"AGRESSIE"
DOSSIER,
WAARONDER
-HANDVEST
VAN NEURENBERG
+
ANDERE INT.
RECHTSPRAAK
STUKKEN +
AANDACHTS-
PUNTEN,
ALSMEDE HET
CONCRETE
VOORBEELD VAN
AGRESSIE
TEGEN
I.R.M.

Internationaal Strafhof wordt gepolitiseerd door nieuw delict

8-1-2013

Agressie als misdrijf zet de deur open voor politiek misbruik van internationaal strafrecht, aldus Geert-Jan Knoops.

Zal de premier van een land als Israël, als dit een *preemptive strike* op Iran uitvoert om Iraanse nucleaire installaties uit te schakelen zonder dat het de steun krijgt van de Veiligheidsraad van de Verenigde Naties, in de toekomst kunnen belanden in het beklaagdenbankje van het Internationaal Strafhof?

Ja, luidt het antwoord van de voorstanders van het Internationaal Strafhof. Het Strafhof krijgt de bevoegdheid om in de nabije toekomst – als een bepaald minimumaantal landen dit amendement heeft goedgekeurd – politiek leiders van landen die verantwoordelijk zijn voor 'agressie' jegens andere landen, strafrechtelijk te vervolgen. Dit kan ook landen treffen die het Strafhof niet erkennen.

De internationaal-rechtspolitieke gevolgen van het introduceren van dit nieuwe misdrijf van 'agressie' zijn niet te onderschatten.

Het eerste probleem is: hoe 'agressie' te definiëren? Wat voor land A dat militair optreedt een handeling uit zelfbehoud (zelfverdediging) is, is voor het aangevallen land B een daad van 'agressie'. Op dit punt zal dezelfde discussie kunnen worden gevoerd als over terrorisme: wat voor land A een daad van terreur is, is voor land B een handeling die past binnen een vrijheidsstrijd.

Beziet men de definitie die het strafhof zal hanteren, dan lijkt dit de deur open te zetten voor rechtspolitiek misbruik. Dit misdrijf van agressie zal omvatten: „het plannen, voorbereiden, initiëren of uitvoeren van een daad van agressie, door een persoon die in de positie is om effectief controle uit te oefenen over een staat of om politieke of militaire acties van een staat te leiden, welke door zijn aard, ernst en omvang een manifeste schending van het VN-Handvest vormt". De kern vormt dus een „manifeste schending van het Handvest". Dit wordt in eerste instantie ter beoordeling overgelaten aan de VN-Veiligheidsraad. De aanklager moet in beginsel een besluit van de Veiligheidsraad hierover afwachten voordat hij een onderzoek hiernaar mag openen. Als de Veiligheidsraad niet binnen zes maanden in staat is te beslissen, mag de aanklager – met toestemming van drie rechters van het strafhof – alsnog zo'n onderzoek instellen.

Het tweede probleem is de vraag wat er wordt verstaan onder een „manifeste schending van het VN-Handvest". De ontwerpers van dit 'nieuwe' misdrijf noemen onder meer: een blokkade van de havens of kusten van een staat door de strijdkrachten van een andere staat; een aanval door de strijdkrachten van een staat op de land, zee- of luchtmacht, of marine- en luchtvloten van een andere staat; en het gebruik van gewapend geweld door een staat binnen het territorium van een andere staat, met instemming van deze andere staat, maar in strijd met de voorwaarden van de overeenkomst.

Valt het uit de lucht proberen te schieten van een Amerikaanse *drone* door twee Iraanse gevechtsvliegtuigen ten oosten van Koeweit, zoals onlangs gebeurde, te beschouwen als een daad van agressie jegens de Verenigde Staten?

Deze constructie zet de deur open voor oneigenlijk gebruik van het internationaal strafrecht. In deze constructie zet een politiek orgaan, de VN-Veiligheidsraad, in feite het licht op groen voor een vervolging van het handelen van een land voor een 'misdrijf' dat op zichzelf ook al een politieke lading heeft – een dubbele politieke factor dus, die doorslaggevend kan zijn voor een vervolging voor 'agressie'.

Politieke, economische, religieuze en ethische belangen binnen de Veiligheidsraad – en niet juridische afwegingen – zullen dus voortaan het lot bepalen van een militaire operatie die een bepaald land uitvoert, bijvoorbeeld uit hoofde van geanticipeerde zelfverdediging.

Op deze wijze wordt er geen zinvolle, maar eerder een destructieve bijdrage gegeven aan het systeem van het internationaal strafrecht. Sterker: het zal landen als Rusland, China en de VS alleen maar sterken in hun overtuiging om het Strafhof vooral niet te erkennen. Toch zou het deze landen er niet van weerhouden om in de Veiligheidsraad juist wel een land als Israël te kunnen 'aanklagen' voor 'agressie' (wegens schending van het VN-Handvest) en dus de weg te openen voor een vervolging voor het Internationaal Strafhof. Hiermee is (weer) een bouwsteen aangeleverd die de betrouwbaarheid van het systeem van het internationaal strafrecht aantast.

Investeren in wereldvrede via het internationaal strafrecht dient niet te geschieden met politiek bepaalde 'delicten' als agressie. Steek die tijd, die energie en dat geld liever in andere vormen van conflictbeslechting.

G.G.J. Knoops is advocaat en strafrechtdeskundige.

7-10-2011

Voor legup "politieke Sleur" aan
relatum generaal rapporteur → zie rapport
Commissie Davids "Rapport Commissie
Onderzoek Besluitvorming Irak, pag
5-73. EV

Dossier overlegt aan raadsleden

Jaarplan / Agenda

RTS

Zie ook opmerkingen over "samenleving inter-
venties (Kosovo!)" pag. 82

7-10-2011

Voor het begrip "politieke Steun"
aan Milošević geeft → zie "rapport
agressie
Commissie Davids" Rapport Commissie
Onderzoek Besluitvorming Irak pag.
5.7.3.eV

DOSSIER AGRESSIE

Zie ook opmerking over Samenhang
Universele (Kosovo!)
pag 8.2

Over het Recht van het Palestijnse Volk
tot Verzet tegen Israelische Bezetting

door Louie Jalandoni
Nationaal Democratisch Front van de Filippijnen

Het Palestijnse volk heeft het onvervreemdbare recht tot verzet tegen Israelische bezetting. Dit fundamentele recht is internationaal erkend in Protocol I, dat in 1977 is toegevoegd aan de Geneefse Conventies van 1949, waarin de strijd van volkeren voor zelfbeschikking tegen coloniale overheersing, buitenlandse bezetting en racistische regimes word erkend als een internationaal conflict. (Protocol I, Artikel 3).

Volgens VN Resolutie 3070 van 30 november 1973, mag het volk "alle beschikbare middelen", inclusief de gewapende strijd, gebruiken in zijn strijd voor zelfbechikking en tegen buitendlandse bezetting.

