as for Canada (as to details see Bassiouni, *ibid.*, 512 and L.C.Green, "Canadian Law, War Crimes and Crimes against Humanity", *BYIL* 59 (1988), 217 et seq.) The Canadian Law just referred to was confirmed by the Decision of the Canadian Supreme Court in the Case of Regina v. Finta, *ILR* 104 (1997), 284 et seq. (356–357).

156 Barcelona Traction, Light and Power Company, ICJ Reports 1970, 3 et seq., (33).

157 O. Schachter, *International Law in Theory and Practice*, 1985, 264 as well as K. Randall, "Universal Jurisdiction under International Law", *Tex. L. Rev.* 66 (1988), 785 et seq., (830) and finally M. von Sternberg, "A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the 'Elementary Dictates of Humanity' ", *Brook. J. Int.'l L.* 22 (1996), 111 et seq., (151).

notion of universal criminal jurisdiction[158]. While it is true that any such provision is only applicable with respect to the other contracting parties of the given treaty, it might be stated that, given their broad acceptance, those treaties also confirm the fact that the principle of universal criminal jurisdiction has by now become largely accepted in regard to crimes against humanity.

3. War Crimes

In regard to war crimes contained in the draft statute of the future ICC, universal criminal jurisdiction also seems to be accepted. First, it has to be noted that already before 1949, i.e. before the entry into force of the four Geneva Conventions, states have punished war crimes regardless of the nationality of the offender, the nationality of the victim or the place where the crime in question had been committed[159]. This approach has since been confirmed by the concept of grave breaches as contained in the four Geneva Conventions of 1949 since the contracting parties to the Geneva Conventions are thereby obliged to punish such grave breaches regardless of the nationality of the offender[160].

The same is also true for the other parts of the statute applicable to international armed conflicts, i.e. those war crimes which do not relate to grave breaches of the four Geneva Conventions of 1949. In relation to the more than 150 contracting parties to the First Additional Protocol to the Geneva Conventions, this can be based on the fact that these other war crimes, as contained in the statute, are either identical or duplicate, at least in substance, to the grave breaches provisions of the First Protocol[161]. But

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158 See article 5 para. 2 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment as well as article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid, which itself classifies apartheid as a crime against humanity.

159 See Randall, see note 157, 804 et seq.

160 See article 49 of the First Geneva Convention, article 50 of the Second Geneva Convention, article 129 of the Third Geneva Convention and finally article 146 of the Fourth Geneva Convention.

161 See generally as to the concept of grave breaches under the First Additional Protocol, J. de Breucker, "La répression des infractions graves aux dispositions du Premier Protocole Additionnelle aus quatre Conventions de Genève du 12 août 1949", *Rev.Dr.Mil.Dr. Guerre* 16 (1977), 498 et seq. and more specifically W. Wolf/G. Kummings, "A survey of penal sanctions under Protocol I to the Geneva Conventions of August 12, 1949",

even with regard to those states which have so far not become contracting parties to the Protocol and in relation to those parts of the statute which do not reiterate the grave breaches provisions of the law of Geneva, still the same result must be reached. This is due to the fact that these provisions are either based on treaty-based provisions which, like as in the case of the Convention on the Rights of the Child, now possess a universal character, or where the customary law nature of such provisions cannot be seriously doubted.

Eventually one might question, however, whether the exercise of universal criminal jurisdiction as to war crimes committed in internal armed conflicts is by now generally accepted. This is due to the fact that the Second Additional Protocol to the four Geneva Conventions does not enshrine the concept of grave breaches. One might, however, argue again, based on the finding of the ICJ in the Nicaragua Case[162], that common article 3 of the Geneva Conventions must by now also be considered to possess an *erga omnes* character. But even for other violations of the rules and customs of war applicable in internal armed conflict, as contained in the Second Additional Protocol of 1977, states such as Belgium or Switzerland, have within the context of the Yugoslavia and the Rwanda conflicts exercised universal criminal jurisdiction without having met with any protest or opposition[163] .

Case W.Res. J. Int.'l L. 9 (1977), 205 et seq., (246) which expressly state that "(...) [t]he importance of an act being a gave breach is that the offender is subject to the universal jurisdiction of states".

162 ICJ Reports 1986, 14 et seq., (114).

163 See the Decision of the Swiss Tribunal Militaire de Division 1 in the Case of G. Goran in which the Tribunal, basing itself on article 1 or 9 of the Swiss Military Criminal Code, considered that violations of article 4, 5 and 13 of the Second Additional Protocol would be subject to its jurisdiction, see in this regard the Case note by A. Ziegler, *AJIL* 92 (1998), 78 et seq. See also the respective Canadian Law of 1987 which generally speaks of war crimes without distinguishing between crimes committed in international and those committed in internal armed conflicts. See also A. Carnegie, "Jurisdiction over Violations of the Laws and Customs of War", *BYIL* 39 (1963), 402 et seq., (423) who, already in 1963, took the position that at least with regard to more serious war crimes, all states would be empowered to exercise universal criminal jurisdiction. See also the *British Manual of Military Law*, 1958, para. 404. For an overview of respective national legislation see T. Graditzky, "La résponsabilité pénale individuelle pour violation du droit international humanitaire applicable en situation de conflit armé non international", *Rev.ICR* 80 (1998), 29 et seq.

4. Crime of Aggression

Finally, the exercise of universal jurisdiction in regard to the crime of aggression by the future ICC would already be justified by the sole fact that the Security Council, acting under Chapter VII, has already made a determination that the given state has committed an act of aggression and would thereby, at least implicitly, give its permission for such exercise of jurisdiction. This is even more true since in regard to the crime of aggression, which forms the core responsibility of the Security Council for the maintenance of international peace and security, it seems evident that the Security Council is indeed in a position to empower an international criminal tribunal to act on the basis of universal jurisdiction.

IV. Trigger Mechanism and Role of the Security Council

1. General Questions

During the work of the Preparatory Committee, it became obvious that, as a matter of principle, three possibilities coexist whereby the jurisdiction of the court could be triggered, i.e. by virtue of a referral by the Security Council, by virtue of a state complaint and finally by virtue of *ex officio* investigations by the prosecutor. While the first two alternatives proved to be the least controversial, the last one gave rise to serious doubts by some states. Only this last possibility[164], which somewhat surprisingly had not been provided for by the ILC in its draft statute, would enable the Court to act free of political interference. The granting of such *ex officio* investigatory powers would also constitute significant progress as compared to the current two *ad hoc*-tribunals, since in these two cases it would be the Security Council which determined the competence *ratione temporis* and *ratione personae* of the respective tribunal. On the other hand, one should not overlook the fact that if such an *ex officio* power is granted, the selection of the chief prosecutor would become a highly politicised question[165]. A compromise might lay in providing that any such *ex officio* investigation is made subject to a prior confirmation by a chamber of the Court[166]. If one was to limit triggering the jurisdiction of the court to the possibility of a referral by the Security Council or to state complaints, it

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164 See article 12 Draft Statute.

