

FOLLOW-UP OF THE UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (ROME-ITALY, 15 JUNE-17 JULY 1998): WORK OF THE PREPARATORY COMMISSION FOR ICC

(i) Introduction

The Secretariat of the AALCC has in the past followed the work of the International Law Commission (ILC) on the establishment of an International Criminal Court (ICC). The matter relating to the ICC has been discussed at successive sessions since the 33rd Session and continues to be on its work programme. The topic was also considered at two special meetings held within the framework of the 35th (Manila, 1996) and 36th (Tehran, 1997) sessions of the AALCC.

The 37th Session of the AALCC had mandated the Secretariat to participate actively in the Rome Diplomatic Conference. The Deputy Secretary General Ambassador Dr. Wafik Zaher Kamil was deputed to represent the AALCC at the Conference. Two meetings were organized by the AALCC parallel to the Rome Conference. The aim was to collate the views of the member States and to present a collective view regarding the contentious issues to the Committee of the whole. The discussion at those meetings were based on a working document prepared by the Secretariat of the AALCC: Overview of the Statute of the International Criminal Court. The views expressed during those meetings had been forwarded to the chairman of the Committee of the Whole, Mr. Philip Kirsch.

The 38th Session of the AALCC held in Ghana adopted a resolution which *inter alia* requested the Secretary General of the AALCC to monitor and report the developments in the Preparatory Commission at the 39th Session of the Committee. Accordingly Dr. Kamil (DSG), was deputed to attend the Second Session of the Preparatory Committee for the Establishment of the International Criminal Court held in New York from 26 July to 13 August 1999.

Thirty-ninth Session: Discussions

The Deputy Secretary General Amb. Dr. Wafik Zaher Kamil recalled that the AALCC Secretariat had closely followed the evolution of work of the United Nations paving the way for the establishment of an International Criminal Court. For the last six years the matter had been extensively discussed at AALCC's annual sessions and at the two special meetings held during the 35th (Manila) and 36th (Tehran) Sessions.

The 38th Session of AALCC had adopted a resolution, requesting AALCC to monitor and report the developments in the Preparatory Commission for the ICC at the 39th Session. He also attended the second session of the Preparatory Commission held in New York from 26 July to 13 August 1999.

The AALCC was not represented at the third meeting of the Preparatory Commission held in November-December (29 November-17 December) 1999. However, a brief report on the work of the Commission was presented during that session.

The Commission had focussed on two instruments necessary for the functioning of the Court i.e. (i) The Rules of Procedure and Evidence and (ii) The Elements of Crimes. The Crime of Aggression had also been considered.

The Preparatory Commission took note of the oral reports of the co-ordinators for Elements of Crimes and Rules of Procedure and Evidence for parts 2, 4, 6, 7, 8, 9 and 10 of the Statute and for the Crime of Aggression, it noted that the first reading of crimes and rules of procedure was completed.

The Commission also took note of General Assembly resolution 54/105 of 9 December 1999, which renewed the mandate of the Commission and in accordance with paragraph 3 of that resolution the Secretary General of the United Nations was requested to convene the meetings of the Preparatory Commission from 13 to 31 March, 12 to 30 June and 27 November to 8 December 2000.

Regarding Rules of Procedure and Evidence, Dr. Kamil stated that at the third session the Commission continued its consideration of rules pertaining to Part 2 (Jurisdiction, Admissibility and Applicable Law); Part 4 (composition and Administration of the Court); Part 6 (the Trial); Part 7 (Penalties); Part 8 (Appeal and Revision); Part 9 (International Cooperation and Judicial) and Part 10 (Enforcement). He added, that the working group had before it several proposals, in addition to those made at the first two sessions of the Commission's first reading of the rules of procedure and evidence.

Concerning the Elements of Crimes, he said that the Working Group had primarily focussed on the Crimes against Humanity. A first reading of the proposals had been completed.

He noted that a working group on the crime of aggression was established during the third Session of the Commission. A general debate had ensued on the basis of a compilation of proposals submitted by Governments to the Preparatory Committee (1996-1998), the Rome Conference (1998) and the Preparatory Commission (1999). Taking into account views expressed in the Working Group, a consolidated text of proposals as proposed by the coordinator was prepared. The Group undertook a preliminary consideration of the new consolidated text of proposals.

He urged the AALCC Member States to continue to actively participate in the remaining sessions of the Preparatory Commission.

The Delegate of Japan observed that the aim for the establishment of the International Criminal Court was primarily to bring justice to individuals. The adoption of the Rome Statute had been a historical achievement. At present the Preparatory Commission is in the process of preparing texts of the (i) Rules of Procedure and Evidence; (ii) Elements of Crimes and (iii) A definition for the Crime of aggression. He urged the United Nations to maintain the momentum of work in the Working Groups. He stated that in this regard his country was always willing to work effectively with the United Nations as well as the AALCC. He emphasized the universality of the Court and appealed to States to accede to the Statute as soon as possible.

The Delegate of the United Arab Emirates stated that the establishment of the International Criminal Court was one of the most important accomplishments of the last century. The fact that 123 States were signatories to the Rome Statute was itself an indication of the desire of the international community to put an end to crimes against humanity, and the perpetrators be tried. Although the Statute had come through after difficult negotiations, in the Preamble the principles of state sovereignty and non-intervention into the internal affairs of states has been emphasized. These principles in his view were paramount, and should not be tampered with.

He noted that the Preparatory Commission at present was considering three important items (i) Rules of Procedure and Evidence; (ii) Elements of Crimes and (iii) Crime of aggression. With respect to war crimes, he stressed that these should only relate to armed internal strife and should not apply to internal confusion or strikes. The sovereignty of States was to be fully respected. The parameters of the Court with regard to war crimes should be clearly drawn up or else there was a concern that the Court might end up as being a human rights courts. With respect to the Definition of War, Victims of Crimes, while appreciating the role played by NGO's as mentioned in the Paris document he stated that the definition was not acceptable to them. For arriving at a definition certain obligations and responsibilities have to be borne in mind. Furthermore this definition cannot be applied to trade unions.

The Delegate of Republic of Korea stated that his country had taken active part during the Rome Conference and continues to do so in the Preparatory Commission i.e. the rule making process. He was hopeful of signing the Statute during the early part of this year, and the process of ratification of the Statute would be done as soon as realistically possible.

The Delegate of the Arab Republic of Egypt stated that the establishment of the International Criminal Court was a long cherished hope of the international community since the time of the Nuremberg and Tokyo trials. In his view certain issues needed serious consideration. Among them of paramount importance was first the definition of Aggression, which he felt, was to be judged on the basis of definition of Aggression as proposed by General Assembly Resolution in 1974. He expressed satisfaction at establishment of a working group to discuss a definition for the crime of aggression. Regarding the relationship between the Court and the Security Council he reiterated the need to ensure the independence of the Court and to maintain its supreme role in characterization of crimes. In conclusion he pointed out that the success of the Court and the hope for adherence to its statute would not be achieved alone by urging states to do so, but required an amount of flexibility and realism in addressing the genuine concerns and apprehensions which many states continue to have regarding the role of the Court and the scope of its competence.