Op 12 dezember 1973 heeft de Algemene Vergadering van de VN Resolutie 3103 aangenomen, waarin strijders tegen coloniale en buitendlanse overheersing en racistische regimes de status van "combatant" krijgen in de zin van de Geneefse Conventie van 1949. In Resolutie 2787 van 1971 geeft de Algemene Vergadering van de VN een opsomming van volkeren die voor zelfbeschikking strijden waaronder de volkeren van Palestina, Zuid-Afrika, Mozambique, Namibia, etc.

In het Neurenberg Tribunaal tegen het Nazi regime is ook het recht der volkeren tot verzet tegen invasie en bezetting erkend, waarmee recht gedaan is aan Hannie Schaft, "het meisje met het rode haar", de deelnemers aan de Februari Staking (1941) en vele andere verzetsstrijders tijdens de Tweede Wereldoorlog in Nederland, Frankrijk, Belgie Noorwegen en andere landen.

Bovendien is in juli 1976 de Verklaring van Algiers gepubliceerd over het recht van de volkeren om ook gewapenderhand te strijden voor nationale bevrijding.

Natuurlijk omvat dit fundamentele recht ook de strijd tegen de Israelische annexatie van Palestijnse grondgebied--inclusief Oost-Jerusalem, tegen massamoorden als in Deir Yassin, Sabra en Shatila, tegen de blockades, tegen de bouw van illegale nederzettingen, tegen de illegale muur, en tegen de jongste barbaarse aanval op Gaza.

Op de Filippijnen hebben zeventien revolutionaire organisaties zich georganiseerd in het Nationaal Democratisch Front van de Filippijnen (NDFP). Het NDFP heeft in 1996 Protocol I van de Geneefse akkoorden ondertekend. Het doel is de internationale status van de strijd, inclusief de gewapende strijd, van het Filippijnse volk te versterken. Deze strijd is voor zelfbeschikking tegen de neokoloniale overheersing van het VS-imperialisme en tegen de uitbuiting door de lokale heersende klassen. Het New People's Army (NPA), geleid door de Communistische Partij, viert op 29 maart zijn 40ste verjaardag en 40 jaar van revolutionaire strijd. Het NPA is met steun van het Filippijnse volk, momenteel aktief in meer dan 120 guerrilla fronten of gebieden met programma's voor landhervorming, gezondheidszorg, onderwijs (inclusief alphabetisering), kultuur, zelfverdediging, etc. Behalve de gewapende strijd, gebruikt onze revolutionaire beweging ook andere strijdvormen zoals de revolutionaire massabeweging, de parlementaire strijd, de strijd voor mensenrechten en vredesbesprekingen, maar de gewapende strijd is het voornaamste.

Op 7 juni 1982 heeft de Palestijnse Bevrijdingsorganizatie (PLO) een verklaring van adhesie aan de Geneefse Conventies en het toegevoegde Protocol I ondertekend. Bovendien heeft de Permanent Waarnemer van de VN voor Palestina op 21 juni 1989 een brief aan het VN-kantoor in Geneve gestuurd, waarin hij meedeelt, dat het Uitvoerend Comite van de PLO dat de Palestijnse staat besuurt, bij besluit van de Palestijnse Nationale Raad van 4 mei 1989, heeft verklaard zich te houden aan de Vier Geneefse Conventies van 1949 inclusief de twee toegevoegde Protocollen. Daaardoor is de gewapende strijd van het Palestijnse volk nog verder gelegitimeerd..

Met de erkenning van de rechten van het Palestijnse volk hangt noodzakelijk samen de vervolging van Israel wegens oorlogsmisdaden en misdaden tegen de menselijkheid.

Onder andere VN Secretaris Generaal Ban Ki-moon, de VN Raad voor Mensenrechten, de Arabische Liga hebben de oorlogsmisdaden en misdaden tegen de menselijkheid van Israel tijdens de aanval op Gaza, veroordeeld en eisen vervolging van de veraantwordelijken. In Spanje heeft rechter Fernando Andreu op 29 januari dit jaar een strafrechtelijke onderzoek begonnen naar aanleiding van een klacht tegen zeven hoge officieren van de Israelische strijdkrachten voor het bombardement op Gaza op 22 juli 2002 waarbij 15 doden waaronder negen kinderen, en 150 gewonden vielen. Deze Israelische officieren worden beschuldigd van misdaden tegen de menselijkheid.

Ook de VS wordt sterk bekritiseerd en medeveraantwordelijk gesteld wegens politieke en diplomatieke steun aan Israel en de jaarlijks miljarden dollars belopende militaire steun. In de VN Veiligheidsraad gebruikt de VS bijna iedere keer het vetorecht om resoluties tegen Israel te ontkrachten of tegen te houden.

De heroische en gerechtvaardigde strijd van het Palestijnse volk krijgt de strijdbare solidariteit van de volkeren der wereld. Daarom waren er vele demonstraties overal ter wereld tegen de barbaarse aanval van Israel op Gaza. Meer dan twee honderd vraachtwagens met hulpgoederen reden meer dan 10,000 kilometer uit solidariteit voor het Palestijnse volk in Gaza. Wij op de Filippijnen, die ook strijden voor zelf-beschikking, soevereiniteit en nationale en sociale bevrijding tegen het VS imperialisme en het fascistische regime van Gloria Arroyo, staan in solidariteit met het Palestijnse volk! ###

Leiden, 13 maart 2009

THE STATUS IN INTERNATIONAL LAW OF NATIONAL LIBERATION MOVEMENTS AND THEIR USE OF ARMED FORCE

by Edre U. Olalia



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THE STATUS IN INTERNATIONAL LAW OF NATIONAL LIBERATION MOVEMENTS AND THEIR USE OF ARMED FORCE

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This paper seeks to give an academic legal opinion – using a survey of pertinent legal literature - on the legitimacy under international law of national liberation movements and their use of armed force.

The status of national liberation movements in international law has been the subject of much scholarly work through the years. The increasingly progressive trend and view in international law and diplomatic circles is that such liberation movements are considered to have a *locus standi* in international law in the context of the struggle of peoples against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination.

Necessarily, several questions need to be addressed. What are *national liberation movements*? What are *wars of national liberation*? What is meant by the exercise of one's *right to self-determination*? What is meant by *peoples*? What is meant by *struggles against colonial domination, alien occupation and against racist regimes*? Do these include struggles against other forms like the modern day neo-colonialism or imperialist aggression and intervention?

And assuming such struggles against neo-colonialism are included, how can and how do these liberation movements adhere to or abide by the norms of international law, particularly in the sphere of international humanitarian law? Regardless of whether these national liberation movements are engaged in armed conflicts of an international or non-international character or both, how does international law view them? And are individuals involved in or supportive of these liberation movements to be regarded as criminals, terrorists, freedom fighters or revolutionaries?