165 As to the election and qualification of judges and the prosecutor see generally article 37 respectively article 43 Draft Statute.

166 Article 13 Draft Statute.

seems to be rather unlikely that crimes committed by nationals of one of the five permanent members of the Security Council could be investigated by the ICC. This is demonstrated by the fact that already within the framework of the European Convention on Human Rights and even within the framework of the highly integrated European Union, states are rather reluctant when deciding whether or not to bring another state before an international tribunal. This would be even more true since such a state complaint might imply that the leading representatives of another State might have committed genocide, crimes against humanity, war crimes or even the crime of aggression.

Until the very end of the discussions of the preparatory committee it remained doubtful whether — as supported *inter alia* by the United States — the complaining state should only refer a given situation as such to the ICC or whether that state should or could instead name concrete individuals or single out concrete offences. In order to avoid, as far as possible, that the future ICC becomes a means of political conflict, it seems to be most appropriate that, in accordance with the precedence of both the Yugoslavia and the Rwanda Tribunal, it should be only possible for a complainant State to refer a general situation as such to the court and leave it to the prosecution to decide whether there are sufficient elements of proof in order to investigate a given individual or a given group of persons.

2. Role of the Security Council[167]

The ILC had provided in its Draft statute that on the one hand the Security Council might, in accordance with Chapter VII of the Charter, refer a matter to the future ICC[168], that the crime of aggression might be only brought before the Court after the Security Council has made a determination that the state concerned has committed an act of aggression under Article 39 of the Charter[169], and finally that the Court would be barred from exercising its jurisdiction in regard of all those matters which are concurrently being dealt with by the Security Council[170].

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167 For an overview see already S. Yee, "A Proposal to Reformulate article 23 of the ILC Draft Statute for an International Criminal Court", *Hastings Int.'l & Comp.L.Rev.* 19 (1996), 529 et seq.

168 See article 23 para. 1 of the Draft Statute submitted by the ILC, ILCYB 1994 Vol.II, Part 2, 43–44.

169 See article 23 para. 2 of the Draft Statute of the ILC, *ibid.*

170 See article 23 para. 3 of the Draft Statute of the ILC, *ibid.*

A. Referral of a Situation by the Security Council

After the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of Tadic[171] and the decision of the Second Trial Chamber of the International Tribunal for Rwanda in the case of Kanyabashi[172], no serious doubts seem to exist that the Security Council might within the framework of its competences under Chapter VII of the UN Charter, also establish *ad hoc*-tribunals if the Council considers it to be necessary for the maintenance of international peace and security. *A fortiori* this must be also true where the Security Council was not to create a new *ad hoc* tribunal but instead where it would solely confer certain competences upon an already existing criminal tribunal provided that, however, in a given situation the requirements of Chapter VII of the Charter are indeed fulfilled.

It must be noted, however, that whenever a matter is referred to the future ICC by the Security Council, the ICC would then act within the framework and on the basis of the resolution granting jurisdiction. This means that the Security Council could then, within the framework of the limits of Chapter VII of the Charter of the United Nations, free the ICC from those limitations which otherwise derive from the fact that the ICC is created by an international treaty. Accordingly, even those states which are not contracting parties to the statute could be obliged to cooperate with the future ICC. Furthermore, the Security Council could also deviate from the other limitations contained in the statute such as the principle of complementarity[173]. Similar to the situation as it exists in regard to the existing two *ad hoc*-tribunals, the Security Council would however only refer a general situation to the future ICC while the investigation of

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171 The Prosecutor v. Tadic, IT-94-1-Ar72 of 2 October 1995 in particular paras. 32–40.

172 Unpublished Decision of 18 June 1997, The Prosecutor v. J. Kanyabashi, ICTR-96-15-T, 5 et seq.; see in this regard the note by V. Morris, *AJIL* 92 (1998), 67 et seq.

173 Some states have proposed to provide additionally that the Security Council could also under Chapter VI, similar to a state, make a simple complaint. In that regard it has to be noted, however, that the Security Council, acting within the framework of Chapter VI might only adopt recommendations. Accordingly, it is for this reason alone, that it cannot be empowered by the statute to bring about proceedings before the Court which would then create certain legal obligations for the contracting parties to the Statute.

concrete offenders and offences would still fall within the competences of the Prosecutor[174].

While the possibility of such a referral of a situation by the Security Council is the least controversial, the question whether a concurrent seising of the Security Council with a given situation would automatically exclude the exercise of jurisdiction of the future ICC, was one of the most critical ones during the work of the Preparatory Committee.

B. Should the Jurisdiction of the Future ICC be barred when a Situation is simultaneously being dealt with by the Security Council?

The ILC had provided in its draft statute that proceedings before the future ICC should not be commenced in relation to a situation which is being dealt with by the Security Council under Chapter VII as a threat to the peace, breach of the peace or act of aggression, unless the Security Council decides otherwise. This proposed provision would largely be parallel — in particular by using the formula *being dealt with* — to Article 12 para. 2 of the United Nations Charter. In the context of Article 12 para. 2 of the Charter, it is common practice, however, that the Secretary-General notifies to the General Assembly all those situations which are on the agenda of the Security Council even if they are not being actively considered by the Council[175]. The same could therefore eventually also apply to the provision proposed by the ILC. Accordingly, the limiting effect of this clause for the exercise of jurisdiction by the future ICC would be rather far reaching. On the other hand, one has to also note that, according to the proposal originally made by the ILC, any such barrier to the exercise of jurisdiction would only become effective if in addition the Security Council had coped with the situation under consideration by making reference to Chapter VII of the Charter of the United Nations as a threat to or breach of the peace or act of aggression. This means that under this formula it would not be sufficient for barring the exercise of jurisdiction by the ICC that a given situation has been simply put on the agenda of the Security Council, be it as a separate point of order, or be it under the point of order

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174 See in this regard the respective commentary by the ILC, ILCYB 1994 Vol.II, Part 2, 44.

175 As to details see K. Hailbronner/E. Klein, "On Article 12", Mn. 36 in: Simma, see note 122.

"other matters"[176], since otherwise the necessary link to action taken under Chapter VII would be missing[177]. At the same time, every action of the Security Council on the basis of Chapter VII, thus also the pure adoption of non-binding recommendations under Article 39 of the Charter would bar any action by the ICC, unless the Security Council would itself expressly grant the Court the competence to become active[178].