The Delegate of Nepal stated that his country had actively participated at the Rome Conference and was one of the countries to have voted for adoption of the Statute. In his view experiences of various regional conflicts where basic human rights had been seriously violated indicated the existence of circumstances in which States themselves are unable to prosecute such criminals. His delegation had time and again reiterated the need that the Asian African States should take into consideration the

seriousness of such events and have a unified opinion for the establishment of the Court. Furthermore, the United Nations Conference had proved to be a vital decision making process which reflected the determination of the world community to make the principles of justice prevail over those forces which foster anarchy and narrow nationalistic interests, by taking recourse to ways and means repugnant to human consciousness. His delegation was of the opinion that in order to carry on the world opinion perpetrators of the serious crimes of concern to the international community as a whole including genocide, crimes against humanity and the Crime of aggression should not go unpunished. In this regard he suggested that the AALCC Secretariat should consider developing common strategies to be followed by the AALCC Member States in furthering the progress achieved by the Rome Conference. It should also develop a model national legislation to fulfil state responsibility and other obligations so that judicial assistance may take place in a coherent fashion in harmony with the Rome Statute of the International Criminal Court.

The Delegate of Indonesia recognised that the Principle of complementarity was the fundamental basis for any criminal jurisdiction. He felt that the efforts to set up an International Tribunal for East Timor was in a way undermined the genuine efforts of his country to bring to book perpetrators of crimes. In this regard, he added that the government of Indonesia has been in the process of setting up a human rights court and incorporated a number of core crimes such as genocide, torture and crimes against humanity etc in its domestic legislation.

The Delegate of Thailand stated that his country had actively participated in the adoption of the Rome Statute, and noted with satisfaction, that the establishment of a permanent judicial body to try perpetrators of serious crimes, has come a long way and has thus received universal participation of the international community regardless of the existing different legal systems. Further, he added his delegation had closely followed the developments and discussions on the drafting of the Rules of Procedure and Evidence, particularly the determination of the Elements of Crimes being drafted by the Preparatory Commission for the International Criminal Court. The outcome of the said instrument and details as such would be a crucial yardstick to determine whether it was feasible to assume obligations under the Rome Statute. He said that in Thailand a Committee has been set up to study and scrutinize the implications of the Rome Statute in terms of the policy commitment and legal obligations should Thailand become a party thereto. However, unless and until the Rules of Procedure and Evidence, as well as the Elements of crimes were finalized. It would not be in a position to make a decision on its membership of the Court. He implored the world community to reach an agreement on all parts of Statutes, taking into account the concerns of the developing countries. His delegation was of the opinion that the broadest participation of the Members of the AALCC in ongoing discussion on remaining substantive issues, especially elements of crimes, would help steering the Rules of Procedure and Evidence and the Elements of Crimes.

He suggested that in order to facilitate the Member Countries to further associate themselves with the Rome Statute and the Rules of procedure and Evidence, a series of seminars or workshops in the area of international criminal law be held without delay.

The President took note of the request from an Observer Delegation representing the Afro-Asian Law Federation to take the floor and stated that consideration would be given at the appropriate time on the permissibility of such an intervention, after taking into consideration the rules of procedure under the Statutes of the AALCC.

The Delegate of Kenya said that his country attached great importance to the establishment of the ICC. It had participated in the Rome Conference, as well as the three Preparatory Commission meetings. He thanked the Secretariat for preparation of the document on the subject. He observed that the Rome Statute is an advancement in public international law. He supported the suggestion of Thailand that seminars or symposia be held on the subject. As there were still three more sessions of the Preparatory Commission, which *inter alia* would discuss the definition of the crime of aggression, these seminars could be very helpful to the member States who sometimes do not have the resource or the necessary expertise, and hence were disadvantaged to this extent.

The Delegate of Iraq stated that the Rome Conference of 1998 was of great importance to the Asian African countries. It had dealt with important matters relating to crimes of war, internal conflict, crimes against humanity, crime of aggression, relationship of the court with the Security Council etc. He had certain reservations regarding the definitions, if they were not laid down clearly it was likely to jeopardize the interests of the AALCC Member States. Therefore, it was necessary to have coordination among AALCC Member States, in order to present a united stand during the remaining Preparatory Commission meetings. This would ensure that Western ideas do not prevail over the Asian African States and they are able to defend their interests.

The Delegate of India noted that there was no change in their ideas towards the opposition to the present Statute, which was no doubt an excellent idea. While there was ample justification for the creation of an international criminal court as a number of crimes had gone unpunished, its establishment would prove to be a deterrent. Unfortunately, the Statute did not get either the time or atmosphere where genuine concerns could be addressed without losing focus. However its scope had been expanded vis-à-vis the number of crimes which should have been under domestic jurisdiction and were now crimes to be tried by the ICC. He shared the concern of some other delegations that the court should not become a merely a Human Rights Court.

He stressed the need to see that the principle of complementarity is maintained and the Court should not intervene in the internal affairs of criminal law jurisdiction central to national sovereignty. He added that presently the ICC has the ultimate power to decide its jurisdiction and serious crimes of terrorism, narcotics and drug trafficking have not been attended to. Aggression which was well defined by the General Assembly has been ignored. Though he was not fundamentally opposed to the idea of the Court, but it would be more acceptable if the genuine concerns of States were looked into and principles of parliamentary democracy followed. In his view, lack of time in the Preparatory Commission could lead to serious problems while adopting the rules of the court. He recognized that the AALCC could play an effective role in helping countries to develop consensus as they lacked time and resources needed, otherwise there was fear of being left behind the decision making process.

The Delegate of Ghana observed that his main concern was the relationship of the Court to the Security Council particularly with regard to the financial resources for the operation of the court. Furthermore this is evident as the three permanent members of the Security Council had not signed the Statute. Under the UN Charter it was the Security Council which should determine aggression. Hence the Preparatory Commission should address this as well as other outstanding issues. He noted that so far out of the 84 signatories to the Statute only 9 were from the Asian African region. He urged the AALCC Member States to take active part in the Preparatory Commission and suggested that the AALCC Secretariat should organize Seminars and Workshops to convince other member states to join the Statute.

The Delegate of the Islamic Republic of Iran noted the mandate of the Preparatory Commission as contained in Resolution F was to finalize the draft rules of procedure and elements of crimes by the end of June 2000. It also has to consider a definition of aggression and the relationship of the Court with the Security Council. He cautioned that in such an exercise care should be taken not to depart from the letter and spirit of the statute of the ICC and it should not indirectly modify the Statute. He felt that the completion of definition of aggression would encourage universal acceptance and ratification of the Statute by many more states. Regarding the definition of aggression he was of the view that General Assembly Resolution 3314 adopted on 14 December 1974, ought to be the basis for discussion and elements contained therein should be transferred into a formulation suitable for inclusion in a criminal law instrument. Hence he urged the AALCC to hold Seminars which would help the Member States. He informed the meeting that an Expert Commission had been set up in Iran to consider the feasibility of joining the Statute.

The Delegate of the Peoples Republic of China supported the idea of the ICC, even though it had not addressed all the issues. His Government had taken active part in the three meetings of the Preparatory Commission during the last two years. He stated that Seminars or workshops organised by the AALCC could prove to be useful for exchange of views to help facilitate formulation of views, but not to convince Member States to join the Statute.

On the issue of the request from an Observer Delegation to make a statement, the Chinese delegate pointed out that the Statutes of the AALCC provide for statements to be made only by Observers specifically admitted to do so during the annual session.

The Delegate of Sri Lanka appreciated the work done so far in the Preparatory Commission but expressed his concern regarding high threshold for treating a crime, as a war crime; terrorism and drug trafficking to be addressed adequately. He was happy to note that the definition of aggression had been taken up.

The Delegate of Gambia called for further examination and analysis of the issue and to reflect on why States were hesitant to ratify the Statute. She felt it was time that practical steps be taken towards ratification. She felt proposed seminars or Workshops could examine AALCC Member States concerns, and in turn would help in early ratification of the Statute.