I. WHAT INTERNATIONAL LAW AND COMMENTARIES SAY

A. National Liberation Movements and Wars of National Liberation

1. On Different Types of Armed Conflict

The different types of armed conflict[2] to which the term "wars of national liberation, in terms of humanitarian law, has been applied are (1) those struggles of peoples fighting a foreign invader or occupant; (2) those that have evolved within the United Nations and identified from the practice of States and international organizations, namely colonial and alien domination (or rule or government) and racist regimes which according to Article 1, paragraph 4 of Protocol I, are armed struggles aimed at resisting the forcible imposition or maintenance of such situations to allow people subjected to them to exercise its right of self-determination; [3] (3) dissident movements which take up arms to overthrow the government and the social order it stands for. Their members may consider themselves as a "liberation movement" waging a "war of national liberation" against a regime or government which masks or represents "alien domination;" and (4) armed struggle of dissident movements representing a component people within a plural State which aims at seceding and creating a new State on part of the territory of the existing one.

A different perspective states that "parties to an armed conflict, other than states, are legally classified – 'along a continuum of ascending intensity' – as (1) rebels, (2) insurgents or (3) belligerents. Rebellion consists of sporadic challenge to the established government but which remains "susceptible to rapid suppression by normal procedures of internal security'; it is within the domestic jurisdiction of the state. Insurgency is a 'half-way house between essentially ephemeral, spasmodic or unorganized civil disorders and the conduct of an organized war between contending factions within a State. The material conditions for a condition of belligerency are (1) the existence of an armed conflict of a general character; (2) occupation by the insurgents of a substantial portion of the national territory; (3) an internal organization capable and willing to enforce the laws of war; and (4) circumstances which make it necessary for outside states to define their attitude by means of recognition of belligerency." [4]

It was proposed, however, that "a more flexible interpretation would assess the effectiveness of liberation movements not in isolation, but in relation to that of their adversary." A more definitive interpretation would also take into consideration not only the elements in which liberation movements succeed in

controlling, but also those which they succeed in extracting from the control of that adversary. Such an interpretation would logically lead to the conclusion that, though not exercising complete or continuous control over part of the territory, liberation movements, by undermining the territorial control of the adversary as well as their own control of the population and their command of its allegiance, muster a degree of effectiveness sufficient for them to be objectively considered as a belligerent community on the international level.[5]

"While belligerents can only speak for themselves, a liberation movement represents not only itself or the territory it controls, but the whole people whose right to self-determination is being denied. It is this representative capacity which makes the status of a national liberation movement inherently independent of a geo-military dimension. The Protocol acknowledges this representative character in Article 96, wherein it refers to a liberation movement as '(t)he authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4.'"[6]

"The term 'war of national liberation' is not just a legal construct; it refers to a fact. Long before liberation wars were integrated into international law, they had existed as concrete historical phenomena. The Protocols Additional, therefore, do not invent a new category but merely acknowledge a material situation already existing. There are facts, of course, that are not politically neutral, but that does not make them any less factual. Moreover, this classification of liberation wars as a category of armed conflicts is based not on morality but on law – the legal right to self-determination."[7]

2. On People

On the concept of people in the context of national liberation movements, it was explained that "in international law there is no definition of what constitutes a people; there are only instruments listing the rights it is recognized all peoples hold.

Neither is there an objective or infallible criterion which makes it possible to recognize a group as a people: apart from a defined territory, other criteria must be taken into account such as that of a common language, common culture or ethnic ties. The territory may not be a single unit geographically or politically, and a people can comprise various linguistic, cultural or ethnic groups. *The essential factor is a common sentiment of forming a people, and a political will to live together as such.* Such a sentiment and will are the result of one or more of the criteria indicated, and are generally highlighted and reinforced by a common history. This means simultaneously that there is a bond between the persons belonging to this people and something that separates them from other peoples; there is a common element and a distinctive element."[8]

B. Legal Development and Trends on Recognition of the Right to Self-determination, the Use of Armed Force and the Right to Revolution

A survey of international documents through the years concerning the subject helps in understanding the conceptualization, contours and development on these points.

In fact, even from a liberal bourgeoisie legal point of view, resort to revolution has been recognized for the longest time, though more and more as merely rhetoric today in the context of the international situation.

1. Historical Basis of Right to Revolution

This kind of perspective was provided in this way:

"The right of "revolution" refers to the right fundamentally to change a governmental structure or process within a particular nation-state, thus including the right to replace governmental elites or overthrow a particular government. Such a change can occur slowly or quickly, peacefully or with strategies of violence. x x x x x x What Abraham Lincoln recognized was the fundamental democratic precept that authority comes ultimately from the people of the United States, and that with this authority there is retained a "revolutionary right to dismember or overthrow" any governmental institution that is unresponsive to the needs and wishes of the people.

The right of revolution recognized by President Lincoln has, of course, an early foundation in our history. Both the Declaration of Independence (1776) and the Declaration of the Causes and Necessity of Taking Up Arms (1775) contain recognitions of this right, and several state constitutions within the United States consistently recognized the right of the people "to reform, alter, or abolish government" at their convenience. x x x x "[9]

A Justice of the US Supreme Court said that "the American Revolution served as a precursor for numerous others in the Americas, Europe, and elsewhere, even into the twentieth century. Today, it is common to recognize that all peoples have a right to self-determination, and, as a necessary concomitant of national self-determination, a right to engage in revolution." [10]

The nature and scope of the right of revolution was further clarified: "With such a focus, one should discover that private individuals and groups can and do engage in numerous forms of permissible violence. It is too simplistic to say, therefore, that authoritative violence can only be engaged in by "the government" or by governmental elites and functionaries. As Professor Reisman stated, the notion that only state institutions can permissibly use high levels of violent coercion

"is a crucial self-perception and deception of state elites." Thus, the useful question is not whether private violence is permissible, but what forms of private violence are permissible, when, in what social context, and why. *[Underscoring supplied.]*

"As Professor Reisman further suggests:

"[I]nsistence on non-violence and deference to all established institutions in a global system with many injustices can be tantamount to confirmation and reinforcement of those injustices. In certain circumstances, violence may be the last appeal or the first expression of demand of a group or unorganized stratum for some measure of human dignity. *[Underscorings supplied.]*

"Early in our history, we appealed to natural law and the "rights of man" to affirm the right of revolution. Two historic declarations provide an inventory of the forms of oppression thought to justify armed revolution. Our Declaration of Independence proclaimed to the world the expectation that all governments are properly constituted in order "to secure" the inalienable rights of man, that governments derive "their just powers from the consent of the governed," and that "it is the Right of the People to alter or abolish" any form of government which "becomes destructive of these ends." x x x x [11]