Given the fact that the United Nations Charter does not, as far as the relationship between the Security Council on the one hand and the ICJ on the other[179] is concerned and given the danger that the inclusion of such a provision, as originally proposed by the ILC, would seriously endanger the effectiveness of the future ICC, Singapore proposed a compromise which found support among a large number of states including the United Kingdom, itself being one of the permanent members of the Security Council. This proposal provides that the jurisdiction of the ICC, other than in regard of the crime of aggression, shall be only considered to have been suspended if the Security Council, apart from generally exercising its functions under Chapter VII of the United Nations Charter, additionally and *expressis verbis* requests the ICC not to start or continue certain specific proceedings. The inclusion of such a provision would mean that the consensus of all permanent members plus the consent of at least four more members of the Council is needed in order to prevent the ICC from exercising its jurisdiction. Thus the possibility that one single permanent member by exercising its veto power would suspend the jurisdiction of the ICC would be excluded.

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176 This view was already been taken by the ILC itself, see ILCYB 1994 Vol.II, Part2, 45 where the ILC stated that article 23 would be only applicable in regard to a situation "with respect to which *action under Chapter VII (...) is actually been taken* by the Council" (emphasis added).

177 But see also the proposals made during the work of the Preparatory Committee to completely delete any link to article 39 respectively to Chapter VII. This would have the effect that a pure seisin of the Security Council with a given situation would *per se* exclude any exercise of jurisdiction by the ICC.

178 Given the fact that a simple presidential statement would lack any reference to Chapter VII, it would not be sufficient to be considered as an action of the Security Council under Chapter VII.

179 But see also article 298 para. 1, lit. (c) of the United Nations Convention on the Law of the Sea according to which the contracting parties to the Convention can declare that disputes with regard to which the Security Council of the United Nations is exercising its functions in accordance with the Charter shall not be subject to the provisions on the peaceful settlement of disputes contained in the Convention itself.

Adopting this proposal would not amount to an illegal interference with the competences of the Security Council under the Charter given the fact that the organ itself, but not just a single permanent member, would still be in a position to stop any proceeding if, in the view of the Council, there was serious reason to believe that such investigation or prosecution by the ICC would put in question the powers of the Security Council[180]. Such a provision which would allow the ICC to move forward with an investigation if the Security Council remains inactive would also not amount to a contradiction of the role of the Security Council in regard to the crime of aggression. This is due to the fact that as to the question whether a given act constitutes an act of aggression, the Security Council, in accordance with Article 39 of the Charter, has, notwithstanding the jurisdiction of the ICJ in a given case, the sole competence to make such a determination. On the other hand it is also possible, if not even most probable, that crimes of genocide, crimes against humanity and also war crimes do not always and automatically fall within the scope of application of Chapter VII of the Charter[181]. Thus, the fact that the ICC is dealing with one of these crimes would only in exceptional circumstances simultaneously conflict with competences of the Security Council under Chapter VII. Therefore, the Singapore formula seems not only politically a wise compromise but also legally appropriate.

V. Complementarity of the Future ICC

Both article 9 of the statute of the International Criminal Tribunal for the Former Yugoslavia and article 8 of the statute of the International Tribunal for Rwanda provide that the jurisdiction of these two tribunals shall enjoy primacy over national criminal proceedings. This means that both tribunals might, in any circumstances, request national criminal tribunals to defer cases to them. On the contrary the draft statute for the future ICC[182]

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180 One possible scenario could be a situation in which the participation of an indicted person in negotiations on an armistice or a peace agreement would constitute a *conditio sine qua non* for a peaceful settlement of a given situation but where the danger existed that the person concerned would be apprehended once participating in such negotiations.

181 See, *inter alia* the statement made by the Peoples Republic of China after the adoption of Resolution 827, which pointed to the exceptional character of the creation of such an *ad hoc*-tribunal under Chapter VII of the Charter of the United Nations, the text can be found in Morris/Scharf, see note 16, 199–200.

182 See article 15 of the Draft Statute.

is based on the premise that the ICC shall only exercise its jurisdiction as a matter of principle if[183],

- the competent national authorities and tribunals are either unable or unwilling to genuinely[184] prosecute[185] individuals who have committed a crime subject to the jurisdiction of the tribunal[186]
- a state has decided not to prosecute the person concerned due to an unwillingness or inability of the state to genuinely prosecute that person[187] or finally
- a trial by the ICC would amount to a violation of the principle of *ne bis in idem* as contained in article 13 of the draft statute[188] [189].

A possible inability of a state to genuinely prosecute might, for example, arise in the case of a failed state, i.e. where there is a complete or partial breakdown of the legal order of the territorial state, or also in those situations where the respective territorial state is no longer in a position to

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183 It is particularly important to note that under the Draft Statute, the Decision as to whether a national criminal proceeding would bar an investigation by the ICC shall be made by the ICC itself and not by the respective national authorities.

184 Article 15 of the Draft Statute contains, instead of the originally proposed word *effectively* the word *genuinely* in order to make sure that the ICC shall not act as a court of appeals. On the other hand, the addition of the word *genuinely* makes sure that only those national criminal proceedings undertaken with the serious intent of eventually bringing the offender to justice shall bar the exercise of jurisdiction by the ICC.

185 Article 15 of the Draft Statute implicitly takes the view that the exercise of national criminal jurisdiction should be the rule, since the prosecution should be undertaken by national courts *unless* the state under consideration is indeed either unable or unwilling to organize criminal proceedings which are adequate to the offences committed.

186 See article 15 para. 1 lit. (a) Draft Statute.

187 See article 15 para. 1 lit. (b) Draft Statute.

188 See article 15 para. 1 lit. (c) Draft Statute.

189 Besides it is also possible to foresee that a state, which would otherwise be in a position to exercise criminal jurisdiction over the crime in question, waives its right to do so and defers a case to the ICC, or where finally the Security Council, when referring a situation to the ICC, would, as in the cases of the two ad-hoc tribunals, grant the ICC primacy over national courts of one or all states.

exercise jurisdiction effectively in the whole of its territory[190]. If in such a situation the territorial state is unable to either obtain the accused or the necessary evidence or testimony, the ICC shall be in a position to exercise its jurisdiction.

Apart from this inability of a state to exercise its own criminal jurisdiction, there is an obvious possibility that the respective national authorities might have no genuine interest in effectively prosecuting those crimes which would otherwise come within the jurisdiction of the ICC. This is due to the fact that the crimes which are, as a matter of principle, subject to the jurisdiction of the ICC, are committed frequently either on behalf of or at least with knowledge of the state on the territory of which they are committed. In order to determine unwillingness the statute contains a non-exhaustive list of situations in which no effective national criminal jurisdiction is being exercised, which would have otherwise prevented the ICC from exercising its jurisdiction.