The President associated himself with the delegations of Kenya Islamic Republic of Iran, Thailand, China and Gambia who had suggested that the AALCC should organize workshops or Seminars to discuss the issues of concern to the Member States. He gave the example of the Arab Council which had arrived at certain common points which were helpful in alleviating the fears in the minds of people. Reverting to the earlier request of the Observer delegation representing the Afro-Asian Law Federation, he said that after examining the legal position on this matter and in the light of reservations expressed by some delegates he ruled against the request for an intervention.

- (ii) Resolution on the "Follow-up of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, Italy, 15 June - 17 July 1998): Work of the Preparatory Commission for International Criminal Court"

(Adopted on 23.2.2000)

The Asian African Legal Consultative Committee at its Thirty-ninth Session

Having considered the Brief prepared by the Secretariat on the Follow-up of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, Italy, 15 June - 17 July 1998): Work of the Preparatory Commission for ICC contained in Document No. AALCC/XXXIX/CAIRO/2000/S.7

1. Taking note that the Statute for an International Criminal Court was open for signature in Rome from 17 July until 17 October 1998 and thereafter in New York at the United Nations Headquarters until 31 December 2000;
2. Reiterates the vital importance of the universal acceptance of the International Criminal Court;
3. Urges Member States to consider signing, ratifying and acceding to the Rome Statute;
4. Commends the progress of work achieved in the Preparatory Commission;
5. Urges Member States to actively participate in the work of the Preparatory Commission which has the mandate to prepare proposals for practical arrangements for establishment and coming into operation of the Court, including the finalization of the draft texts of the rules of procedure and evidence and of the elements of crimes;
6. Requests the Secretary General to monitor and report on the developments in the Preparatory Commission;
7. Also requests the Secretary General to explore the possibilities of organizing a workshop/seminar related to the item; and

8. Decides to place the item "follow-up of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" on the agenda of its fortieth session.

(iii) Secretariat Study: Follow up of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome-Italy, 15 June - 17 July 1998): Work of the Preparatory Commission for ICC.

The terror and social alarm generated world-wide by increasing and systematic criminal offences against population and groups in time of peace and war has created the conditions for the advent of international criminal law, and for the creation of a category of actions known as "crimes against the peace and security of mankind".^{1[1]} The victims of these offences are not only the individuals and respective relatives whose lives and interests have been directly violated by the offences, but also humankind as a whole. The magnitude of a crime against humanity offends all individuals and groups including states living "peacefully" on Earth, and all citizens in the world community should be legally protected from these crimes committed against customary international law.^{2[2]}

(i) The ILC Draft Statute

When the issue of establishing an international criminal court was put back on the agenda of the UN General Assembly in 1989,^{3[3]} the General Assembly referred the matter to the International Law Commission by requesting a report in one year (GA Res 44/39, 1990). The Commission, recognised that there was agreement on the desirability of such a court, it reported to the General Assembly and was subsequently asked to prepare a draft statute for an international criminal court.^{4[4]} The ILC established a Working Group on an International Criminal Court, which in turn formulated basic propositions for the establishment of such a Court.^{5[5]} The Working Group set up in 1993 and 1994, presented the International Law Commission's initial report to the Sixth Committee of the General Assembly (Res. 47/33 of 25 November 1993) and finally produced a Draft Statute for the International Criminal Court (Res. 48/31 of 9 December 1993) which was contained in its 1994 report.^{6[6]}

1[1] Thirteenth Report on the Draft Code of Crimes against the Peace Security of Mankind, Special Rapporteur: Doudou Thiam (Senegal) UN Doc.A/CN, 4/466, 24 March 1995.

2[2] European law student's Association: Handbook on the Draft Statute for an International Criminal Court, May 1998, Chapter 1 p. 3.

3[3] UNGA Doc A/C.6/44/SR.38-41 (1989).

4[4] UNGA Res. 47/33, UN Doc A/47/49 (1992).

5[5] UNGA Doc. A/47/10/ (1992), p.143.

6[6] Report of the ILC on the work of its forty-sixth session, by the Secretary General, UNGA Doc.A/49/355, 1 September 1994.

(ii) Ad hoc Committee

During the Sixth Committee debate in 1994 the States faced a difficult choice on the method relating to the Court's establishment and the future work of an international diplomatic conference. Some delegations did not favour negotiations, while others viewed negotiations as unproblematic, keeping in view that the Security Council had created ad hoc International Criminal Tribunals for Yugoslavia and Rwanda. Thus an ad hoc Committee was established to review major substantive and administrative issues arising out of the ILC Draft Statute. The Committee also considered the agreements^{7[7]} for convening of an international conference of plenipotentiaries. More than 60 countries participated in the discussions and after discussion in the sixth Committee it was felt that the *ad hoc* Committee review of the ILC draft was neither sufficient nor comprehensive.

(iii) Preparatory Committee

Thus with resolution 50/46 adopted by the General Assembly in 1995 the Preparatory Committee was established, the Committee would start negotiations in light of the convening of a conference of Plenipotentiaries and continue the work of the *ad hoc* Committee with a renewed and enlarged mandate. The Preparatory Committee on the establishment of an ICC met twice during 1996.^{8[8]} Its mandate was renewed by the General Assembly and there were three PREPCOM meetings in 1997 and a conclusive one in March/April 1998. The mandate of the 1997/1998 Preparatory Committee was to finalize a draft consolidated text of the ICC Statute to be presented to the decision makers at the Rome Conference. In February 1997 the PREPCOM adopted the ICC consolidated Draft Statute which constituted the main working instrument at the Rome Diplomatic Conference.

UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC, Rome (Italy)

By its resolution 51/207 of 17 December 1996 the General Assembly *inter alia* decided to hold, in 1998 a diplomatic conference of Plenipotentiaries with a view to

^{7[7]} The *ad hoc* Committee met twice during 1995, from 3 to 13 April and 14 to 25 August (Report of Committee UNGA Doc.A/50/22, 6 September 1995).

^{8[8]} The Preparatory Committee on the Establishment of an International Criminal Court was established by GA Resolution 50/46 of 11 December 1995 to further consider major substantive and administrative issues arising out of the draft statute of an ICC prepared by the ILC in 1994 and to draft texts with a view to preparing widely acceptable consolidated text of a convention for an ICC for consideration by a Conference of plenipotentiaries. Its mandate was thereafter reaffirmed by GA resol. 51/207 of 17 December 1996. The PREPCOM under the chairmanship of Mr. Adriaan Bos (Netherlands), held a total of six sessions: first from March 25 to April 12, 1996; Second August 12 to August 30, 1996; Third February 10 to February 21, 1997; Fourth from 4 to 15 August 1997; Fifth from 1 to 12 December 1997; and Sixth from March 16 to April 3, 1998. In addition the PREPCOM held an inter-sessional meeting in Zutphen, the Netherlands, from January 19 to 30, 1998. The Secretariat of the AALCC was represented only at the Second Session of the Preparatory Committee.

finalizing and adopting a convention on the establishment of an International Criminal Court.

Thereafter the General Assembly at its fifty second session accepted "with deep appreciation the generous offer of the Government of Italy to act as host to the diplomatic conference of plenipotentiaries" and decided that the UN Conference of Plenipotentiaries on the Establishment of an ICC, open to all States Members of the UN or members of specialized agencies or of the International Atomic Energy Agency, shall be held at Rome from 15 June to 17 July 1998, with a view to finalizing and adopting the convention on the establishment of an ICC.

