

in views in the Preparatory Committee. It may be recalled that during the 37th Session of the AALCC concern was expressed by Member States that a financial system was essential to ensure smooth and effective functioning of the Court.

(ix) Review Conference

Article 123 addresses the issue of the Statute's review and provides that seven years after entry into force, the Secretary General of UN is to convene a *Review Conference*²¹ to consider any amendment to it. Such a review may include but is not limited to the list of crimes under the jurisdiction of the Court. Subsequent debates in the Sixth Committee reveal that delegates do favour only a review of matters but are against altering the basic elements of the Court.

(x) Ratification

Article 126 in Part 13 of the Statute deals with Entry into Force. It states that the Statute shall enter into force on the first day of the month after the 60th day following the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary General of the United Nations. It may be recalled that the Statute was opened for signature in Rome on 17 July 1998 and will remain open for signature at the United Nations Headquarters until 31 December 2000. (We already have before us the experience of the UN Convention on the Law of the Sea which required 60 ratifications to enter into force, and about which it was felt that in a bid to ensure universality of participation too large a number delayed its entry into force. But a lower number of ratifications could jeopardize the objective of universality of acceptance of an international jurisdiction).

²¹ See Article 123 of the Statute.

Discussion in the Sixth Committee and Resolution Adopted by the 53rd Session of the General Assembly

The Sixth Committee witnessed a debate on the future of the International Criminal Court with several speakers urging that its Preparatory Commission commence work at the earliest possible dates in 1999. The Preparatory Commission, provided for by the Statute of the International Criminal Court adopted in Rome in July 1998, will lay the groundwork for the functioning of the Court. Among its first tasks, the Commission would begin drafting the Court's rules of procedure and evidence, and elements of crime as well as a budget for the Court's first financial year. These are to be finalized before 30 June 2000. All these elements are critical to the manner in which the Statutes will actually be applied and implemented. The Commission will also be involved in making arrangements for the physical establishment of the Court. Participation in the Preparatory Commission is open to all States even those that have not signed the Statute.

Resolution 53/105 adopted by the General Assembly during the 53rd Session²² *inter alia* has requested the Secretary General to convene the Preparatory Commission to meet, in accordance with Resolution F²³ adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in order to perform the mandate of that resolution, and in that connection to discuss ways to enhance the effectiveness and acceptance of the Court from, 16 to 26 February 1999. For effective participation in the work of the Preparatory Commission the Secretary General has been requested to take steps to expand the mandate of the trust fund established in General Assembly Resolution 51/207 for voluntary contributions towards meeting the cost of participation of the least developed countries.

²² Annexure I to this brief.

²³ Annexed herewith as Annexure II.

First Session of the Preparatory Commission for International Criminal Court, held at United Nations Headquarters, New York, 16-26 February, 1999

Pursuant to Resolution F of the Final Act adopted at the Rome Conference on the establishment of an International Criminal Court, and by General Assembly resolution 53/105 of 8 December, 1998, the Preparatory Commission was directed to finalize draft texts on rules of procedure and evidence and elements of crimes before 30 June 2000. The Preparatory Commission is entrusted with laying the groundwork for the operation of the Court, once the Statute enters into force with 60 ratification.

The Officers of the Preparatory Commission are Mr. Philippe Kirsche (Canada), Chairman; Mr. Muhamed Sacirbey (Bosnia and Herzegovina), Mr. Medard Rwellamira (South Africa), and Mr. George Mckenzie (Trinidad and Tobago), Vice Chairmen and the Rapporteur is Mr. Salah Suheimat (Jordan).

Two co-ordinators were appointed one for each group, the coordinator for the Working Group on Rules of Procedure and Evidence is Ms. Silvia Fernandez de Gurmendi (Argentina), while Mr. Herman Van Hebel (Netherlands) is coordinator of the Working Group on Elements of Crimes.

During the session, the Preparatory Commission agreed to the appointment by the Chairman of Additional Co-ordinators. They were Mr. Rwellamira (South Africa) to coordinate matters relating to Part 4 of the Statute (Composition and Administration of the court); Mr. Rolf File (Norway) on Part 7 (Penalties); Mr. Phakiso Mochochoko (Ie-sotho) on Part 9 (International Co-operation and Judicial Assistance); and Mr. Tuvalu Manongi (United Republic of Tanzania) on the definition of the Crime of Aggression.

Report of Working Group of Rules of Procedure and Evidence

Ms. Silvia Fernandez de Gurmendi, Coordinator for this group while presenting an oral report on its work, said it held nine meetings. It deferred decisions relating to the final structure of the rules of procedure and evidence. The group considered a number of proposals submitted by delegations on Part 5 of the Statute. It was suggested that the authors should consult with a view to merging the proposals into one consolidated document. An informal consultation, open to all delegations, was coordinated by the representative of Switzerland. In the end document PCNICC/1999/WGRPE/RT.4 was drawn up to serve as a basic document for future discussions.