In that regard, the first alternative refers to proceedings which were or are being undertaken for the purpose of shielding the person concerned from criminal proceedings before the ICC[191]. Such a shielding could not only arise where the accused was not punished at all by a national tribunal for a crime for which otherwise he or she would have faced prosecution by the ICC, but also where the accused was convicted, but where the punishment was clearly inproportionate to the crimes committed or where the person convicted was released shortly after conviction. In particular such an intent to shield a person concerned from criminal responsibility might be found where the judicial practice in a given case is significantly different from the otherwise existing practice in the state under consideration. On the other hand, it is not necessary that the respective national conviction is based on exactly the same criminal norms as contained in the statute of the future ICC[192]. At a minimum it seems to be necessary, however, that the respective national criminal proceeding penalizes the same criminal activity and that the sanction applied in a given case is not completely beyond any reasonable proportionality.

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190 This last alternative is in particular referred to in para. 3 of article 15 of the Draft Statute which states that, in order to determine inability in a particular case, the court shall also consider whether there exists a total or partial unavailability of its national judicial system.

191 See article 15 para. 2 lit. (a) Draft Statute.

192 Thus, it would, for example be, sufficient that a person who committed the crime of genocide would be punished for murder or man-slaughter or that a soldier, who in violation of relevant rules of humanitarian law has killed civilians, is punished for murder or man-slaughter.

Furthermore, the jurisdiction of the ICC would not be barred in situations where the national criminal proceedings were delayed to an extent that it is inconsistent with an intent to bring the person concerned to justice. Here again, a pure delay of the proceedings beyond what is prohibited by relevant human rights guarantees is not in itself sufficient to trigger the jurisdiction of the ICC. Instead it should be considered most relevant — also given the eventual complexity of investigations — whether the period of time which it takes to bring the person to justice is still comparable to other national proceedings of a similar kind[193]. Finally, the future ICC might also take into account the fact whether the accused is held in custody pending his trial, which would indicate a willingness to genuinely prosecute, or whether instead the offender is not being held in custody which could even eventually enable him or her to influence witnesses or to tamper with evidence.

Finally, a last example of a lack of effective national criminal proceedings is a situation where the proceedings were not or are not being conducted independently or impartiality and where they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

VI. Cooperation of the Contracting Parties with the ICC

1. General Obligation to Cooperate

One question which is crucial for the effectiveness of the ICC to be created, is the effective cooperation of the contracting parties to the statute with the Court. Unlike, as in the cases of the two *ad hoc*-tribunals, the existence of which is based on Chapter VII of the Charter of the United Nations, the future ICC will be created by way of an international treaty. Thus it is obvious that — unless there is a referral of a situation by the Security Council acting under Chapter VII — only the contracting parties of the statute will be under an obligation to cooperate with the Court[194].

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[193] If, similar to the case of Rwanda after the end of the civil war, almost all criminal proceedings of a given state are not brought to term within an acceptable period of time and if, therefore, persons who have committed crimes within the jurisdiction of the ICC would de facto not be punished or prosecuted, the ICC might exercise its jurisdiction, since the state concerned would then be otherwise unable to carry out its proceedings in the sense of article 15 para. 3 of the Draft Statute.

[194] Thus, the Draft Statute only provides that the Court shall attempt to cooperate with such third parties on an *ad hoc*-basis, see in this regard

In that respect it is first important to note that the statute contains the general obligation of the contracting parties to cooperate with the future ICC in accordance with the statute[195]. A further important relevant question, given the experiences of both the Yugoslavia and Rwanda Tribunal, is the question as to what measures might be taken in case of non-cooperation in violation of the statute. Given the fact that the future ICC will not itself possess the possibility to order sanctions[196], the sole possibility remains to either inform an organ created by the statute itself or inform an organ of the United Nations. The draft statute, as adopted by the Preparatory Committee, provides as possible solutions that the ICC could either inform the Assembly of States Parties, the General Assembly of the United Nations or the Security Council as to any instance of non-cooperation[197]. In that respect, one has to consider, however, that the Assembly of States Parties given its size and its low frequency of meetings would not function as an effective organ to sanction incidents of non-cooperation. The same might be true for the General Assembly of the United Nations, even more since at least during the opening phase of the life of the future ICC the (large) majority of states represented therein will not themselves be party to the statute. Besides it may be doubted, whether such an organ of the United Nations, created by the Charter, might fulfil duties which lie beyond those provided for in the Charter itself. Thus, it seems that the only effective alternative remains a seizing of the Security Council to bring

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article 85 para. 4 Draft Statute; as to the situation which exists when a situation is referred by the Security Council under Chapter VII, see under IV 2.A.

195 During the *travaux préparatoires* some more restrictive states had proposed to replace the formula *shall fully cooperate* with the formula *shall afford the widest possible measure of assistance.*

196 See as to the question whether the two *ad hoc*-tribunals possess the competence to order sanctions against states or high government officials the Decision of the Appeals Chamber of the Yugoslavia Tribunal of 29 October 1997 in the case of Prosecutor v. Blaskic, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14-AR108 bis (see: http://www.un.org/icty/blaskic/english/71029JT3.html); see also J. A. Frowein/G. Nolte/K. Oellers-Frahm/A. Zimmermann, "Investigating Powers of the International Criminal Tribunal for the Former Yugoslavia *vis-à-vis* States and High Government Officials — A*micus Curiae* Brief Submitted by the Max Planck Institute for Comparative Public Law and International Law to the International Criminal Tribunal for the Former Yugoslavia in the Case of the Prosecutor v. Tihomir Blaskic", *Max Planck UNYB* 1 (1997), 349 et seq.

197 See also article 86 para. 6 Draft Statute.

about effective sanctions against a non-cooperating contracting party. This is even more true since only decisions of the Security Council – unlike recommendations of the General Assembly or resolutions of the Assembly of States Parties – are legally binding *vis-à-vis* such non-cooperating States.

The adoption of any such binding resolution by the Security Council requires, however, that there is at least an implicit determination that any such non-cooperation constitutes a threat to international peace and security. For those cases in which the exercise of jurisdiction by the ICC is itself based on a referral by the Security Council, this seems to be unproblematic since the non-obeyance of a resolution itself based on Chapter VII *per se* brings with it the competence of the Security Council to enforce it itself. On the contrary it seems to be more problematic to grant the Security Council a sanctioning power in those situations in which the jurisdiction of the ICC has not been triggered by the Security Council itself but either by a complaint of a contracting party or by the prosecutor acting *ex officio*. However, if one shares the view, that under Chapter VII, the Security Council could at least in the case of a massive committing of crimes listed in the statute, either set up an *ad hoc*-tribunal or itself refer the situation to the future ICC, the Council must *a fortiori* possess the competence to sanction any possible non-cooperation in such a situation.