In his address to the 50th Anniversary Congress of the International Bar Association the Secretary General of the United Nations, Mr. Kofi Annan, stated: "Peace and justice are indivisible. They are indivisible in the former Yugoslavia, in Rwanda, in all post conflict situations where the dawn of peace must begin with the light of justice.

"The International Criminal Court is the symbol of our highest hopes for its unity of peace and justice. It is the vital part of an emerging system of international human rights protection. It will ensure that indicted criminals suspected of genocide in any country can be tried and convicted."

"Great progress has been made since the 1994 Draft Statute prepared by the International Law Commission. The General Assembly has decided to convene a conference of Plenipotentiaries in 1998 to adopt a convention on the establishment of an ICC. That Conference will coincide with the fiftieth anniversary of the adoption of the Genocide Convention. I cannot think of a more significant occasion for the world to take final step toward global justice. The creation of an ICC will not only complete the vision of the genocide convention: it will bring that vision into reality.

The UN Diplomatic Conference of Plenipotentiaries on Establishment of International Criminal Court elected Mr. Giovanni Conso (Italy) as President. It elected as Vice Presidents the representatives of 32 States.⁹[10] In addition four Committees were set up by the Conference: General Committee;¹⁰[11] (ii) Committee of the Whole;¹¹[12] (iii) Drafting Committee;¹²[13] and (iv) Credentials Committee.¹³[14]

⁹[10]Algeria, Austria, Bangladesh, Burkina Faso, China, Chile, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Latvia, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Samoa, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.

¹⁰[11]Comprising of the President of the Conference and Members i.e. the President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee.

¹¹[12]Chairman Mr. Philippe Kirsch from Canada and 4 Vice-President i.e. Ms. Silvia Fernandez de Gurmendi (Argentina), Mr. Constantin Virgil Ivan (Romania) and Mr. Phakiso Mochochoko (Lesotho) and a Rapporteur, Mr. Yasumasa Nagamine (Japan).

Participating in the Conference were delegations from 160 countries, 17 Intergovernmental organizations, 14 specialized agencies and funds of the United Nations and 124 organizations. The Statute of the Court was adopted by a non-recorded vote which was requested by the United States, 120 in favour to 7 against with 21 abstentions.

Salient Features of the Rome Statute

The "Rome Statute for the Establishment of an International Criminal Court", comprising of a Preamble, 128 articles, is substantially longer than the ILC Draft Statute of 60 articles.^{14[15]} The Preamble to the Statute sets out the main purpose of the Court, and also affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished," and their effective prosecution must be insured by measures at the national level, by enhancing international cooperation. It also emphasizes that the Court shall be complementary to national criminal jurisdictions and expresses its resolve to guarantee lasting respect for the enforcement of international justice.

The 128 Articles are grouped together in 13 parts viz. Part 1 Establishment of the Court (Articles 1-4); Part 2 Jurisdiction, Admissibility and Applicable Law (Articles 5-21); Part 3 General Principles of Criminal Law (Articles 22-33); Part 4 Composition and Administration of the Court (Articles 34-52); Part 5 Investigation (Articles 53-61); Part 6 The Trial (Articles 62-76); Part 7 Penalties (Articles 77-80); Part 8 Appeal and Review (Articles 81-85); Part 9 International Cooperation and Judicial Assistance (Articles 86-102); Part 10 Enforcement (Articles 103-111); Part 11 Assembly of States Parties (Articles 112); Part 12 Financing of the Court (Articles 113-118); and Part 13 Final Clauses (Articles 119-128). The text of these provisions along with their alternative formulations, (the draft provided by the Preparatory Commission) constituted the basic working document for the Conference of Plenipotentiaries convened at Rome. Following are the salient features of the Statute:

(i) Establishment and Structure of the Court

12[13]The Drafting Committee was chaired by Mr. Cherif Bassiouni (Egypt) and 24 Members from Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela. The Rapporteur of the Committee of the Whole participated *ex officio* in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of Conference; and

13[14]The Credentials Committee was Chaired by Ms. Hannelore Benjamin (Dominica) and its Members were from Argentina, China, Cote d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America and Zambia.

14[15] Report of the ILC UN, GAOR, 49 Session, Supp.No.

The Statute establishes an International Criminal Court as a permanent institution with power to exercise jurisdiction over persons for the most serious crimes of international concern and which is complementary to national criminal jurisdiction.^{15[16]} Besides providing for the institutional structure, it lays down the general principles of criminal law^{16[17]} to be applied by the Court and hence is both a constituent instrument as well as a codification treaty.

The Statute establishes the following organs of the Court: the Presidency, an Appeals Division, a Trial Division, and a Pre-Trial Division; the office of the prosecutor and the Registry.^{17[18]} The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties,^{18[19]} with functions such as (i) providing management oversight to the principal organs i.e. the Presidency, Prosecutor and Registrar regarding the administration of the Court; (ii) considering and approving the budget of the Court; (iii) determining whether to alter the number of judges serving on a full or part time basis and (iv) perform any other function or take any other action as specified in the Statute of the Rules of Procedure and Evidence. The Assembly of States Parties can, upon the recommendation of the Court or its own Bureau, consider any question relating to non-co-operation by States Parties and take appropriate measures. The Seat of the Court shall be established at the Hague in the Netherlands.^{19[20]}

It may be recalled that during the Special Meeting on International Aspects between the International Criminal Court and International Humanitarian Law held during the 36th Session of the AALCC held in Tehran in May 1997, delegates had unanimously favoured the establishment of an independent and impartial international criminal court, free from political pressures and tendencies. Preference was for the establishment of the Court by a multilateral treaty.

(ii) Material Jurisdiction of the Court

The Court would be competent to adjudicate upon the core-crimes i.e. the most serious crimes of concern to the international community as a whole, including genocide; crime against humanity; war crimes and the crime of aggression.^{20[21]}

^{15[16]}See Part I, Article 1 of the Rome Statute of the International Criminal Court Doc.A/CONF. 183/9 dated 17 July 1998.

^{16[17]}See Part 3 (Articles 22-23) of the above stated document.

^{17[18]}See Part 4 Composition and Administration of the Court of the Rome Statute A/CONF.183/9.

^{18[19]}See Article 112 in Part 11 of the Statute, see also Part 13 on Final Clauses A/CONF.183/9.

^{19[20]} See Art.3, Part I, Doc. A/CONF.183/9.

^{20[21]} Part 2, Arts 5-8 of the Statue Doc. A/CONF.183/9.

The Preparatory Commission²¹[22] shall *inter alia* determine the definition and elements of crimes of aggression and the conditions under which the Court shall *inter alia* determine the definition and elements of crimes of aggression and the conditions under which the Court shall exercise its jurisdiction with regard to this crime. In one of the six resolutions adopted at the Conference, it was recognized that terrorist acts were serious crimes of concern to the international community, and that the international trafficking of illicit drugs was a very serious crime sometimes destabilizing the political, social and economic order in States. It was regretted that no generally acceptable definition of the crimes could be agreed upon for inclusion within the jurisdiction of the Court. It was recommended that the Review Conference provided for in Article 123 of the Statute should consider illicit trafficking in drugs and terrorism and try to arrive at an acceptable definition and inclusion in the list of crimes within the Court's jurisdiction.

Article 24 of the Statute deals with non-retroactivity *ratione personae* and emphasizes that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute.