"It is important to note two primary aspects of the right of revolution claimed in these two Declarations. First, the claim was made in a situation in which a ruler and a government sought to subject a people to despotism through various forms of political and economic oppression. Second, and most importantly, the Declaration of Independence was proclaimed "in the Name, and by authority of the . . . People." Thus, although the framers of these Declarations appealed to natural law and inalienable rights, including the right to be free from governmental oppression and to alter or abolish oppressive forms of government, the primary justifying criterion was the proclaimed authority of the people."[12]

"In view of the above, one can also recognize the propriety of a claim by the government, when representing the authority of the people, to regulate certain forms of revolutionary violence or, when reasonably necessary, "incitement to violence" engaged in by a minority of the people of the United States and without their general approval. Indeed, several Supreme Court cases document the permissibility of such a claim, although a few others seem to go too far. If, however, the right of revolutionary violence is engaged in by the predominant majority of the people, or with their general approval, the government (or a part of thereof) would necessarily lack authority, and governmental controls of such violence or incitements to violence would be impermissible. Thus, for example, it would be constitutionally improper to allege that "incitement to violence" is always a justification for governmental suppression of such conduct even if violence is imminent. Permissibility does not hinge upon violence as such, but ultimately

upon the peremptory criterion of authority — i.e., the will of the people generally shared in the community."[13]

"In summary, numerous cases either affirm or are consistent with a distinction between permissible forms of violence approved by the authority of the people and unlawful violence, especially violence engaged in contrary to the authority of the people. Perhaps in recognition of such a distinction, Justice Black has stated:

"Since the beginning of history there have been governments that have engaged in practices against the people so bad, so cruel, so unjust and so destructive of the individual dignity of men and women that the "right of revolution" was all the people had left to free themselves. . . . I venture the suggestion that there are countless multitudes in this country, and all over the world, who would join [the] belief in the right of the people to resist by force tyrannical governments like those." [14]

"It is doubtful whether Justice Black had in mind specific portions of the Universal Declaration of Human Rights when he recognized the seemingly wide approval of a general right of revolution, but he could have. The preamble to the Universal Declaration declares, for instance, that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." *[GA. Res. 217A, at 135, U.N. Doc. A/810 (1948).]* As one commentator has noted, the preamble to the Universal Declaration actually supports the right of revolution or rebellion, and it reflects the growth of acceptance of that right at least from the time of the American Declaration of Independence, "an acceptance so pervasive as to allow text writers to conclude that "the right of a people to revolt against tyranny is now a recognized principle of international law." x x x x and that the right of rebellion against tyranny and oppression is an internationally recognized right.[15]

"Although some have recognized that armed revolution is a form of "self-defense" for an oppressed people and others seek to limit the right of revolution to cases of a reasonably necessary defense against political oppression, the principles of necessity and proportionality should apply only to the strategies of violence utilized during revolution and are not needed for the justification of a revolution. "[17]

It was noted that "allowing for an 'explicit and authentic act of the whole people,' apart from the constituent acts of the electorate, gives rise to what has been referred to as the right to revolution as a recognized principle of international law." [18]

"The right of a people to revolt against tyranny is now a recognized principle of international law."

The American Declaration of Independence of July 1776 categorically states that:

Whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Governments, laying its foundation on such principles and organizing its powers in such forms, as to them shall seem most likely to effect their Safety and Happiness.

Abraham Lincoln in his 1861 Inaugural Address said:

'(t)his country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it.' [19]

This right has been juridically expressed as 'direct state action' by constitutionalists:

"A revolution, therefore, may be illegal from the standpoint of the existing constitutional scheme; it is legal, however, —

'from the point of view of the state as a distinct entity not necessarily bound to employ a particular government or administration to carry out its will, it is the direct act of the state itself because it is successful. As such, it is legal, for whatever is attributable to the state is lawful."[20]

However, it was conceded that:

"The danger with this formulation is that it is useful only in hindsight. It is premised upon the fact of success thus rendering the whole theory, at best, as an after-the-fact justification. While it is internally self-consistent within its theoretical framework, it is actually useless in practice. Revolution is a right but it remains a crime unless its assertion ripens into victory. The paradox, therefore, is that the process of asserting a right is illegal, but the end-product of that process is legal, at which point the legality retroacts to the inception of the process itself."[21]

Another writer cautioned that "International humanitarian law, as embodied in the 1949 Geneva Conventions, establishes rules of humane conduct for parties engaged in armed conflict. The norms of humanitarian law require that violent acts be consonant with fundamental human rights. Two principles underlie human rights and humanitarian law: first, "all peoples have a right to self-determination and ... a right to engage in revolution"; and second, "international law ... limits the permissibility of armed revolution and participation of individuals in revolutionary social violence." [22]

Still another writer wonders whether national liberation movements have a right to use force in international law against established governments and comes

to the conclusion that "the trend over the last four decades and since 1960 in particular has been toward the extension of the authority to use force to national liberation movements" [23]

2. Right to Self-Determination in Positive Law

The right to self-determination first appears in positive international law in Articles 1 and 55 of the United Nations Charter, then with General Assembly Resolution 1514 (XV) of 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, then Articles 1 (1) of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both of 1966.[24]

In 1948, this landmark provision was reached by the international community:

Whereas, it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law. *[Universal Declaration of Human Rights of December 10, 1948]*

In the Declaration Of The Independence Of Colonial Nations And Peoples" (Resolution 1514, XV, December 14, 1960:

2. All peoples have the right of self-determination. They are free to politically determine the force of this right and to freely struggle for economic, social, and cultural development.

4. All armed actions and measures of repression, of any type whatsoever, against dependent peoples are to be halted in order to make it possible for them to peacefully and freely enjoy their right to full independence. The integrity of their national territory will be respected.

In this connection, it was explained that :

"Since 1949, however, the developments which have taken place both in the international community and, consequently in international law, have led progressively and cumulatively to the establishment and consolidation of the international character of wars of national liberation; and this both within and outside the framework of international organizations, as a result of practice and consensus, on the basis of the principle of self-determination."[25]

"United Nations organs, especially the General Assembly, have confirmed the latter interpretation (the principle of self-determination is a legal principle imposing an obligation on the colonial Powers and establishing a right for all peoples to the exercise of self-determination) in many resolutions, dealing with the subject matter in general or in relation to a specific situation. This trend culminated in general Assembly Resolution 1514 (XV) of 1960 containing the

Declaration on the Granting of Independence to Colonial Countries and Peoples. Self-determination was also recognized as a human right in Article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly in 1966. The most significant achievement in this respect, however, is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations which was adopted by General Assembly resolution 2625 (XXV) in 1970..... led to the universal recognition of the legally binding nature of the principle of self-determination." [26]

In Resolution 2105 (XX) of 20 December 1965, the General Assembly of the UN recognized the legitimacy of the struggle of colonial peoples against colonial domination in the exercise of their right to self-determination and independence, and it invited all States to provide material and moral support to national liberation movements in colonial territories.