2. Surrender of Persons

The surrender of persons is one form of cooperation with the ICC which for some states, such as Germany, creates specific problems due to prohibitions contained in their respective national legislation concerning the extradition of their own nationals. This is even more true where, as in Germany, this is contained in the constitution of that given state[198]. In that respect, it is of particular importance if and under what conditions a contracting party might eventually refuse to surrender a given individual to the ICC. While a large number of states, including Germany, pleaded in favour that there should be no ground of refusal whatsoever, some delegations had proposed an exhaustive list of possible grounds for refusal. In particular the question arose whether the fact that a given person possesses the nationality of the requested state or when there is a concurrent request for extradition by a third state these might be valid reasons to refuse surrendering that person to the future ICC.

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198 As to the constitutional situation prevailing in Germany see article 16 para. 2 sentence 1 of the German Basic Law.

A. Surrender of Nationals of the Requested State

Granting contracting parties the possibility not to surrender their own nationals would – as is demonstrated by the example of the Yugoslavia Tribunal – largely undermine the effectiveness of the future ICC since the crimes falling within the jurisdiction of the ICC are frequently committed in pursuance of a policy of the respective territorial state. This would mean that the ICC could only effectively prosecute such crimes where the Security Council had referred that situation to the ICC. Given this fact it seems appropriate and even necessary to provide that contracting parties to the statute also surrender their own nationals. Against this background Germany will face a constitutional law issue as to whether the ratification of the future statute would necessitate an amendment to its constitution. In this respect it is doubtful, however, whether the surrender of a German national to the future ICC indeed constitutes an extradition *to a foreign country*, prohibited by article 16 para. 2 of the Basic Law. Since the words *to a foreign country* as contained in article 16 para. 2 of the Basic Law were only added during the drafting of the Basic Law in order not to make extraditions to other parts of Germany, i.e. the then existing Soviet Occupation Zone of Germany, or the Saar territory, legally impossible, they do not otherwise limit the scope of application of the prohibition[199]. That means that the notion of *"foreign state"* as contained in article 16 para. 2 of the German Constitution encompasses international criminal tribunals such as the two *ad hoc*-tribunals set up by the Security Council and also the future ICC.

Notwithstanding one might still argue that it is in accordance with the underlying reason which lead to the inclusion of this norm into the German Constitution to limit its scope of application to those cases where Germany itself has not actively participated in the creation of the entity in question. This is due to the fact that it is the main purpose of article 16 para. 2 of the Basic Law to protect German nationals against those criminal proceedings, which do not sufficiently protect the rule of law as well as fundamental rights. Such protection is not needed, however, where – as in the case at hand – the individual is protected by the fact that Germany might only transfer sovereign rights to international organizations and thus also ratify the statute of the ICC within the limits provided for in article 24 para. 1 of the Basic Law[200] and provided that the statute enshrines

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199 See as to details G. Lübbe-Wolff, "On article 16", Mn. 74, with further references in: H. Dreier (ed.), *Grundgesetz-Kommentar*, 1996.

200 As to the extent of those limits see Bundesverfassungsgericht, Vol. 37, 271 et seq. (Solange I) and Bundesverfassungsgericht, Vol. 73, 339 et seq. (Solange II).

a level of protection of fundamental rights *mutatis mutandis* equivalent to the one provided for under the Basic Law itself[201]. Still, it seems to be advisable, when considering the ratification of the future statute of the future ICC by Germany to — be it in a purely declaratory manner — clarify that article 16 para. 2 of the Basic Law does not bar the surrender of German nationals to such an international criminal tribunal[202].

B. Surrender of a Person to the ICC in the Case of a Competing Request for Extradition by a Third State

A further problem arises in the context of competing requests for extradition by third parties[203]. In the case of the two *ad hoc* tribunals created by the Security Council by virtue of Chapter VII of the Charter of the United Nations, requests for surrender made by one of those tribunals have preference *vis-à-vis* over requests for extradition by third states even if in relation between the custodial state and the requesting third state, there exists a treaty-based obligation to extradite the given person. This is due to the fact that under Article 103 of the Charter of the United Nations, obligations arising under the Charter prevail over obligations contained in any other treaty. In contrast thereto, in the case of the future ICC to be created on the basis of a multilateral treaty, regular rules regulating competing treaty obligations must be abided by. If therefore the requesting third state is itself a contracting party to the statute of the future ICC, there is no doubt that the statute may grant a request by the ICC priority over any other such request. The same is true in those cases in which there is no treaty *obligation* to extradite a given person to a third state or where the ICC acts on the basis and in accordance with a referral by the Security Council[204].

In all other cases, however, i.e. those cases where the requesting state itself is not a contracting party to the statute of the future ICC, the statute — in order not to conflict with the traditional concept of *pacta tertiis nec*

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201 A similar view is shared by C. Tomuschat, "Sanktionen durch internationale Strafgerichtshöfe", Verhandlungen des 60. DJT, S. Q., 53 et seq., (68). But see also the reasoning of the Federal Government when submitting the German Law on Cooperation with the International Criminal Tribunal for the Former Yugoslavia to parliamentary approval, which argued that article 16 para. 2 of the Basic Law must be amended in order to enable Germany to also surrender German nationals, Bundesrats-Drucksache 991/94, 15.

202 Tomuschat, *ibid.*

203 Article 53 para. 6 options 1–3 Draft Statute.

204 See also under IV 2.A.

nocent as contained in the Vienna Convention on the Law of Treaties[205] — must grant requested states, as a matter of principle, the possibility not to surrender the person to the ICC but to another third state requesting the extradition of the person on the basis of a bi- or multilateral extradition treaty. An exception would apply, however, in cases in which there exists under general international law, such as in the case of genocide, an obligation to punish a given person which would be also fulfilled by surrendering the person to the ICC. If in such a case the requesting state seeks extradition for another crime, which is not subject to that obligation to prosecute, the requested state could also rely *vis-à-vis* that third party on the primacy of the exercise of jurisdiction by the future ICC.

3. Limits as to the Duty to Cooperate Based on National Security Concerns

The Blaskic case[206] has demonstrated what kind of sensitive issues of national security might arise within the framework of the duty to cooperate with international criminal tribunals. The background of this decision was a case in which the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia took the position that it is for the respective international tribunal itself to make the final decision whether certain evidence should be submitted to the Court irrespective of the fact that this evidence is related to questions of national security. Against this background, certain states have submitted, during the work of the Preparatory Committee, detailed proposals which — both in regard to providing evidence as well as in regard to witnesses — contain rather far-reaching possibilities to deny the Court the access to such evidence for reasons of national security of the requested state[207]. A proposal put forward by the United Kingdom, while granting the future ICC the final decision as to whether the claim of national security is well-founded or not, has come up with the compromise formula which would still grant the requested state the possibility to invoke such reasons of national security in a detailed procedure in which it could bring forward its arguments relating to issues of national security and which would oblige the Court to take appropriate measures in order to safeguard legitimate national security interests of the state concerned.