With regard to *ratione personae* it may be stated that the statute contemplates jurisdiction of the court over legal persons, with the exception of States,²²[23] Article 25 of the Statute deals with individual criminal responsibility and clearly states that the court is primarily to have jurisdiction over natural persons. It may be mentioned here that in the context of the applicable penalties, that the Court shall have no jurisdiction over persons under 18 years of age.²³[24] As to the jurisdiction *ratione temporis* of the court paragraph 1 of Article 8 of the Statute states that the "Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute".

(iii) Complementarity

The third preambulatory paragraph provides that the principle of jurisdiction of the International Criminal Court is to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective. Besides the preambulatory paragraph the principle of complementarity involves issues of admissibility" *ne bis in idem*"; initiation of an investigation; general obligation to cooperate and surrender of a person to the Court. More specifically attention needs to be drawn to the vague formulations involved in determination of the actions of a State or its legal system as regards unwillingness or inability to prosecute, doubts on the independence or impartiality of proceedings, etc. These issues involve subjective element of determination and the real implications of the complementarity principle could be known only when the Court starts applying a set of identifiable criteria to decide when the national legal systems are ineffective or unavailable. The views as expressed by the AALCC Member States are still valid as regards the drawing up of clear jurisdictional boundaries between the jurisdiction of the Courts functioning within the criminal legal system of States and the court so as to avoid overlapping of jurisdictions in the administration of justice.

²¹[22] See Art 121 and 123 of the Statute Doc. A/CONF.183/9.

²²[23] Art. 25 of the Statute.

²³[24] Art. 26 of the Statute.

(iv) Trigger Mechanism

Although the consent of the State is primary in deciding the extent of jurisdiction of the Court the "trigger mechanism" was carefully considered by the Conference of Plenipotentiaries. This mechanism touches upon two main clusters of issues (i) acceptance of the Court's jurisdiction, State consent requirements and conditions for the exercise of jurisdiction and (ii) who can trigger the system and the role of Prosecutor.²⁴[25] The jurisdiction of the Court over a person with respect to a crime referred to in the statute of the Court may be invoked by either (i) a State Party; (ii) the Prosecutor or (iii) the Security Council.

(v) Role of the Security Council

Under the Charter of the United Nations the Security Council is entrusted with the task of maintaining international peace and security. Article 39 of the UN charter confers on the Council the power to determine an act constituting aggression or threat to international peace. Besides enabling the Security Council to refer a matter to the Court for its exercise of jurisdiction, the Statute empowers the Security Council to seek a deferral of any investigation or prosecution for a period of 12 months from the date of its request.²⁵[26] Article 16 of the Statute states that no investigation or prosecution may be commenced or proceeded with for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations has requested the Court to that effect. It was felt that the Security Council should have a minimum role to play in the functioning of the Court or else it could cloud the independent functioning of the Court.

(vi) Principles of Criminal Law

Although there were different views on many aspects of the Court, there was a broad agreement that the fundamental principles of criminal law be applied to the crimes punishable under the Statute of the Court be clearly pronounced in accordance with the principle of legality, *nullum crimen sine lege, nulla poena sine lege*. Accordingly part 3 of the Statute (Articles 22-33) addressed the General principles of Criminal Law.

The General Principles of Criminal Law are to be supplemented by Rules of Procedure and Evidence to be prepared by the Preparatory Commission established by the Rome Conference. The draft text of the Rules and Procedures and Evidence would thereafter be approved by the States Parties to the Statute.

The Statute incorporates fairly detailed and elaborate provisions for conducting investigation and prosecution of cases (Part 5 - Art. 53-61); The Trial (Part 6 - Art. 62-76); Penalties (Part 7 - Art. 77-80); Appeal and Review (Part 8 - Art. 80-84); and Enforcement (Part 10 - Art. 103-111). It also stipulates the Court's organizational law, by specifying the required qualification of judges etc. (Part 4).

²⁴[25]Articles 13 (Exercise of Jurisdiction) 14 (Referral of a Situation by a State Party and 15 (Prosecutor) Doc. No.A/CONF.183/9.

²⁵[26]See Article 16 referral of investigation or prosecution.

(vii) Financing of the Court

Part 12 of the Statute comprising of 6 articles (113-118) concerns financing of the Court, Article 115 of the Statute states that expenses of the Court and of the Assembly of States Parties shall be provided by mainly two sources i.e. assessed contributions made by States Parties, and funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council. It also provides that the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties. This was an issue where there was divergence 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 sound financial system was essential to ensure smooth and effective functioning of the Court.

(viii) 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* 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.

(ix) 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 criminal jurisdiction).

Establishment of the Preparatory Commission

One of the recommendations of the Final Act adopted at Rome was the establishment of a Preparatory Commission, which was assigned to prepare proposals for practical arrangements for the establishment and coming into operation of the Court.

The Commission is to prepare proposals for a provision on aggression, including the definition and elements of crimes of aggression and the conditions under which the ICC shall exercise its jurisdiction with regard to this crime. It shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an

acceptable provision relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute. The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties.

The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties,^{26[27]} Part 11, Article 115 of the Statute establishes the Assembly of States Parties, on which other States which have signed the Statute or the Final Act may take part as observers. Among other functions, the Assembly shall consider and adopt recommendations of the Preparatory Commission; providing management oversight to the presidency, the Prosecutor and the Registrar regarding the administration of the Court; consider and decide the budget for the Court; decide whether to alter the number of judges; and consider any question relating to non-cooperation; it shall prepare a report on all matters within its mandate and submit it to the Assembly of States Parties and shall meet at the Headquarters of the United Nations.

At its 53rd Session, by its resolution 53/105 of January 1999, the General Assembly took note of the outcome of the Rome Conference and also of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court done at Rome on 17 July 1998, which provided for the establishment of a Preparatory Commission for the Court.

The Preparatory Commission has been mandated to prepare draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes, before 30 June 2000, it shall *inter alia* prepare drafts texts of:

- (1) Rules of Procedure and Evidence;
- (2) Elements of Crimes including the definition and elements of the crime of aggression and the conditions under which the court shall exercise jurisdiction with regard to this crime.
- (3) A relationship agreement between the Court and the UN;
- (4) Basic provisions governing a headquarters agreement to be negotiated between the Court and the Host country;
- (5) Financial regulations and rules;
- (6) A budget for the first financial year; and
- (7) Rules of procedure of the Assembly of States Parties.

The General Assembly directed the Preparatory Commission to hold three sessions during the year 1999. The first from 16 to 26 February, second from 26 July to 13 August and the third from 29 November to 17 December 1999, to carry out its mandate.

^{26[27]}See Article 115 of the Statute.

Substantive Output of both First and Second Sessions of Preparatory Commission

The Preparatory Commission as envisaged by Resolution F of the Final Act of the Rome Statute and in accordance with the General Assembly resolution 53/105 adopted at the 53rd Session has so far held two sessions at the UN headquarters in New York, one each in February (16-26), and July/August (26-13) 1999.²⁷[28] To facilitate its work the Commission has at its session established three Working Group: (1) Working Group on Rules of Procedure and Evidence; (1a) Working Group on Composition and Administration; (2) Working Group on Elements of Crimes; and (3) Working Group on the definition of the Crime of Aggression, the first two were established in February and third was established during the July/August Session.²⁸[29]

(i) Working Group on Rules of Procedure and Evidence

While the First Session of the Preparatory Commission considered various proposals submitted in connection with part 5 of the statute it took into account the written proposals and the views expressed in the working group and informal consultations, the co-ordinator proposed discussion papers for consideration at the next session of the Preparatory Commission.²⁹[30]

The Second Session of the Preparatory Commission concentrated on rules pertaining to the following parts of the Rome Statute:

Part 4 (Composition and Administration of the Court); Part 5 (Investigation and Prosecution) Part 6 (the trial) and Part 8 (Appeal and Revision). The Working Group made considerable progress on parts 5,6 and 8 of the Statute, even though it was unable to conclude its consideration of the latter part.

