

under the UN Charter as reflected in recent practice. On the other hand, in the view of several other delegations, it would reduce the credibility and moral authority of the Court. According to some delegations, it would introduce an inappropriate political influence over the functioning of the ICC. The ICC may also find it difficult, it is pointed out, to question or contradict a finding of the SC. Views were divided on the question as to what extent the ICC should be permitted to consider a plea of self-defence raised by the accused since a SC finding under Article 39 of the Charter would have clear implications with respect to Article 51 of the Charter.

Some delegations sought to address the question of the Statute of limitations in the light of divergences between national laws. On the other hand, some delegations questioned the applicability of the Statute of limitations to the types of serious crimes under consideration and drew attention to the 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

D. Methods of Proceedings: Due Process

In view of the considerable powers vested in the ICC, it was felt essential to apply the highest standards of justice, integrity and due process. Accordingly, it was also felt that the rules of the Court should be prepared by the States and these should be eventually adopted by States parties to the Statute. Considering that both the civil-law and common-law systems would be represented on the Court, it was found necessary to give appropriate reflection to both the systems in the Statute as well as in the rules of the Court. During the course of the discussion, a proper balance was sought to be achieved between two concerns, namely, the effectiveness of the prosecution and respect for the rights of the suspect or the accused. Some delegations sought to place emphasis on the need to formulate the provisions on due process in such a way as to allow for the application of standards contained in relevant human rights documents.

E. Relationship between States Parties, non-States Parties and the ICC

The relationship between States parties and the ICC, it was pointed out, was intrinsically linked with that of the relationship between the provisions of the Statute and their implementation under national law. It also depended on the nature and extent of obligations of States to guarantee such cooperation. In view of the importance and complexity of such a relationship, it was suggested that the basic elements of the required cooperation be laid down explicitly in the Statute itself. Furthermore, a view was also expressed that any impediments arising from the application of existing regimes of cooperation or considerations of national constitutional

requirements should be clearly identified for the purpose of devising appropriate schemes for cooperation.

The system of apprehension and surrenders under Article 53 of the draft Statute, for instance, in the view of some delegations, was a departure from the traditional regime of cooperation between States established under the existing extradition treaties. So, it was suggested that while creating a new scheme of cooperation to suit the needs of the ICC, the principles and established practices of the existing extradition treaties should be taken into account. The views of the delegations differed on the question as to whether the Statute should provide for the direct recognition and enforcement of the orders, decisions and judgements of the Court. The question of the rights of third parties, particularly involving confiscation of property, forfeiture of profits and issues relating to restitution were also noted by the various delegations.

Concerning the applicable law to govern the enforcement of sentences, the view was expressed that the terms and conditions of imprisonment should be in accordance with international standards. Several delegations noted that the issues relating to fines and other financial sanctions needed further consideration. And as regards Article 60 concerning pardon, parole, commutation of sentence or release of the convicted person, it was pointed out that a relative uniform administration at the national level should be ensured.

F. Budget and Administration

The issues concerning the budget had three strands: (i) the costs of the Court should be financed from the regular budget of the UN; or (ii) States parties should bear the costs; or (iii) it would be too early to discuss budgetary matters in detail until the nature of the Court and the degree of its general acceptability had been clarified. The first approach, it was pointed out, sought to emphasize the need to ensure the universal character of the Court by making it a part of the UN system. It also allowed all States to initiate proceedings without financial burdens. The second approach noted that it would generate increased interest and participation by the States and a formula similar to that applicable in the framework of the Permanent Court of Arbitration was mooted. Various suggestions were also made to reduce the costs. For instance, it was suggested that the Court could move to the location where a particular crime had been committed. A State which had lodged a frivolous complaint should be made to pay some of the costs. A suggestion was also made to establish an auditing mechanism to monitor the expenditure of the Court and also to establish an appropriate supervisory mechanism to oversee the administrative aspects.

V. VIEWS AND COMMENTS BY THE AALCC SECRETARIAT

Having considered the draft Statute for an ICC, the *Ad Hoc* Committee proposed the next step as to call for the conference of plenipotentiaries with a view to its early completion.²⁵ The Resolution adopted by the Sixth Committee also noted that the States participating in the *Ad Hoc* Committee still had different views on major substantive and administrative issues. Therefore, it called for further discussion for reaching consensus. Accordingly, it decided to establish a Preparatory Committee open to all States Members of the UN or members of specialized agencies or of the IAEA. Many States, on the other hand, while recognising the need to maintain the momentum to establish the ICC, have found it unrealistic to stipulate a rigid time-frame for the proposed Preparatory Committee to complete its work.²⁶ To facilitate comprehensive discussion during the Preparatory Committee meeting, the AALCC Secretariat seeks to offer the following comments for the consideration of the Committee.