Document PCNICC/1999/DP.8 and Add. 1 and 2 were also discussed by the Working Group, but due to lack of time no single text based on them could be produced. In view of the difficulties encountered the Coordinator urged delegations to present their proposals well in advance of the next session. At its next session the Working Group should attempt to complete work on Parts 5,6 and 8 of the Statute.

Summary of Discussion Papers

The Coordinator of the Working Group of Rules of Procedure and Evidence submitted four discussion papers. The Working Group focused only on Part 5 of the Rome Statute, which deals with investigation and prosecution.

The first discussion paper (PC NICC/1999/WGRPE/RT.I) dealt with the determination by the Prosecutor to proceed an investigation. Among the views presented were that: the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony. Secondly, when the Prosecutor decides that there was not sufficient basis for prosecution, he or she shall inform in

writing the Pre-Trial chamber together with State or States that referred a situation to him or her.

The second discussion paper (PC NICC/1999/WGRPE/RT.2) dealt with procedure to be followed in the event of an application of a decision by the Prosecutor not to proceed with an investigation or not to prosecute. In that regard the views expressed included: where the Pre-Trial Chamber requested the prosecutor to review his or her decision not to initiate an investigation or not to prosecute, the Prosecutor shall reconsider that decision as soon as possible. Another view was that once the Prosecutor has taken a final decision, he or she shall notify the Pre-Trial Chamber in writing. That notification shall contain the Prosecutor's conclusion, the reasons for the conclusion as well as a full explanation of those reasons. Finally, the Pre-Trial chamber may, on its own initiative, review a decision of the prosecutor of its intention to review his or her decision and shall establish a full-frame during which he or she may submit observations.

The third discussion paper (PC NICC/1999/WGRPE/RT.3) dealt with proceedings with regard to the confirmation of charges. In that regard, the views expressed included: A person subject to a warrant of arrest or a summons to appear in the Court shall appear before the Pre-Trial Chamber in the presence of the Prosecutor. At this first appearance, the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges. Between the first appearance and confirmation hearing, evidence shall be disclosed. The victims and their legal representatives, who shall have access to the proceedings, shall be notified to the date of the confirmation hearing. They may also be asked to intervene during the hearing, by addressing a written request to that effect to the Pre-Trial Chamber. Finally, states wishing to challenge the jurisdiction of the court or the admissibility of the case before the Pre-Trial chamber at the time of the confirmation hearing shall make a written request to that effect no later than 30 days before the hearing.

The fourth discussion paper (PC NICC/1999/WGRPE/RT.4) dealt with disclosure of evidence. In that regard, the views expressed included: The Pre-Trial chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a pretrial judge be appointed to organize such status conferences. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify at trial and copies of statements made by those witnesses. However, the question of non-disclosure of the identity of witnesses who need to be kept anonymous, needs further discussion. The defence shall notify the Prosecutor of its intent to plead an alibi, in which case the defence shall specify the details of the alibi. The defence shall also give notice to both the Trial Chamber and Prosecutor if it intends to raise a ground for excluding criminal responsibility.

Report of Working Group on Elements of Crimes

At the first stage of discussions the Working Group considered the elements of the Crimes of genocide in article 6 of the Rome Statute, as well as paragraph 2(a) of article 8 concerning war crimes, on the basis of proposals before it. The Working Group completed general discussion on genocide and grave breaches. The discussions focused mostly on substantive issues. Further discussion was necessary in order to design a structure acceptable to delegations. The Working Group would continue its consideration of the elements of crimes at the next session of the Preparatory Commission.

Summary of Discussion Papers

The Coordinator of the Working Group on Elements of Crimes submitted three discussion papers. The Working Group focused only on article 8 (war crimes).

The first discussion paper (PC NICC/1999/WGRPE/RT.1) dealt with article 6 (the crime of genocide). That paper states that the crime of genocide was the intent to destroy, in whole or in part, a national, ethnical, racial or religious group: Genocide shall also occur if the accused knew

or should have known that his or her actions would destroy a group or the conduct was part of similar conduct directed against that group. The paper further defines five different types of genocide crimes.

The second discussion paper (PC NICC/1999/WGRPE/RT.2) dealt with article 8 (war crimes). It stated that war crimes would occur if the conduct took place in the context of and was associated with an international armed conflict; and if the person or persons affected by the conduct were protected under one or more of the Geneva Conventions of 1949 and the accused was aware of the factual circumstances that established this status.