The Working Group held 12 meetings, from 26 July to 6 August 1999. It had before it several proposals, in addition to those which had been made at the first session of the Preparatory Commission. The proposals submitted at the second session are contained in documents: (i) PCNICC/1999/DP.7/Add.1/Rev 1; PCNICC/1999/DP.8 Add.1/Rev.1; PCNICC/1999/WGRPE/DP.5-38; and PCNICC/ 1999/WGRPE/INF.2 and Add.1

²⁷[28]The Officers of the Preparatory Commission are Mr. Philippe Kirsch (Canada) Chairman, Mr. Muhamed Sacirbey (Bosnia and Herzegovina); Mr. Medard Rwelamira (South Africa); and Mr. George Mckenie (Trinidad and Tobago), Vice Chairmen and Mr. Salah Suheimat (Jordan) Rapporteur.

²⁸[29]Ms. Silvia Fernandez de Gurmendi (Argentina) was appointed Co-ordinator for the Working Group on Rules of Procedure and Evidence, Mr. Medard Rwelamira (South Africa) is co-ordinator for this Working Group with a specific mandate to deal with para 4 of the statute while Mr. Herman Van Hebel (Netherlands) is coordinator of the Working Group on Elements of Crimes.

²⁹[30]For details of the Work of the 1st Session of the Preparatory Commission See Doc. No.AALCC/XXXVIII/Accra/99/S-8.

The Working Group considered proposals related to parts 6 and 8 of the Statute. Numerous informal consultations were also held on rules related to the aforementioned parts of the Statute, as well as to part 5, which the Preparatory Commission had begun to consider during its first session.

Taking account of the views expressed in the Working Group and in informal consultations, the coordinator proposed the following discussion papers for consideration at the November-December session of the Preparatory Commission - (i) PCNICC/WGRPE/RT.5/Rev.1, Add.1 and Corr.1, and Add.2 and 3 on rules related to part 6 of the statute (ii) PCNICC/WGRPE/PT.6 on rules related to part 5 of the statute; and (iii) PCNICC/WGRPE/RT.7 on rules related to part 8 of the statute.

(1) (a) Composition and Administration of the Court

Mr. Medard Rwelamira (South Africa), Coordinator for the Working Group on Part 4 dealing with the Rules on composition and Administration of the Court, said that Group had held comprehensive discussion on (i) Rules governing disciplinary measures; (ii) excuse and disqualification; (iii) organization of the various organs of the court, including replacement; (iv) authentic texts and (v) amendments and languages.

The Working Group, however, had not been able to finalize its discussion on Rules governing the office of Defence Counsels and Alternate Judges. At the end of the general discussion, the Working Group had turned to informal consultations divided into three clusters, consultations on the first cluster: situations that may affect the functioning of the Court had materialized into a paper^{30[31]} that would be the basis of discussion. That document constituted a measure of progress in carrying out the working group's mandate, and would facilitate work in the next session.

(ii) Working Group on Element of Crimes

The coordinator of the Working Group on Elements of Crimes, Mr. Herman Van Hebel (Netherlands), in his oral report given at the First Session of the Commission stated that at the first stage of the discussion, the working group considered the elements for the crime 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 discussions in the Working Group focussed mostly on substantive issues.

Taking account of the views expressed in the Working Group and of the written proposals, in order to facilitate discussion, the coordinator prepared discussion papers for the elements of crime of genocide and for the element of crimes relating to subparagraphs (i) to (iii) of article 8, paragraph 2(a), on war crimes.

After the Second Session of the Preparatory Commission held in July-August, the coordinator of the Working Group stated that the Group had before it several proposals in addition to those introduced at the Commission's first session in February

30[31]PCNICC/1999/WGRPC (4) RT.1.

1999.31[32] The Working Group had resumed consideration of the elements of war crimes, article 8 of the Statute begun at the first session. The remaining provisions of the article were divided into nine clusters because of the possible commonality of their elements. This had been done in order to facilitate discussions. Taking into account all the views expressed it was suggested that at the next session the Group would consider elements of article 8(2) (a),32[33] 8(2)(C),33[34] 8(2)(b)(xxii),34[35] 8(2)(b)(xiii)-(xvi) and (xxi),35[36] 8(2)(b)(i)-(iii),36[37] 8(2)(b)(vi), (vii), (xi) and (xii),37[38] and a compilation of proposals by Governments on elements of Article 8(2)(b)(viii),38[39] Document PCNICC/1999/WGEC/INF.3 and Corr.1 contains a compilation of proposals by Governments on elements of article 8(2)(b)(vii) relating to the crime of transferring population.

While the Working Group had a general discussion on the elements of all the Crimes contained in Article 8, there was not enough time for the coordinator to prepare discussion papers on all the provisions of war crimes. Though substantial progress had been made on article 8 (war crimes), further consideration of the article required at the Working Group's next session to ensure the formulation of generally acceptable elements of crimes contained in article 8, as part of a complete set of elements of crimes, for all crimes laid down in the Court's Statute.

(iii) Report on the Crime of Aggression

During the First Session of the Preparatory Commission, a preliminary meeting was held to consider modalities of discussion for a definition of the crime of aggression, which is included in the Statute, but not yet defined. As a result of the suggestions of many Members States a coordinator Mr. Tuvako Manongi (United Republic of Tanzania), was designated for the crime of aggression. Informal bilateral or multilateral discussions continued in the inter-sessional period.

During the Second Session, the coordinator held consultations to explore the possibility for a consensus on a possible definition of the crime of aggression and the conditions under which the International Criminal Court was to exercise jurisdiction over the crime. On the basis of proposals he received, the coordinator would continue to consult with delegations, with an object to identify those elements which were common

31[32]The latest proposals were contained in Documents: PC NICC/1999/WGEC/DP.8 to DP.27; and PC NICC/1999/WGEC/INF.2 and Adds 1-2.

32[33] PCNICC/1999/WGEC/RT.4.

33[34] PCNICC/1999/WGEC/RT.5.

34[35] PCNICC/1999/WGEC/RT.6.

35[36] PCNICC/1999/WGEC/RT.7.

36[37] PCNICC/1999/WGEC/RT.9.

37[38] PCNICC/1999/WGEC/RT.10.

38[39] PCNICC/1999/WGEC/INF.3.

and those which were not, and to see how resulting differences could be bridged or narrowed. A large number of delegations continued to express, as they had during the last session of the Preparatory Commission, their desire to see the establishment of a Working Group charged with that specific responsibility.

The Chairman of the Preparatory Commission, said "considerable time was being spent by delegations on organizational issues relating to the definition of aggression, to the detriment of substantive discussions on the subject".

There were persistent differences among delegations on some of those organizational issues, notably the principle and timing of the establishment of a Working Group on the definition of aggression. Essentially some delegations felt that a Working Group should be established to reflect the importance of the issue and the need to make progress during the life time of the Preparatory Commission. These among others had included (Islamic Republic of Iran, Arab Republic of Egypt, Syria, Kuwait, People's Republic of China, Saudi Arabia, Pakistan, Senegal, Iraq, Republic of Korea and Oman.