In Common Article 1 of the International Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights (Adopted by Resolution 2200 (XXI) of the General Assembly of 16 December 1966), it is provided unequivocally that all peoples have the right of self-determination by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

In the same vein, it was said that:

"This development reached a high-water-mark with the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations contained in General Assembly Resolution 2625 (XXV) of October 24, 1970 , which proclaimed the 'progressive development and codification' of, among seven principles, that of equal rights and self-determination of peoples."[27] It provided, *inter alia*, :

(b) to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjections of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental rights, and is contrary to the Charter of the United Nations.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against

resistance to such forcible action in pursuit of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the United Nations.

3. Legal Standing of Liberation Movements

The Declaration, it was observed, resolves several intricate and controversial problems posed by cases of violent self-determination, to wit:

(a) It clearly states that the 'forcible action' or force which is prohibited by Article 2, paragraph 4 of the Charter is not that used by peoples struggling for self-determination but that which is resorted to by the colonial or alien governments to deny them self-determination.

(b) Conversely, by armed resistance to forcible denial of self-determination – by imposing or maintaining by force colonial or alien domination – is legitimate under the Charter, according to the Declaration.

(c) The right of liberation movements representing peoples struggling for self-determination to seek and receive support and assistance necessarily implies that they have a *locus standi* in international law and relations.

(d) This right necessarily implies also that third States can treat with liberation movements, assist and even recognize them without this being considered a premature recognition or constituting an intervention in the domestic affairs of the colonial or alien government." [28]

But even before the adoption of the said 1970 Declaration, different organs of the United Nations affirmed, on several occasions, the legitimacy of such struggles. For instance, the General Assembly said in resolution 2649 (XXV) (1970) that it

1. Affirms the legitimacy of the struggles of peoples under colonial and alien domination recognized as being entitled to the right of self-determination to restore to themselves that right by any means at their disposal.[29]

"The Declaration has been construed to have legalized the use of armed means to assert the right to self-determination. The 'forcible action' which is prohibited under Article 2 (4) of the Charter comprehends the use of force by colonial governments to deny a people of their right to self-determination. The wording of the Declaration has been interpreted to exclude the armed means of ascertaining the right to self-determination from the general prohibition on the use of force. In short, the Charter proscribes the forcible denial but permits the forcible assertion on the right to self-determination." [30]

"Another significant development based on the 1970 Declaration is the affirmation that liberation movements had *locus standi* in international law and that wars of national liberation were armed conflicts of an international character.

"Under the 1970 Declaration, a movement representing a people 'in their actions against, and resistance to, such forcible action' used to deny them their right to self-determination, are entitled to seek and receive outside support. Furthermore, third parties who assist such liberation struggles are not deemed to have breached the duty of non-intervention in the domestic affairs of another state, for such assistance is precisely in accordance with the purposes and principles of the Charter itself. The text of the 1970 Declaration shows that both non-intervention and self-determination are enshrined principles of international law in the same instrument, such that the exercise of one cannot possibly be deemed to be in breach of the other co-equal principle. There is, therefore, a built-in 'exception' in favor of self-determination.

"The 1970 Declaration therefore implies that such movement is capable as an international actor to deal directly with outside states. And regardless of whether or not the 1970 Declaration grants international locus standi to those movements, at the very least, it expressly and effectively cracks the protective shell of domestic jurisdiction."[31]

x x x

"The right to self-determination gave rise to a corresponding duty of other states to respect it. And states which use forcible means to deny a people of this right may be legally resisted by armed force as well. Hence, the legal basis of the politico-military means of ascertaining this right to self-determination. The process of this armed assertion is a war of national liberation; the politico-military group which represents a struggling people in that process is a national liberation movement.

"The next logical development was for this war to attain the character of an international armed conflict and for this movement to be deemed an international person.

"A people asserting their right to self-determination are exercising an international right. Other states, in giving them aid in their struggle to assert that right, do not commit an act of intervention; they are simply upholding the Charter of the United Nations and the fundamental principles of international law according to the Charter.

"Furthermore, a state that denies a people this right is liable for an international delict, a breach of duty owed under international law; and if that denial is done by resort to force, it is liable for the illegitimate use of force, contrary to the Charter itself."[32]

4. Various International Instruments on Struggles and Means

Thereafter, General Assembly Resolution 2649 (XXV) on The Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights (1970) declared that it:

1. Affirms the legitimacy of the struggle of peoples under colonial and alien domination recognized as being entitled to the right to self-determination to restore to themselves that right by any means at their disposal.

In fact, each year thereafter, the General Assembly had passed a resolution of identical title affirming the right to self-determination. In Resolution 2787 (XXVI) of December 6, 1971, the General Assembly 'confirmed the legality of the people's struggle for self-determination.' In Resolution 3070 (XXVIII) of 30 November 1973, the General Assembly categorically affirmed the right to pursue self-determination 'by all means, including armed struggle.'

In Resolution 2787 (XXVI) (1971), it said that it:

1. Confirms the legality of the people's struggle for self-determination and liberation from colonial and foreign domination and alien subjugation... by all available means consistent with the Charter of the United Nations. 2. Affirms man's basic human right to fight for the self-determination of his people under colonial and foreign domination.

In the same vein, General Assembly Resolution 3103 (XXVIII) on the Basic Principles of the Legal Status of the Combatants struggling against Colonial and Alien domination and Racist regimes (December 12, 1973) proclaimed that:

3. The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions ... is to apply to persons engaged in armed struggle against colonial and alien domination and racist regimes

The said Resolution 3103 stated in its preamble that "the continuation of colonialism in all its forms and manifestations ...is a crime and that all colonial people have the inherent right to struggle by all necessary means at their disposal against colonial powers and alien dominations in the exercise of their right to self-determination...."

The General Assembly identified and recognized the legal characterization of armed conflicts as wars of national liberation including those in Southern Africa, the peoples of Zimbabwe, Namibia, Angola, Mozambique, Guinea-Bissau and

the Palestinian people (resolution 2787, XXVI, 1971). In fact, several liberation movements have been granted observer status in various organs of the United Nations and regional organizations. In fact, many States have even recognized liberation movements, allowed them to establish official representation in their territory and provided and still provide them with moral and material assistance.[25]

In the United Nations Declaration on the Protection of Women and Children in Emergency and Armed Conflict, proclaimed by General Assembly resolution 3318 (XXIX) of 14 December 1974, it was affirmed that:

Deeply concerned by the fact that, despite general and unequivocal condemnation, colonialism, racism and alien and foreign domination continue to subject many peoples under their yoke, cruelly suppressing the national liberation movements and inflicting heavy losses and incalculable sufferings on the populations under their domination, including women and children,

Deploring the fact that grave attacks are still being made on fundamental freedoms and the dignity of the human person and that colonial and racist foreign Powers continue to violate international humanitarian law, x x x x

Even in the Helsinki Accord of 1975, applying the principle of self-determination to internal democracy addressed particularly to European states *[signed by 35 States, 33 European plus Canada and the US]*, Principle VIII, Final Act of Conference on Security and Cooperation in Europe, this principle appears:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

Eventually, Article 1 of Protocol I of 8 June 1977 states that:

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

Thereafter, General Assembly Resolution 32/147 on measures to prevent international terrorism of 6 December 1977 again:

3. Reaffirms the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination,

and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations.

4. Condemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedom; x x x x

Also, in Resolution 40/61 adopted on December 9, 1985 by the 108th Plenary Meeting, the General Assembly adopted a Resolution on Measures to Prevent International Terrorism[34], to wit:

Reaffirming also the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination, and Upholding the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

In Economic and Social Council Resolution 1986/43, on the Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination, the following is again stated:

Reaffirming the legitimacy of the struggle of peoples and their liberation movements for their independence, territorial integrity, national unity and liberation from colonial domination, apartheid, foreign intervention and occupation, x x x

Once again, in G.A. res. 48/94, [48 U.N. GAOR Supp. (No. 49) at 199, U.N. Doc. A/48/49 (1993)], the General Assembly, on its 85th plenary meeting on 20 December 1993 on the Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, agreed thus: x x x

2. Reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation, in all its forms and by all available means;

The International Court of Justice, in advisory opinions, had occasion to affirm that the principle of self-determination as enshrined in the United Nations Charter has through subsequent development of international law been accepted as a "right" of peoples in non-self-governing territories [35]

It was concluded that "as concerns the *jus in bello* – i.e. the law governing relations between belligerents and between them and third parties – the most important consequence of the recognition of self-determination as a legal right (a

consequence which inexorably derives also from all the others mentioned above) is to confer an international character on armed conflicts arising from the struggle to achieve this right and against its forcible denial. As such, they are subject to the international *jus in bello* in its entirety."[36]

> The right to self-determination confers an international character on armed conflicts arising from the struggles to achieve this right.

"The right to self-determination, a fundamental principle of human rights law, is an individual and collective right to "freely determine . . . political status and [to] freely pursue . . . economic, social and cultural development." (ICCPR, Art.1; ICESCR, Art. 1)[37]

The International Court of Justice refers to the right to self-determination as a right held by people rather than a right held by governments alone. [38][39] Western Sahara Case, 1975 International Court of Justice 12, 31.

An observer noted again:

"Today, the right of revolution is an important international precept and a part of available strategies for the assurance both of the authority of the people as the lawful basis of any government and of the process of national self-determination. Under international law, the permissibility of armed revolution is necessarily interrelated with legal precepts of authority and self-determination, as well as with more specific sets of human rights."[40]

More direct to the point, it was said that:

"(I)t is evident that the people of a given community have the right to alter, abolish, or overthrow any form of government that becomes destructive of the process of self-determination and the right of individual participation. Such a government, of course, would also lack authority and, as a government representing merely some minority of the political participants, it could be overthrown by the majority in an effort to ensure authoritative government, political self-determination, and the human rights of all members of the community equally and freely to participate.

"Thus, as mentioned, the right of revolution supported by the preamble to the Universal Declaration and accepted by text writers as a principle of international law is a concomitant precept and a part of available strategies for the securing of the authority of the people and national self-determination. Importantly also, the international precepts of authority and self-determination provide criteria relevant to our inquiry into the permissibility of individual participation in armed revolution. As in the case of domestic standards, the right of revolution is necessarily a right

of the majority against, for example, an oppressive governmental elite. Furthermore, the authority of the people is the only legitimate standard."[40]

5. Limitations on Use of Force

As for the concern regarding the limitations on the use of force, it was also pointed out that: "No matter how rationally one may justify revolutionary means in terms of the demonstrable chance of obtaining freedom and happiness for future generations, and thereby justify violating existing rights and liberties and life itself, there are forms of violence and suppression which no revolutionary situation can justify because they negate the very end for which the revolution is a means. Such are arbitrary violence, cruelty, and indiscriminate terror.

"Under international law, including the law of human rights, there are certain forms of violence that are impermissible per se. Included here are strategies and tactics of arbitrary violence, cruelty, and indiscriminate terror. International law also prohibits the use of violence against certain targets, and permissible uses of force are conditioned generally by the principles of necessity and proportionality.

"Thus, with regard to questions of legality concerning targets, tactics, and strategies of social violence, international law already provides normative guidance. A realistic and policy-serving jurisprudence is needed, however, to integrate relevant principles of international law into appropriate analysis and choice about the permissibility of a particular method or means of violence in a given social context.

"Revolution is actually one of the strategies available to a people for the securing of authority, national self-determination and a relatively free and equal enjoyment of the human right of all persons to participate in the political processes of their society.

"With regard to the separate question of the legality of various means of furthering revolution, numerous sets of domestic and international law already proscribe certain forms of social violence. For example, international law, including human rights law, prohibits tactics of arbitrary violence, cruelty, and indiscriminate terror; the targeting of certain persons (such as children) and certain things; and generally any unnecessary death, injury, or suffering.[41]

"Thus, in a state in which the basic human rights are disregarded by the authorities and no democratic or peaceful means are available to enforce respect for those human rights, rebellion is a legitimate reaction. This right to rebel against tyranny is an integral part of the Western liberal tradition, and usually is defined as a "right of resistance" to oppressive government.

"The right to rebel against oppression is, therefore, well rooted both at an international and a national level, but the method of its implementation raises

several questions. First, when is armed violence justified, and within what bounds? The answer of the international community is limited to a set of historical forms of rebellion: struggles against oppression by colonial powers, racist regimes, and foreign occupants. The majority of the numerous U.N. General Assembly resolutions on self-determination grant the right to take up arms to achieve self-determination. International practice has evolved along these lines, and was confirmed in 1977 in the first Geneva Protocol on the Humanitarian Law of Armed Conflict (Protocol I). Thus, we can conclude that in those three categories of fighting for self-determination, the rebels can legitimately use armed violence to exercise their right of rebellion."[42]

C. The Application of Article 1, paragraph 4 and Article 96, paragraph 3 of Protocol I and other pertinent international humanitarian law instruments to National Liberation Movements (NLMs)

1. Recognition of NLMs in the Conventions

Common Article 2, paragraph 3 of the Conventions provides:

"Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall be bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

There is the view that that the non-recognition of the declaring party or of the authority representing it, in the context of common Article 2, paragraph 3, of the Conventions, inspired Article 96, paragraph 3 of the Protocol, and as such applies to the latter. [43]

It was posited that that though the term 'Power' usually denotes a State in diplomatic language, it has occasionally been used in a wider sense to include some other entities not having this character and, therefore, in that sense, liberation movements can become parties to the Conventions especially so that a wider interpretation is more compatible with the humanitarian objective and purpose of the conventions which, to be fully realized, commend universal application. [44]

The following views[45] on whether such an "authority" has to fulfill certain conditions for it to be able to make the declaration are advanced persuasively:

(1)The attempt to impose the condition that there must be recognition of the liberation movement by the regional intergovernmental organization concerned did not succeed and cannot be read into the language of Article 96 as it stands

because such a condition would have led to a restrictive interpretation incompatible with the object and purpose of humanitarian law. While such recognition reduces the margin of possible controversy, "it is not constitutive of the international status or *locus standi* of the liberation movement for the purposes of the Conventions and the Protocol."