Following issues need greater consideration by the Members of the AALCC while taking part in the future negotiations within the proposed Preparatory Committee. These issues could be briefly summarized as under:

- (a) Complementarity between ICC and National Jurisdictions.
- (b) The extent and scope of crimes which may be considered by the ICC and the extent of applicability of the provisions relating to the Draft Code of Crimes in determining the jurisdiction of the ICC.
- (c) The scope of inherent jurisdiction as enunciated in the Article 20 of the ICC Statute.
- (d) Exercise of jurisdiction and the State consent; consideration to be accorded to the "trigger mechanism".
- (e) The Role of SC *vis-a-vis* the ICC: and
- (f) Procedural issues and the uniform application of international standards relating to these procedures.
- (g) Budget and Administration.

In the following discussion these issues could be briefly elaborated.

It should be noted that the Statute provides in the preamble itself that the "Court is intended to be complementary to national criminal jurisdiction".

25. *Conclusions of the Ad Hoc Committee*, see Report of the Ad Hoc Committee, n.22, page. 49. Also see Resolution passed by the Sixth Committee, A/50/639, 5 December 1995.

26. *Ibid.*

Even in the provisions of the Statute the primacy of the national jurisdiction is maintained except in the cases of serious violations and the crimes which affect the conscience of the international community. State consent is also an essential ingredient of the applicability of jurisdiction. So, it would be appropriate to conclude that the evolving practice in the arena of international criminal jurisdiction may provide for the appropriate functional definition of "complementarity". Having stated that, the AALCC Secretariat also notes that the criminal jurisprudence essentially provides primacy to the State and its investigative agencies. The institutionalisation of the experience of the post-Second World War era concerning the evolving principles of international criminal jurisdiction needs further careful consideration. For instance, the principles relating to humanitarian law have evolved rapidly and govern the conduct of both internal and international armed conflicts ('internal conflict' as defined in the 1977 Protocol to the Geneva Conventions, 1949). So, the definition of crimes constitutes a major focal point in determining the extent of international criminal jurisdiction.

References, it should be noted, have been made to the Draft Code of Crimes and its effective application within the evolving international criminal jurisdiction. Initially, it had been felt that work on the Draft Code of Crimes should have preceded the creation of an ICC. Article 20 of the Statute, for instance, lists crimes over which the court has jurisdiction. These crimes, it should be noted, are a part of the draft Code of Crimes. Considering the wide and extended discussion on the scope of the crimes to be listed in the Statute it would be essential to clearly outline the relationship between the two i.e. Draft Code and the ICC. Furthermore, it should be noted that the nature of crimes has a direct bearing on the question of "inherent jurisdiction".

Although consent of the State is primary in deciding the extent of jurisdiction, the so called "trigger mechanism" as enunciated in Article 21 needs careful consideration. Its application is limited, however, to the cases of genocide. The factual determination of the crime of genocide is also within the purview of the ICC. However, the investigation of the crime is done by the Prosecutor and he has been authorised to act in a certain way to facilitate speedy investigation. Article 26 of the Statute specifies these aspects. Considering the magnitude of the prosecutor's responsibilities, particularly investigating and determining the *prima facie* existence of the act of crime, it would be appropriate to carefully consider the role of the prosecutor and the mode of prosecution. The role of Procuracy, for instance, may become controversial and difficult in the cases of crimes with substantial political overtones.

As could be seen from the discussion at the *Ad Hoc* Committee, the defining of the relationship between the SC and the ICC has remained an unsettled area. Many States seek to allow SC a major role, particularly in determining the political nature of any alleged crime. On the other hand, some States are also sceptical about the increasing influence of the SC on the ICC. Despite these differences, Article 23 specifically outlines the role of SC, particularly acting under Chapter VII of the UN Charter. A complaint relating to the act of aggression cannot be brought directly to the ICC unless the SC has first determined the act of aggression. In matters of peace and security ICC has no role to play *vis-a-vis* SC. Any conflict situation in these areas will have to allow the SC a predominant role. In other words, the political nature of any alleged crime may overshadow the efficient and objective functioning of the ICC.

The harmonization of the procedural issues from different legal systems, particularly concerning the exercise of criminal jurisdiction is sure to pose problems. A widely held view that in these matters priority to be given to the national laws and practices needs greater consideration. The creation of international standards concerning the procedural aspects, without adequately debating the bottlenecks, may result in inequitable situations. For this reason, consolidation of procedural issues of all the different criminal jurisdictions need utmost consideration. A particular reference may be made to the issues relating to the transfer of accused to the jurisdictions of the ICC. The necessary legal framework for the transfer of accused needs closer consideration in the light of bilateral arrangements existing between States. The procedures for the recognition of the judgements of the ICC and its enforcement within the national jurisdiction also needs consideration. In the event of a State refusing to adhere to the enforcement requirements may create problems for the effective functioning of ICC. In such an event, the course to be adopted by the ICC needs elaboration.

The relationship between the UN and the ICC is crucial for the objective and independent functioning of the latter. Considering the difficulties involved in amending the UN Charter and establishing the ICC as an independent judicial organ of the UN, as a first step the ICC could be established by a treaty with the UN providing the necessary infrastructure (subject to guarantees of independence).