Others, were not convinced that a Working Group should be established at this time, and were concerned that such a Working Group might prejudice the ability of the Preparatory Commission to complete the rules of procedure and evidence and elements of crimes by 30 June 2000, as mandated by Resolution F of the Rome Conference.

At the same time, Mr. Kirsch said that "delegations favouring the establishment of a Working Group on aggression consistently maintained that their intention was in no way to delay or hamper work towards meeting the mandatory deadlines imposed by Resolution F".

In order to resolve the organizational issues the Preparatory Commission agreed on the following arrangements concerning the question of the crime of aggression:

- (a) a Working Group on the crime of aggression will be established at the outset of the next session of the Preparatory Commission;
- (b) At the next and following session of the Preparatory Commission, the plenary traditionally held each Monday morning will be maintained, but will be significantly shorter, essentially limited to brief reports by the coordinators;
- (c) A meeting of the Working Group on the crime of aggression will follow each of the Monday morning plenary meetings, until the end of the morning;
- (d) Informal consultations on the crime of aggression will be conducted at other times where possible and appropriate, it being understood that this should be without prejudice to the requirements of the work on subjects which must be completed by 30 June 2000. Within the limits of what is practicable, the Secretariat will endeavour to provide the best possible facilities for these informal consultations;
- (e) The above arrangements are based on a clear and general understanding that they will remain.

During the Second Session, the President of the International Criminal Tribunal for the former Yugoslavia, Judge Gabrielle Kirk McDonald stated that the establishment of the International Criminal Court was a recognition by the International Community that, humanitarian norms must be enforced. However, that recognition was only a first step. The International community must work to ensure that the Court was more than "an empty promise or merely a paper tiger.

She noted that rules were important to the Court because they establish the framework for conducting trial and appellate proceedings. They provide guidance to the parties as to what they could expect in those proceedings, and brought consistency to the Court's decisions and work. While the rules served several important functions, she said, it should be borne in mind that they could only be a framework. The rules could not, no matter how well drafted, foresee every courtroom situation. These rules should be a framework and not a straightjacket.

Judge McDonald noted the Statute for the International Criminal Court had established rigorous requirements for the court's judges, for the judges to effectively manage and direct proceedings, she said, the rules must allow them to address evolving situations and respond to issues that could not be anticipated during the drafting process.

She hoped that the report of the judges of the Tribunal for the former Yugoslavia would assist the Preparatory Commission in its work. The Tribunal's judges had actively supported the creation of the ICC. Their unprecedented experience in handling trials and appeals of prosecutions of international crimes gave them a particularly informed perspective on the unique process of dispensing international justice. That was especially true regarding the drafting and application of rules for such proceeding. The Tribunal's judges had been responsible for the formulation and amendment of its rules and procedures and evidence, and had to revise them in light of what actually happened in those proceedings.

She stated that the wisdom of judges, were vital resources in the process of adopting rules for the ICC. The Preparatory Committee should recommend to the Assembly of States Parties that Judges be elected first, in order to allow their input into the rules. If that was not possible, the Commission or Assembly of States Parties should consider establishing an advisory committee of judges, and provide advice before the adoption of the rules.

Other Activities

The Preparatory Commission took note of the Intergovernmental Regional Caribbean Conference for the signature and ratification of the Statute of the International Criminal Court hosted by the Ministry of the Attorney General of Trinidad and Tobago and the No Peace Without Justice Foundation, in Port of Spain from 15 to 17 March 1999, as well as the Port of Spain Declaration resulting therefrom; the international seminar on victims access to the International Criminal Court hosted by the Government of France in Paris from 27 to 29 April 1999; the informal inter-sessional meeting hosted by the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy from 21 to 27 June 1999; and the two briefing sessions on ratification

and implementation of the Rome Statute, hosted by the International Human Rights Law Institute of De Paul University and Parliamentarians for Global Action on 31 July and 7 August 1999 at the United Nations Headquarters in New York.

General Comments

The Chairman of the Preparatory Commission, Mr. Philippe Kirsch (Canada) in his closing remarks stated: "that the main function of the Preparatory Commission for the International Criminal Court was to create conditions that would allow the Court to function effectively as soon as its Statute enters into force".

Accordingly it could be said that the Commission within its mandate, was supposed to develop, a series of instruments that would be necessary for the Court to function; an agreement on the relationship between the Court and the United Nations, a headquarters Agreement with the Government of Netherlands; and financial regulations, including the first budget for the Assembly of States Parties.

As a priority, the Commission is mandated to complete two instruments by the end of June 2000. The first is related to the rules of procedure and evidence and the other is related to the elements of crimes. The latter was a document that would help the Court to interpret crimes that were listed in the Statute. Most of the work at the second session of the Preparatory Commission had focussed on the priority items, and progress had been made on the rules of procedure and evidence. The progress had maintained the balance between different legal systems to be reconciled. In the words of Mr. Kirsch "Irrespective of any substantive differences it is quite difficult to just reconcile civil law and common law for purposes like this".

Substantial progress had been made on the elements of crimes. Particular emphasis was placed on respecting the principle of *nullum crimen sine lege* and for ensuring consistency with existing laws of armed conflict. The focus of discussion had been on war crimes and a number of elements have been developed pertaining to that issue.

The last session had focussed on genocide while the next session would focus on crimes against humanity. The establishment of the working group on the crime of aggression, and its being under the courts jurisdiction would create wider acceptance of the Statute. An agreed definition of this crime would encourage more states to ratify the Statute.

A lot depends on the progress which would be made during the remaining session of the Preparatory Commission and whether or not it can fulfil its mandate. A large number of substantial issues remain to be sorted out, they are (i) the definition of aggression and (ii) relationship agreement between the Court and the UN. Here the role of Security Council vis-à-vis the Court is an issue which has still not been resolved. The primary of the Security Council in determining the existence of an act of aggression is to be noted. Besides this there are countries which would want terrorism; use of nuclear weapons; and drug trafficking to be included in the list of crimes.

The other issues on the agenda of the Commission i.e. Headquarters Agreement, Financial Rules and Regulations, budget for the first financial year, Rules of Assembly of

States Parties, are equally important in nature and a lot of guidance is available from the Law of the Sea Convention and the General Assembly Rules of Procedure.

It is to be noted that the Court will be established only after 60 States ratify the Statute which created it at the Rome United Nations Diplomatic Conference of Plenipotentiaries in June-July 1998. As of 12th August 1999 eighty four³⁹[40] States have signed the Rome Statute, nine among them are: Member States of AALCC.⁴⁰[41] Four States: Senegal, Trinidad and Tobago; San Marino and Italy have ratified the Statute. It is encouraging to note in this regard that during 1999 the Intergovernmental Regional Caribbean Conference for the Signature and ratification of the Statute of the International Criminal Court was hosted by the Ministry of the Attorney General of Trinidad and Tobago. Two briefing sessions on the ratification and implementation of the Rome Statute were also hosted by the International Human Rights law Institute of De Paul University and Parliamentarians for Global Action on 31 July and 7 August 1999 at the United Nations Headquarters in New York. A ratification kit developed by SADC Legal Experts would be of great help in ratification of the Rome Statute. However, at present the focus is to achieve consensus on the issues which were left unresolved at the time of adoption of the Rome Statute and ratification by States at the earliest.

The AALCC's Legal Advisers Meeting which was held in New York in October 1999 also provided an opportunity for the AALCC Member States to reflect on the progress made so far during the 2 substantive sessions of the Preparatory Commission. It is a matter of great satisfaction that the Member States of AALCC have actively participated in the work of the Commission, and it is hoped that they will continue to make useful contributions at the 3rd Session of the Preparatory Commission scheduled to be held in November/December this year.