(2) As to the question of territorial control by the liberation movement, this is a restrictive line of reasoning to base it on the assumptions of conventional warfare and disregards in the process the special features of guerilla warfare characteristic of wars of national liberation. "Though not exercising complete or continuous control over part of the territory, liberation movements, by undermining the territorial control of the adversary as well as their own control of the population and their command of its allegiance, muster a degree of effectiveness sufficient for them to be objectively considered as a belligerent community on the international level." At any rate, it is significant that neither Article 1, paragraph 4 nor Article 96, paragraph 3, require territorial control.

(3) As to the condition that there must be proof that the liberation movement be truly representative of the people in whose name it is prosecuting the war of national liberation: Abi-Saab says that "In fact, until self-determination can be freely and openly exercised, one has to be content with certain indices of the representative character of liberation movements. Prominent among them is the fact that a liberation movement can hold on and continue the struggle even at a low level of intensity, in spite of the difficult conditions in which, and the uneven position from which, it has to operate; something it could not have done if it did not enjoy wide popular support. In other words, a certain degree of continued effectiveness creates a presumption of representativeness. "[45]

(4) As to the condition that the liberation movement should attain a minimum of effectiveness as a belligerent, i.e. it should be a party to a real ongoing armed conflict: it is the whole approach of the Conventions that international armed conflicts are defined not as a function of the degree of intensity of hostilities, but in terms of its parties and the type of relations existing among them. It does not appear as a requirement in either Article 1 or Article 96 nor for that matter common Article 2 of the Conventions. [47]

"The effectiveness of the liberation movement is measured first of all by its organization and internal discipline, as prescribed by Article 43 of Protocol I. It is also revealed by the fact that a liberation movement manages to hold on and continues to operate in spite of the great disparity of means and position between it and its adversary (a fact which can also be considered as a presumption of its representative character."[48]

2. Applicability of ARTICLE 1, PARAGRAPH 4, in relation to ARTICLE 96, PARAGRAPH 3

ARTICLE 1, PARAGRAPH 4 (On General Principles and Scope of Application) of Protocol I Additional to the Geneva Conventions of 12 August 1949 provides:

The situation referred to in the preceding paragraph [Conventions of 12 August 1949 for the Protection of War Victims, shall apply in the situations referred to in Article 2 Common to those Conventions] include *[which means in statutory construction as non-exclusive and merely illustrative]* armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations. *[Underscorings supplied]*

ARTICLE 96, PARAGRAPH 3 (On Treaty Relations upon entry into force of this Protocol):

The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

(a) The Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) The said authority assumes the same rights and obligations as those which have been assumed by a [N.B., referring to any High Contracting Party and not a particular entity] High Contracting Party to the Convention and this Protocol; and

(c) The Conventions and this Protocol are equally binding upon all Parties *[N.B., not necessarily a High Contracting Party]* to the conflict.

3. What Colonial Domination, Alien Occupation and Racist Regimes Mean

Are the instances of colonial domination, alien occupation or racist regimes illustrative or exhaustive a listing to qualify whether a struggle of a people in the exercise of its right to self-determination should be considered an international conflict?

The traditional view is that, despite the use of the word "include", it should be interpreted as introducing an exhaustive list of cases and that the same essentially cover all circumstances in which peoples are struggling for the exercise of their right to self-determination.

There is a legitimate struggle against "colonial domination" when a people have taken up arms to free themselves from the domination of another people, "alien occupation" involves partial or total occupation of a territory which has not yet been fully formed as a State, while "racist regimes" are those founded on racist criteria. "The list is exhaustive and complete: it certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist regime. On the other hand, it does not include cases which, without one of these elements, a people take up arms against authorities which it contests, as such a situation is not to be considered international." [49]

A different view was advanced, to wit:

"(W)henever a state chooses to send its armed forces into combat in a previously non-international armed conflict in another state — whether at the invitation of that state's government or of the rebel party — the conflict must then be considered an international armed conflict, and the rebel party must be considered to have been given, from the date of such intervention, belligerent status, which, as a matter of customary international law, brings into force all of the laws governing international armed conflicts. If a state other than the state in which a civil war is occurring commits its armed forces to the battle on one side or the other, the nature of the armed conflict changes fundamentally. While one can understand that a government involved in a civil war in its territory might object to its internal enemy's acquiring belligerent status merely because another state has been induced to join the war, the armed conflict will certainly have become international, and it will be practically impossible to apply both the rules on international armed conflict and those on non-international armed conflict to what, in fact, is a single armed conflict with two warring sides." [50]

Another insight was provided by the following commentary:

"The next question to be considered is the extent to which the law of Geneva covers acts committed by national liberation movements. From the point of view of international law, until recently national liberation movements could doubtlessly have been regarded as parties to non-international armed conflicts, to which the provisions of Article 3 apply, unless the conditions for their recognition as "belligerents" were met. During the sixties and seventies, however, the non-aligned countries, supported by those of Eastern Europe, launched a massive campaign aiming at the recognition of the armed struggle of national liberation movements as being "international" by definition: i.e., from the first shot, so to speak, without

taking into account the traditional condition of presenting a real and sustained challenge to the government. Thus, General Assembly Resolution 3103 (XXVIII) of December 12, 1973, provides:

"The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes. x x x" [51]

In expounding on the application of Article 1, paragraph 4 of Protocol I, a very progressive view, on the other hand, was posited:

"Article 1, paragraph 4, does refer to the exercise of the right of self-determination; but only in order to qualify the struggles of peoples in the three types of situations mentioned therein, i.e. armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.