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205 Arts. 34–35 of the Vienna Convention on the Law of Treaties.

206 Prosecutor v. Blaskic, Judgment of the Appeals Chamber of 29 October 1997, IT-95-14-AR108 bis, para. 61 et seq.

207 See also article 71 Draft Statute.

VII. Final Clauses and Related Questions

In regard to the final clauses, in particular, the issue of dispute settlement, the issue of reservations and finally the necessary *quorum* for the statute to enter into force, are of particular importance.

1. Reservations as to the Statute

If one considers that the diplomatic conference in Rome indeed, as it seems to be the most probable outcome, decides not to include treaty-based crimes into the statute of the future ICC and also adopts some kind of model of inherent jurisdiction for the Court which is not dependent on an *ad-hoc* consent to be given by the States involved, it seems to be mandatory to provide, at least in regard to the definition of crimes as well as in regard to the exercise of jurisdiction by the Court, a general prohibition to make any kind of reservations. Otherwise that would open the backdoor to a system of a differentiated submission to the jurisdiction of the ICC and would thus contradict the clear intention of the statute. Similarly, it also seems to be essential to provide for a prohibition of reservations as to the cooperation of the contracting parties with the future ICC since otherwise States might, for example, try, by making reservations when ratifying the statute, not to be under an obligation to surrender their own nationals to the ICC.

If one considers, as a compromise, that reservations should be possible for certain parts of the statute, it would then be essential to provide as proposed[208] that any such reservation would be subject to the control and interpretation by the ICC itself and not be subject to the regular reservations regime as provided for in article 21 of the Vienna Convention on the Law of Treaties[209].

2. Financing of the Court

Within the Preparatory Committee there was no common position as to how the future ICC should be financed. While a certain number of states,

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208 Article 109, Option 2, para. 4, Option A Draft Statute.

209 For the current discussion of the issue of reservations within the ILC see the Second Report by Special Rapporteur Pellet, Doc.A/CN.4/478, as well as Doc.A/CN.4/477/Add.1 of 13 June 1996 and Report of the ILC on the work of its 49th Sess. Doc.A/52/10, paras.44-157.

relying on such precedences as the financing of the Committee against Torture established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Committee on the Elimination of Discrimination against Women established under the Convention on the Elimination of all Forms of Discrimination against Women, argued that the expenses of the ICC should be born by the regular United Nations budget since the Court would be acting on behalf of the entire international community, others were proposing a more traditional model under which the expenses of the Court would be born by the contracting parties to the statute[210]. Taking into account the model of the International Tribunal for the Law of the Sea, it seems to at least appropriate, however, that there should be some kind of phasing-in under which the initial costs for the establishment of the ICC and the first budget should be financed by the United Nations at large. Besides in those cases where the ICC would act on the basis of a Security Council referral and where, accordingly, the ICC would replace otherwise necessary *ad-hoc* tribunals, it seems to be appropriate to have at least that part of the budget of the ICC covered by the United Nations. In the case of funding to be provided for by the contracting parties to the statute, most states — with a notable exception of the United States[211] — argued that the scale of contributions should be based on the one used for the regular budget of the United Nations, modified in view of the number of contracting parties to the statute.

3. Quorum for the Entry into Force of the Statute

As to the quorum for the entry into force of the statute[212], it seems to be advisable to use a relatively high one. This is due to the fact that it seems to be reasonable to believe that the ICC will have to cope with the problem of having its authority accepted by the contracting parties which might be unwilling to cooperate in individual cases. In those cases it would be even more important that the Court could base itself on a large number of ratifications. On the other hand, a relatively low number of ratifications necessary for the entry into force of the statute would be even more problematic since these states could eventually largely consist of a relatively homogeneous group of Western countries. In such a situation a

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210 Article 104 Option 1 Draft Statute.

211 Article 106 Draft Statute. The United States proposed that a multi-unit class system similar to the one used by the ITU and the UPU should be used.

212 Article 114 Draft Statute.

problem could arise which would be similar to the one which existed in regard to the United Nations Convention on the Law of the Sea prior to the entry into force of the Protocol relating to Part XI of UNCLOS where, until then, only states from certain regions of the world had ratified the convention.

4. Seat of the Tribunal

While there had been some attempts by Nuremberg, the seat of the International Military Tribunal set up by the Allied Powers after World War II, to have its candidature officially supported by Germany, it was finally only The Hague which, already prior to the diplomatic conference in Rome, was officially declared a candidate by the Government of the Netherlands. This is due to the fact that The Hague has until now already had quite intensive experiences both with the ICJ as well as in particular with regard to the International Criminal Tribunal for the Former Yugoslavia. Besides, almost all countries of the world are represented in The Hague by their embassies which would facilitate contacts between the ICC and states involved in proceedings before the ICC. Given these facts it seems to be by now almost certain that The Hague will finally be chosen as the seat of the future ICC.

VIII. Conclusions

Given the problems outlined above it is still uncertain at the time of writing whether the diplomatic conference to be convened in June/July 1998 will be in a position to adopt the final text of the statute. It seems that foremost the definition of the crimes, in particular, the definition of war crimes, and also the definition of the crime of aggression will lead to significant problems. One might only hope that those states favouring the inclusion of the crime of aggression could agree on a common definition of that crime in order that it would find broad acceptance.

Besides, the role of the Security Council will be of utmost importance. One cannot overlook that many countries not only among the developing States have a rather critical position as to the role to be eventually played by the Security Council. One cannot but hope that this sceptical approach would not make those countries overlook that the Security Council might in certain circumstances foster the effectiveness of the future ICC, such as by referring a situation to the ICC. It is only by this possibility that the current existing situation could be improved. On the other hand, all

attempts should be made that the ICC would not be used as an instrument of the Security Council.

Notwithstanding the definition of the crimes, it must be ensured that the triggering of the jurisdiction of the future ICC in concrete cases is not too burdensome for the Court. Otherwise even those states which *de facto* oppose the creation of the effective ICC would be in a position to ratify the statute in order to foster their international image but then be in a position not to be subject to concrete obligations. That means, in particular, that a regime for cooperation should be created which would enable the prosecution to have persons who have committed aggression, genocide, crimes against humanity or war crimes, bring them into custody and eventually to justice.

To sum up, one might say that the creation of the ICC would only then form an essential step towards an effective punishment of the above-mentioned crimes, if it can act as effectively and as independently as possible. Whether the Rome conference can reach this goal remains open.