Future Work in the Third Session of Preparatory Commission

The provisional plan of the Commission would be formally approved at the commencement of the Commission's next Session in November. It would be adjusted as

³⁹[40]Countries that have signed the Rome Statute are: Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Belgium Bolivia, Burkina Faso, Burundi, Bulgaria, Cameroon, Canada, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, Eritrea, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Jordan, Kenya, Kyrgyzstan, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritius, Monaco, Namibia, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Poland, Portugal, Romania, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Tajikistan, Trinidad and Tobago, Uganda, the Former Yugoslav Republic of Macedonia, United Kingdom, Venezuela, Zambia and Zimbabwe.

⁴⁰[41]Nine AALCC States are: Cyprus, Gambia, Ghana, Jordan, Kenya, Mauritius, Sierra Leone Senegal, and Uganda. Senegal was the first country to ratify the Convention.

required throughout the session. Plenary meetings would be held on Mondays followed by the Working Group on the Crime of Aggression. The Work plan had been prepared with the hope of having a complete first reading of the two priority instruments: the Rules of procedure and Evidence and Elements of Crimes by the end of the next Session.

41[1] Thirteenth Report on the Draft Code of Crimes against the Peace Security of Mankind, Special Rapporteur: Doudou Thiam (Senegal) UN Doc.A/CN, 4/466, 24 March 1995.

42[2] European law student's Association: Handbook on the Draft Statute for an International Criminal Court, May 1998, Chapter 1 p. 3.

43[3] UNGA Doc A/C.6/44/SR.38-41 (1989).

44[4] UNGA Res. 47/33, UN Doc A/47/49 (1992).

45[5] UNGA Doc. A/47/10/ (1992), p.143.

46[6] Report of the ILC on the work of its forty-sixth session, by the Secretary General, UNGA Doc.A/49/355, 1 September 1994.

47[7] The *ad hoc* Committee met twice during 1995, from 3 to 13 April and 14 to 25 August (Report of Committee UNGA Doc.A/50/22, 6 September 1995).

48[8] The Preparatory Committee on the Establishment of an International Criminal Court was established by GA Resolution 50/46 of 11 December 1995 to further consider major substantive and administrative issues arising out of the draft statute of an ICC prepared by the ILC in 1994 and to draft texts with a view to preparing widely acceptable consolidated text of a convention for an ICC for consideration by a Conference of plenipotentiaries. Its mandate was thereafter reaffirmed by GA resol. 51/207 of 17 December 1996. The PREPCOM under the chairmanship of Mr. Adriaan Bos (Netherlands), held a total of six sessions: first from March 25 to April 12, 1996; Second August 12 to August 30, 1996; Third February 10 to February 21, 1997; Fourth from 4 to 15 August 1997; Fifth from 1 to 12 December 1997; and Sixth from March 16 to April 3, 1998. In addition the PREPCOM held an inter-

sessional meeting in Zutphen, the Netherlands, from January 19 to 30, 1998. The Secretariat of the AALCC was represented only at the Second Session of the Preparatory Committee.

- 49[9] Address to the 50th Anniversary Congress of the International Bar Association, UN, New York, 11 June 1997.
- 50[10]Algeria, Austria, Bangladesh, Burkina Faso, China, Chile, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Latvia, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Samoa, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.
- 51[11]Comprising of the President of the Conference and Members i.e. the President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee.
- 52[12]Chairman Mr. Philippe Kirsch from Canada and 4 Vice-President i.e. Ms. Silvia Fernandez de Gurmendi (Argentina), Mr. Constantin Virgil Ivan (Romania) and Mr. Phakiso Mochochoko (Lesotho) and a Rapporteur, Mr. Yasumasa Nagamine (Japan).
- 53[13]The Drafting Committee was chaired by Mr. Cherif Bassiouni (Egypt) and 24 Members from Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela. The Rapporteur of the Committee of the Whole participated *ex officio* in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of Conference; and
- 54[14]The Credentials Committee was Chaired by Ms. Hannelore Benjamin (Dominica) and its Members were from Argentina, China, Cote d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America and Zambia.
- 55[15] Report of the ILC UN, GAOR, 49 Session, Supp.No.
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56[16]See Part I, Article 1 of the Rome Statute of the International Criminal Court Doc.A/CONF. 183/9 dated 17 July 1998.

57[17]See Part 3 (Articles 22-23) of the above stated document.

58[18]See Part 4 Composition and Administration of the Court of the Rome Statute A/CONF.183/9.

59[19]See Article 112 in Part 11 of the Statute, see also Part 13 on Final Clauses A/CONF.183/9.

60[20] See Art.3, Part I, Doc. A/CONF.183/9.

61[21] Part 2, Arts 5-8 of the Statue Doc. A/CONF.183/9.

62[22] See Art 121 and 123 of the Statute Doc. A/CONF.183/9.

63[23] Art. 25 of the Statute.

64[24] Art. 26 of the Statute.

65[25]Articles 13 (Exercise of Jurisdiction) 14 (Referral of a Situation by a State Party and 15 (Prosecutor) Doc. No.A/CONF.183/9.

66[26]See Article 16 referral of investigation or prosecution.

67[27]See Article 115 of the Statute.

68[28]The Officers of the Preparatory Commission are Mr. Philippe Kirsch (Canada) Chairman, Mr. Muhamed Sacirbey (Bosnia and Herzegovina); Mr. Medard

Rwelamira (South Africa); and Mr. George Mckenie (Trinidad and Tobago), Vice Chairmen and Mr. Salah Suheimat (Jordan) Rapporteur.

69[29]Ms. Silvia Fernandez de Gurmendi (Argentina) was appointed Co-ordinator for the Working Group on Rules of Procedure and Evidence, Mr. Medard Rwelamira (South Africa) is co-ordinator for this Working Group with a specific mandate to deal with para 4 of the statute while Mr. Herman Van Hebel (Netherlands) is coordinator of the Working Group on Elements of Crimes.

70[30]For details of the Work of the 1st Session of the Preparatory Commission See Doc. No.AALCC/XXXVIII/Accra/99/S-8.

71[31]PCNICC/1999/WGRPC (4) RT.1.

72[32]The latest proposals were contained in Documents: PC NICC/1999/WGEC/DP.8 to DP.27; and PC NICC/1999/WGEC/INF.2 and Adds 1-2.

73[33] PCNICC/1999/WGEC/RT.4.

74[34] PCNICC/1999/WGEC/RT.5.

75[35] PCNICC/1999/WGEC/RT.6.

76[36] PCNICC/1999/WGEC/RT.7.

77[37] PCNICC/1999/WGEC/RT.9.

78[38] PCNICC/1999/WGEC/RT.10.

79[39] PCNICC/1999/WGEC/INF.3.

80[40]Countries that have signed the Rome Statute are: Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Belgium, Bolivia, Burkina Faso, Burundi, Bulgaria, Cameroon, Canada, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, Eritrea, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Jordan, Kenya, Kyrgyzstan, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritius, Monaco, Namibia, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Poland, Portugal, Romania, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Tajikistan, Trinidad and Tobago, Uganda, the Former Yugoslav Republic of Macedonia, United Kingdom, Venezuela, Zambia and Zimbabwe.

81[41]Nine AALCC States are: Cyprus, Gambia, Ghana, Jordan, Kenya, Mauritius, Sierra Leone, Senegal, and Uganda. Senegal was the first country to ratify the Convention.