The paper discussed five types of war crimes : (i) the war crime of wilful killing; (ii) the war crime of torture; (iii) the war crime of inhuman treatment; (iv) the war crime of biological experiments and (v) the war crime of wilfully causing great suffering.

The third discussion paper dealt with suggested comments relating to the crime of genocide. Among the suggestions the paper stated that it is recognized that rape and sexual violence may constitute genocide in the same way as any other act, provided that the criteria of the crime of genocide were met.

At the end of the first session of the Preparatory Commission, Mr. Philippe Kirsch, Chairman of the Commission, said it was essential that every effort was made by delegations to agree on common approaches to issues before the Preparatory Commission, and to undertake real and effective negotiations. The essential objective was to establish an International Criminal Court which functioned fairly and effectively and was widely supported.

The Chairman designated Mr. Hiroshi Kawamura (Japan) to serve as the contact point for some of the issues to be discussed by the Commission, including: the draft text of financial regulation and rules and the rules of procedure of the

Assembly of States parties. He also designated Mr. Christian Maquieira (Chile) to serve as the contact point for work on the following topics: a relationship agreement between the Court and the United Nations; a draft text of basic principles governing a headquarters agreement to be negotiated between the Court and the host country, and a draft agreement on the privileges and immunities of the Court.

Future Sessions of the Preparatory Commission

The Second Session of the Preparatory Commission is scheduled to be held from 26 July to 13 August. A third Session is planned for 29 November to 17 December. During the July/August Session, the coordinator on the question of aggression would report on the result of his contacts on that questions.

Comments

It is the view of the AALCC Secretariat that the Statute as adopted, although remains far from reaching a unanimous approval is a product of pragmatic compromises. It is satisfying to note that the efforts of the international community to establish an International Criminal Jurisdiction to try heinous crimes has become a reality. The Rome Conference witnessed a considerable number of thorny and extremely sensitive issues being resolved - more particularly issues linked with exercise of national jurisdiction, criminal jurisdiction, matters of national security and sovereignty and role of the Security Council. Concessions have been made by all sides to reach a consensus. The Lacunae and unaccepted dispositions for some countries which are in the present Statute, need not be a cause for acute despair and complete rejection, on the contrary the mere fact that a significant number of States with varied legal systems and cultural ethos have voted for a common text, is an indication of the strong will and political commitment of these States to address international crimes, that have hitherto gone unpunished, and it is indeed a first progressive step taken by these countries to accept therefrom that their own

nationals, perpetrators of these crimes be tried outside their own boundary.

Furthermore, against the backdrop of the discussions held among AALCC Member States during the annual Sessions, the two Special Meetings and subsequently during the Rome Conference, it can be asserted that the Statute goes only half way to meet the aspirations of the AALCC Member States, the task of identifying common grounds has not been an easy one. Nevertheless the explanations offered by AALCC Member States during the adoption of the Statute reveal certain issues that are of common concern;

Firstly, States have taken objection to the exclusion of weapons of mass destruction including nuclear, chemical and biological weapons in general and nuclear weapons in particular from the jurisdiction of the Court. This non-inclusion will be behind the abstention of some States to sign this Statute. An ICC, whose Statute was being negotiated fifty years after the invention and first use of nuclear weapons should explicitly ban their use and consider it a "crime against humanity". However, this has not happened, the message this sends is that, the international community has decided that the use of nuclear weapons, the most inherently indiscriminate of weapons, is not a crime. Another Lacuna which is related to the serious nature of offences, States expressed regret that the Statute had failed to address the crimes of terrorism and drug trafficking.

Secondly, some States have questioned the conferment of *proprio moto* powers on the Prosecutor, on the ground that such right to initiate prosecutions places State Sovereignty on the subjective decisions of an individual. The Pre-Trial Chamber provisions to check these powers was felt to be inadequate.

Thirdly, some States felt that the Statute lacked a clearer definition of Complementarity. Concerns were also expressed about the role of the Security Council in relation to the Court to offset any unilateral reference by the Security-

Council. Some States argued for including the General Assembly also in the process of determination of a reference. The Statute gives to the Security Council a role in terms that violate international law. It was argued that the Council be given a role in the Statute because it had set up the *ad hoc* tribunals for the former Yugoslavia and for Rwanda and has therefore established its right to do so. Those decisions were not legally perfect. It will be recalled, that the Preparatory Commission had taken the view that the International Criminal Court be established by a treaty. Whilst the Security Council can create an institution for a particular situation which is determined to be a threat to the peace and security i.e. under Chapter VII of the UN Charter, it could be an expansive view to suggest that the powers of the Security Council go so far as to create a standing body which would or could deal with situations which had not yet arisen or occurred, much less than be determined to be a threat to the peace and security of mankind.