Aftermath of the Rome Conference

On the 17th of July, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court finally adopted after five weeks of intense and laborious negotiations involving almost 150 States by a vote of 120 to seven States with 21 States abstaining the Statute of the future ICC (Doc.A/CONF.183/9), which in accordance with its article 126 para. 1, will enter into force after 60 States have ratified the convention and which will have its seat in The Hague. Thus for the first time, a permanent international criminal court will come into existence which will have jurisdiction over the most heinous crimes of concern for the world at large.

As to the crimes which will come under the jurisdiction of the ICC, it became however obvious that no agreement could be reached on the *definition of aggression* nor on the appropriate role of the Security Council in that respect. Accordingly, while the crime of aggression as such was included in article 5 of the Statute of the Court, the Court shall not exercise its jurisdiction with regard to that crime until a definition has been agreed upon and the Statute amended accordingly in accordance with article 121 and 123 of the Statute. Besides, any such amendment will again have to address the role of the Security Council with regard to the crime of aggression since article 5 para. 2 now provides that such a provision on aggression shall be consistent with the relevant provisions of the Charter of the United Nations.

Somewhat similar to the crime of aggression, treaty-based crimes such as *drug-trafficking* or *terrorism* were not included in the Statute as such. Instead provision was made in a resolution adopted by the Conference that the issues related to these crimes should be dealt with during a possible review of the Statute. It has to be noted, however, that while the United Nations Convention on the Protection of United Nations and Associated Personnel was neither referred to as such in the Statute, the substance-matter of that convention, i.e. the protection of United Nations personnel in time of armed conflict, is now included in article 8 para. 2 lit. (b) (iii) respectively in article 8 para. 2 lit. (e) (iii) of the Statute.

As already mentioned above, Art. III of the Convention on the Prevention and Punishment of the Crime of Genocide had to be brought in line with the section of general principles of law. Its content was accordingly deleted in the part dealing with the definition of crimes and instead inserted into article 25 of the Statute dealing with individual criminal responsibility and in particular its para. 3 lit. (e).

As to crimes against *humanity*, the final text of the Statute now confirms that such crimes can indeed be committed either in time of peace or in time of armed conflict and that the authors of such acts can either act on behalf of a state or as members of non-state groups or organisations. Besides, it was also acknowledged that such crimes can be committed as part of either a widespread *or* systematic commission of such acts, provided however, that the individual crime is related to a course of action involving the multiple commission of such acts pursuant to or in furtherance of a State or organisational policy. On the other hand, as part of a compromise, it was agreed that for the purpose of the Statute only, a civilian population can be the target of such crimes. Finally, the view that a specific intent should be a requirement for *all* forms of crimes against humanity did not prevail. Accordingly such requirement was deleted from the final text and such subjective element is only required now in relation to the crime of persecution.

As to specific categories of crimes against humanity, one should mention that apart from imprisonment other *severe forms of deprivation of physical liberty* are now also considered to constitute crimes against humanity, provided that the other necessary elements are given. Furthermore, the notion of *torture* now also includes acts emanating from private groups or organisations.

Besides, *enforced disappearance* of persons and the *crime of apartheid* are now also included in article 7 para. 1 lit. (i) respectively lit. (j) of the Statute. It is worth noting, however, that while the definition of enforced disappearance of persons is largely in line with the definition contained in the Inter-American Convention on the Forced Disappearance of Persons, the crime of apartheid has for the purposes of the Statute been defined

significantly narrower than in Art. II of the International Convention on the Suppression and Punishment of the Crime of Apartheid. The latter crime also requires, as provided for in article 7 para. 2 lit. (h), that the acts committed possess a character similar to other crimes against humanity.

The *crime of persecution*, which refers to the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of a certain group or collectivity, now contains an open-ended list of prohibited reasons for persecution including gender and other grounds that are impermissible under international law. Somewhat similar to article 6 lit. (c) of the Nuremberg Charter, the ICC-Statute also requires a certain nexus of the crime of persecution to other acts prohibited by the Statute. It is important to note, however, that it is not a precondition that other crimes against humanity have simultaneously been committed. Instead, it is sufficient that one or more of the acts which, if committed systematically or in a widespread manner would constitute crimes against humanity, or that one or more of the other crimes within the jurisdiction of the ICC, such as e.g. war crimes, have been committed in order to characterise the persecution in itself as a crime against humanity.

As to the list of war crimes finally included in the Statute, it is important to note, that, as already mentioned, intentional attacks against UN personnel or other personnel or material involved in an assistance or peace-keeping mission now specifically constitute war crimes as long as these persons or objects are not otherwise legitimate military objectives.

The proportionality clause now contained in article 8 para. 2 lit. (b) (iv) of the Statute provides that only such attacks which cause *clearly* excessive damages to civilians or the environment constitute war crimes. That language is however not to be understood to refer to the extent of the collateral damage caused, but instead simply to the predictability of such unproportionate damages for the respective military commander as is demonstrated by the fact that all previous versions of that very same provision had in a footnote contained language to that effect.

The clause on the *illegal transfer by an occupying power of parts of its own population into occupied territory* now almost completely mirrors article 85 lit. 4 (a) of the First Additional Protocol, but also refers to actions indirectly leading to such transfers, thereby also arguably including *inter alia* granting incentives to individuals to settle in such occupied territory.

The provisions on *prohibited weapons* as contained in article 8 para. 2 lit. (b) (xvii) – (xx) do not anymore, unlike previous drafts, contain any reference to biological weapons nor to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. This is due to the fact that in order not to raise the question why nuclear weapons were not included in that list the bureau at a very late stage of the Conference decided to also

omit specific references to biological and chemical weapons. Still, reference is made to the prohibition of the use of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, thereby embodying the customary core of the prohibition of chemical warfare. Besides, article 8 para. 2 lit. (b) (xx) now contains a provision which provides, that apart from those weapons or weapons systems *expressis verbis* listed, the Assembly of States Parties set up under article 112 of the Statute, may, by way of amendment, include further prohibited weapons which cause superfluous injury or unnecessary suffering or which are inherently indiscriminate into the Statute, provided that such weapons have become the subject of a comprehensive prohibition. Unfortunately, and somewhat in contrast to the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the Tadic Case, no provision on the use of prohibited weapons can be found in the part dealing with internal armed conflicts.

The issue, whether "*forced pregnancy*" should be included in both the list of crimes against humanity and the list of war crimes, led to serious discussions involving in particular the Holy See, for the reasons given above, strongly opposed any such inclusion. Finally a compromise could be reached which provides that "forced pregnancy" should be understood as comprising only those unlawful confinements of women forcibly made pregnant which occur in order to change the ethnic composition of a given population or in order to carry out other grave violations of international law. Besides it was felt necessary to explicitly reiterate that the definition shall not be interpreted as affecting, in whatever way, domestic legislation relating to pregnancy.