Further, the draft Statute does not clearly indicate as to how the ICC would be financed. Although *Ad Hoc* Committee proposed ways of meeting the costs of the ICC, i.e. from the UN budget or States parties to bear the costs there was no final decision on this question. Nevertheless, this is crucial for the survival of the ICC itself. It is possible that the financing by States parties may also make some States reluctant to become parties

to the Statute. In view of this, it could be suggested that the budget of the ICC, at least during the initial stages could be met by the UN as determined by the GA.

Finally, in the above discussion, an attempt had, however, been made to identify issues which may need further consideration. Despite these differences, the AALCC Secretariat finds this draft comprehensive. As stated in its earlier studies,²⁷ the AALCC Secretariat supports the establishment of an ICC on a permanent footing. At the same time, it also points out that an indepth consideration should be given to the abovementioned areas of contention in the Preparatory Committee.

27. The AALCC Secretariat submitted to the Committee a number of studies relating to the ILC's draft Statute for an ICC. These are: *The ICC: An Update*, (AALCC Doc. No. XXXIV/Doha/95/1A) *Report of the ILC on the Work of its Forty-fifth Session* Doc. No. AALCC XXXIII/Tokyo/94/1; *Note on AALCC's views Relating to ICC submitted to Ad Hoc Committee's Meeting* (Sixth Committee) held From 14 to 25 August 1995.

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

The States Parties to this Statute,

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

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

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective;

Have agreed as follows :

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

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

Article 2

Relationship of the Court to the United Nations

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

Article 3

Seat of the Court

1. The seat of the Court shall be established at ... in ... ("the host State").
2. The President, with the approval of the States parties, may conclude an agreement with the host State establishing the relationship between that State and the Court.
3. The Court may exercise its powers and functions on the territory of any State party and, by special agreement, on the territory of any other State.

Article 4

Status and legal capacity

1. The Court is a permanent institution open to States parties in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Court shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

PART 2. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 5

Organs of the Court

The Court consists of the following organs:

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

Article 6

Qualification and election of judges

1. The judges of the Court shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices, and have, in addition:

- (a) criminal trial experience;
- (b) recognized competence in international law.

2. Each State party may nominate for election not more than two persons, of different nationality, who possess the qualification referred to in paragraph 1(a) or that referred to in paragraph 1(b), and who are willing to serve as may be required on the Court.

3. Eighteen judges shall be elected by an absolute majority vote of the States parties by secret ballot. Ten judges shall first be elected, from among the persons nominated as having the qualification referred to in paragraph 1(a). Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1(b).

4. No two judges may be nationals of the same State.

5. States parties should bear in mind in the election of the judges that the representation of the principal legal systems of the world should be assured.

6. Judges hold office for a term of nine years and, subject to paragraph 7 and article 7(2), are not eligible for reelection. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.

7. At the first election, six judges chosen by lot shall serve for a term of three years and are eligible for reelection; six judges chosen by lot shall serve for a term of six years; and the remainder shall serve for a term of nine years.

8. Judges nominated as having the qualification referred to in paragraph 1(a) or 1(b), as the case may be, shall be replaced by persons nominated as having the same qualification.

Article 7

Judicial vacancies

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 6.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and if that period is less than five years is eligible for re-election for a further term.

Article 8

The Presidency

1. The President, the first and second vice-Presidents and two alternate Vice-Presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier.

2. The first or second Vice-President, as the case may be, may act in place of the President in the event that the President is unavailable or disqualified. An alternate Vice-President may act in place of either Vice-President as required.

3. The President and the Vice-Presidents shall constitute the Presidency which shall be responsible for:

- (a) the due administration of the Court; and
- (b) the other functions conferred on it by this Statute.

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

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

Article 9

Chambers

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

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

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

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

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

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

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

Article 10

Independence of the judges

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

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular, they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes.

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

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

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

Article 11

Excusing and disqualification of judges

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

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

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

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

Article 12

The Procuracy

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

2. The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, who may act in place of the Prosecutor in the event that the Prosecutor is unavailable. The Prosecutor and the Deputy

Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character and have high competence and experience in the prosecution of criminal cases. They shall be elected by secret ballot by an absolute majority of the States parties, from among candidates nominated by States parties. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of five years and are eligible for re-election.

4. The States parties may elect the Prosecutor and Deputy Prosecutors on the basis that they are willing to serve as required.

5. The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor.

7. The staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor.

Article 13

The Registry

1. On the proposal of the Presidency, the judges by an absolute majority by secret ballot shall elect a Registrar, who shall be the principal administrative officer of the Court. They may in the same manner elect a Deputy Registrar.

2. The Registrar shall hold office for a term of five years, is eligible for re-election and shall be available on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on, and may be elected on the basis that the Deputy Registrar is willing to serve as required.

3. The Presidency may appoint or authorize the Registrar to appoint such other staff of the Registry as may be necessary.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar.

Article 14

Solemn undertaking

Before first exercising their functions under this Statute, judges and