But what the Council seeks from the ICC through the Statute, is the power to refer, the power to block and the power to bind non-States Parties. The Power to refer would be unnecessary because the Security Council set up *ad hoc* tribunals at a time when no judicial mechanism existed to try the heinous crimes committed in former Yugoslavia and Rwanda. With the establishment of an ICC the States Parties would have right to refer cases to it and hence there is no need for the Security Council to refer cases.

A view expressed during the "AALCC meeting to consider the Preliminary Reports on the Themes of the First International Peace Conference" raised troubling questions relating to the basic principle of equality among nations and peoples and the five permanent members of the Council had been placed on the pedestal by the rest of the world accepting that their leaders, officials, soldiers, cannot ever be accused before the International Criminal Court of committing grave crimes of international concern.

Since the Council has been provided the power even to capture non-Parties to the ICC within its purview there might arise a legally absurd situation of non-parties triggering ICC jurisdiction on other non-Parties. Under the Law of Treaties, no State can be forced to accede to a treaty or be bound by the provisions of a treaty it has not adhered to or ratified. The Statute violates this fundamental principle of international law by conferring on the Council a power which it cannot have. The Statute will, therefore, given non-States Parties, working through the Council the power to bind other non-States Parties. The role of the Security Council built into the Statute of the ICC and how much control it should have over the Court, will be a cause of concern to the majority of States.

Notwithstanding the inspiration that springs from the rocks of the Statute, it must be considered that many difficult legal issues of highly political and extremely technical nature have to be solved.

Not all the tasks have been accomplished. Other instruments within the Preparatory Commission are still to be finalized, and ratification in a sufficient number is required so that the court can start its work. 75 States have so far signed the Statute to establish the International Criminal Court. Senegal has become the first State to ratify the Statute.

It will not be out of place to mention that the Under Secretary General and Legal Counsel of the United Nations, Mr. Hans Corell at the meeting of the Legal Advisers of Member States of the AALCC convened at the United Nations Office on 30th October, 1998 in New York, as well as during the recently concluded AALCC Meeting to consider the Preliminary Reports on the Themes of the First International Peace Conference, held in New Delhi on the 11th and 12th February, 1999 recognized that the adoption of the Statute of the International Criminal Court in Rome was a major achievement and urged delegates to take a closer look at the Statute and find ways and means of ratifying the same. He felt that the AALCC could act in a manner akin to the Law of the Sea Convention, and be an

organization which encourages its Member States to sign and ratify the Statute at the earliest.

While recognizing the significance of the historic compromise which culminated in the adoption of the Statute it is desirable that the AALCC Member States evolve common strategies in furthering the progress achieved at Rome. For the Court to succeed in its tasks, it would need the widest support of the International Community. In the short term the work in the Preparatory Commission offers scope for articulating AALCC's view points. In the long run, provision for a Review conference could provide a suitable forum for pursuing with renewed vigor tasks unaccomplished at Rome.

VII. STATUS AND TREATMENT OF REFUGEES

(i) Introduction

The subject, "Status and Treatment of Refugees" was initially included in the agenda of the Asian-African Legal Consultative Committee (AALCC) following a reference made by the Government of Egypt in 1964. These discussions culminated in the adoption, at the 8th Session of the AALCC, of a set of guidelines titled "Principles Concerning the Status and Treatment of Refugees, 1966", (commonly referred to as the 'Bangkok Principles'). Subsequently in 1970 and 1987, as a step towards updating the Bangkok Principles, the Committee adopted two addenda on the right of refugees to return and the norm of burden-sharing respectively. Since then, the issues concerning refugees have been subject matter of discussion at successive Sessions of the Committee. The work of the AALCC in this area has been assisted by close functional relationship developed with the Office of the United Nations High Commissioner for Refugees (UNHCR).

At the Thirty-fifth Session of the AALCC (Manila 1996), the UNHCR Representative, commending the work of the AALCC in the field of refugees recalled that the year 1996 marked the 30th anniversary of the adoption of the Bangkok Principles. She felt that the commemoration of this occasion would afford a good opportunity for the AALCC member States to take stock of the experience acquired during the last thirty years. In this context, she expressed the willingness of UNHCR to co-sponsor with the AALCC a Seminar or Colloquium on refugee law whose point of departure will be a review of the Bangkok Principles. Pursuant to its deliberations at the Session, the Committee in its resolution on the 'Status and Treatment of Refugees', took note of the proposals advanced by the Representative of the UNHCR and requested the AALCC Secretariat, "to organize in collaboration with the financial and technical assistance of the UNHCR, a Seminar in 1996, on the