Finally, in order to reach a general consensus including in that regard both the United States as well as the group of Arab States, the clause criminalizing the *recruitment of children* now foresees that only the *conscription* or *enlistment* of children under the age of fifteen into *national* armed forces or using them to participate *actively* in hostilities is prohibited. The first two terms address the issue of children under the age of fifteen becoming military cadets and clarify that any such system of military schools does not constitute an act prohibited by the Statute. Besides, it is worth noting that the limitation of the prohibition to *national* armed forces, which is not contained in the parallel provision on internal armed conflicts, somewhat deviates from the language used in article 43 of the First Additional Protocol of 1977, which speaks of organised armed forces. It would, however, include, the enlistment in all forms of armed forces under the responsible command of the respective State party regardless of whether these armed forces are considered the regular army of this State or not. Besides one might argue that troops under the command of a national liberation movement, provided they fulfill the other require-

ment of article 43 of the First Additional Protocol, should for the purposes of the Statute, also be considered national armed forces.

The part on *internal armed conflicts*, i.e. article 8 para. 2 lit. (c) – (f), led to serious concerns by some States, especially those which so far have not yet ratified the Second Additional Protocol of 1977. In order to address their concerns the threshold to lit. (e), now not only provides that this part does not apply to situations of internal disturbances and tensions, such as riots and sporadic acts of violence but besides presupposes a protracted armed conflict between either governmental authorities and organized armed groups or between such groups. This language, which is derived from the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, unlike a previous draft does not include the content of article 1 para. 1 of the Second Additional Protocol. Accordingly conflicts between several insurgents groups or situations where all effective governmental control has ceased to exist, are now also covered by the Statute. Besides, similar to article 3 para. 1 of the Second Additional Protocol, it is reaffirmed that the provisions dealing with internal armed conflicts shall not affect the responsibility of a Government to maintain or re-establish law and order or to defend the unity and territorial integrity of the State by all legitimate means. Notwithstanding the fact that the final version of the Statute does not refer any more to means which are consistent with international law, it still seems to be correct to state that acts specifically prohibited by the provisions of the Statute itself cannot be considered to be legitimate for the purposes of criminal responsibility.

On the initiative of the United States, article 9 of the Statute now empowers the Assembly of States Parties to adopt so-called "*elements of crime*" which are supposed to further elaborate the different constituent components of each of the crimes. These elements are, however, only to assist the Court its interpretation of article 6–8, but shall not bind it. Besides article 9 para. 3 explicitly reiterates that these elements of crime must be consistent with the Statute and accordingly may not constitute hidden amendments to the Statute.

Maybe the most important issue to be solved by the Conference was the question under which conditions the Court should be *able to exercise its jurisdiction*. First it is important to note, that article 12 para. 1 provides that a State, by becoming a Contracting Party, thereby automatically accepts the jurisdiction of the Court. As to the preconditions to the exercise of jurisdiction, while the German proposal outlined above which purported to apply the principle of universal jurisdiction, had gained considerable support, it became obvious that it was not generally acceptable. Instead, the so-called Korean proposal according to which it would have been sufficient for either the territorial state, the custodial state, the state of origin of the offender or that of the victim to be a party to the treaty

in order for the Court to exercise its jurisdiction had gained the most support. Notwithstanding and in order to gain the support of some important states including certain permanent members of the Security Council for the Statute at large, the final text now is even more limited, in that it presupposes in its article 12 para. 2 and 3, that only if either the territorial state or the State of which the offender is a national is a contracting party to the Statute or consents ad hoc to the exercise of jurisdiction by the ICC, the Court can exercise its jurisdiction.

Besides, a State on becoming a Contracting Party may in accordance with article 123 of the Statute declare that for a period of up to seven years it does not accept the jurisdiction of the ICC with regard to war crimes committed by its nationals or on its territory. This transitional period may be only prolonged by a formal amendment of the Statute in accordance with article 123 para. 3 read in conjunction with article 121 para. 3–7, thus necessitating both a 2/3 majority during the voting in the Assembly of States and a ratification by 7/8 of the Contracting Parties. Given these requirements it seems highly unlikely that this period will in the future be extended.

As to the *triggering of the jurisdiction of the Court* provided for in article 13 of the Statute, the power of the prosecutor to initiate investigations *proprio motu* proofed to be the most controversial alternative but was finally accepted, subject to judicial control to be exercised by the Pre-Trial Chamber in accordance with article 15 paras. 3–5 of the Statute. In line with the by now famous Singapore proposal the Security Council may by way of resolution, to be adopted under Chapter VII of the Charter of the United Nations, and to be eventually renewed, request the Court to interrupt any investigation or prosecution for a period of twelve months. It is worth noting that the powers of the Security Council to act under Chapter VII of the Charter have thereby for the first time been limited in an international instrument since the Security Council would eventually by virtue of article 16 the Statute of the ICC be forced to renew any such request for deferral but could not provide for a deferral *sine die*.

One of the most important provisions is article 120 which explicitly prohibits any kind of reservations to the Statute. As in the case of the United Nations Convention on the Law of the Sea, the question will then arise whether declarations made or understandings submitted by State Parties when ratifying the Statute amount to reservations or not. In that regard Article 119 of the Statute, which provides that any dispute concerning the judicial functions of the Court shall be settled by the Court itself, is of particular importance.

As to the *financing of the Court.* While the regular expenses of the Court will be financed through a system of assessed contributions to be made by States Parties in accordance with article 115 lit. (a) of the Statute, the

expenses incurred due to referrals by the Security Council under article 13 lit. (b) will in accordance with article 115 lit. (b) and subject to a decision of the General Assembly, be borne by the United Nations. Given the fact that this latter provision refers to the fact that such funds shall *in particular* cover referrals by the Security Council it is very foreseeable that the initial costs incurred during the establishment of the ICC, would, following the model of the International Tribunal for the Law of the Sea, be also covered by the budget of the United Nations.

Finally it might be said that the success of the Rome Conference can be considered to constitute a historic milestone in the development of international criminal law. One might hope that the 60 ratifications necessary for the Statute to enter into force will be deposited in the near future. Besides one might similarly hope that some major powers and in particular the United States, which were one of the very few countries to vote against the adoption of the Statute during the final hours of the Rome Conference, will change their attitude towards the Court. In particular the Security Council should, where necessary make use of the Court by referring situations to it thereby putting an end to impunity for perpetrators of genocide, crimes against humanity and war crimes and thus at the same time contributing to the prevention of such crimes.