"Does this mean that the provision is limited to these three specific cases of denial of self-determination? The literal interpretation of the text leads to an affirmative answer to this question. But it may be useful in this context to recall the explanation given by the Australian representative in Plenary at the end of the first session, for his renewed support of Article 1 as amended x x x:

'At that time (of voting in the Committee his delegation had explained that, although it favoured a broadening of the field of application of draft Protocol I, it feared that the terms used . . . might be too restrictive and exclude all conflicts other than those enumerated. After due consideration, his delegation had realized that if paragraphs 1 and 2 (4 in the final version) were taken together and if the word 'include' in paragraph 2 was taken literally, the list could be interpreted as not being exhaustive. '

"In other words, the Australian representative tried to put forward an interpretation of the provision, which considers the enumeration of the specific types of situations as illustrative and not exhaustive.

"Such an interpretation is more in accord with the spirit of the Protocol and the Conventions: for if we proceed from a humanitarian point of view, we have to favour the application of as much humanitarian law to as many conflicts as possible. This has been the systematic policy of the ICRC; and it is through the practice of the ICRC, of international organizations and of States that such a liberal interpretation can progressively consolidate." [52]

This view continued:

"Article 1, paragraph 4, can be plausibly construed in a more liberal way, by interpreting the enumeration of the three categories mentioned therein as illustrative and not exhaustive; an interpretation which brings within its ambit all cases of denial of self-determination, within as well as beyond the colonial context. The absence of the requirement of recognition by the regional organizations either in the definition or for establishing the *locus standi* of liberation movements, facilitates the adoption of this interpretation by the ICRC and by third States in dealing with specific situations. And it is through such subsequent practice that this liberal interpretation - which is much more compatible with the humanitarian object and purpose of the provision and of the whole Protocol – can be anchored in reality and made to prevail."[53]

The effect of non-acceptance by an existing government to Protocol I on the applicability of Article 96, paragraph 3 thereof was also clarified:

"Even if Protocol I is not accepted as a separate legal instrument by the handful of governments facing a war of national liberation, its provisions assert themselves as the proper interpretation of the Geneva Conventions.

"In this respect, the fact that the *locus standi* of liberation movements was codified in Article 96, paragraph 3, vindicates the earlier interpretation of 'Power' in the Conventions to include such movements, at least for the purposes of common Article 2, paragraph 3 of the Conventions, whose formula was more or less borrowed by Article 96 of the Protocol.

"With the progressive development of the people's right to self-determination, it became legally possible to justify the international characterization of civil wars."

"This means that if a liberation movement makes a declaration accepting the provisions of the Conventions, these Conventions, as interpreted in the light of Protocol I, become applicable in the ongoing war of national liberation, regardless of the opposition of the adversary government, as long as it is itself bound by the Conventions."[54]

In this connection, this view is shared by another scholar:

"Wars of national liberation were hitherto considered as internal armed conflicts and were therefore within the domestic jurisdiction of states. They become international conflicts only when they had crossed a geo-military threshold, beyond which the world community was placed on notice that said revolutionaries qua belligerents were entitled to *locus standi* as international persons."

"With the progressive development of the people's right to self-determination, it became legally possible to justify the international characterization of civil wars, without negating the principle of non-interference. First, the right of self-determination is ascribed to a people, such that said possessor of an international right must necessarily be an international person in order to assert and enjoy that right. Second, wars of national liberation were deemed the politico-military assertion of the right to self-determination. A liberation movement, therefore, is asserting an international right against a state, which by denying that right, is in breach of international obligations. Third, the use of armed force to deny a people of their right to self-determination is an act of aggression and entitles the party thus aggrieved to legitimately resort to armed means to resist such forcible denial of their right to self-determination."[55]

Further:

"Through classical colonialism, erstwhile international matters were legally subordinated to the municipal law of the colonializing power. With neo-colonialism, through the granting of nominal independence, two processes simultaneously transpire. Ostensibly, the relationship between the colonizer and its subject is once again 'internationalized', replete with all the trappings of the diplomatic relations between sovereign states. At the same time, however, the client-patron relationship has been so institutionalized, that through sophisticated legal and economic devices, colonial plunder persists. Domestic compradore elements, for instance, shall continue to fight local battles, politically and even militarily, for their patron, a most apt example of a 'war by proxy'.

"Furthermore, the center-periphery relationship that used to exist only as a relationship between the colonizing power and its colony, later comes to exist as a relationship within the colony itself. The anti-colonial struggle is then fought within the boundaries of the neo-colonial state. The 'national sovereignty' of a neo-colony is legal fiction through which the colonizing powers – and the international community in which they are dominant – seek to insulate themselves from the obstinate efforts of peoples to ascertain their right to self-determination. The national liberation framework unmasks that fiction, and in the logic of corporate litigation, pierces the veil of national sovereignty to give aid to those peoples."[56]

In view of the above discussions, what is meant or contemplated by colonial domination, alien occupation and racist regimes in Article 1, paragraph 4?

There is existing and increasingly progressive legal literature that says the struggle against neo-colonialism may be contemplated in these terms.

Does this provision require that there be both colonial domination and alien occupation as one integral ground for unilateral declaration under Article 96,

paragraph 3 or are the three grounds, i.e. colonial domination, alien occupation and racist regime – three separate and distinct grounds which are independent of one another?

There seems to be divergent opinions on this although there is sufficient existing legal literature that says they can be both distinct and independent and at the same time an integral ground.

It was acknowledged that:

"The main legal problem to be solved was the following: whether members of liberation movements fighting against colonial powers were entitled to combatant status and consequently to treatment as prisoners of war upon capture, or whether their acts of violence could lawfully be subject to the penal law of the established government. This problem is now solved by Article 1, paragraph 4 of Additional Protocol I (1977) to the Geneva Conventions, which has given members of liberation movements combatant and POW status. At the time of its drafting, this provision was the object of an acrimonious debate, and the Diplomatic Conference that adopted the Protocols risked becoming a fiasco. Article 1, paragraph 4 of Protocol I is still an object of contention and its existence is one of the main reasons that the United States refuses to ratify Protocol I."[57]

In sum then, the following legal conclusions can re reached:

a. The situations referred to in Article 1 (4) of Protocol 1 need not be exhaustive or exclusive as to definitively foreclose the application of other non-traditionally defined armed conflicts in the exercise of a people of their right of self-determination.

b. The intent of Protocol I is to fully apply the provisions of the Geneva Conventions and Protocol I in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

c. The right of self-determination may be exercised if there is a consistent pattern of gross and proven violations of human rights amounting to a denial of the people's right to freely determine its internal and external political and economic status.

d. The principle of effective implementation i.e. a treaty is interpreted in the light of its object and purpose, in the law on treaties favor as far as possible the upholding of the human spirit of the provisions of the Geneva Conventions and Protocol I.

e. The operative condition in the application of the subject provisions is the justifiability of the right of self-determination.

f. The principles and resolutions of the United Nations as well as the history and development of international humanitarian law unanimously show that the intention is to bring in liberation movements within the ambit of IHL.

Notwithstanding this legal question, what is certain is that:

The status recognized to liberation movements indeed gives them, as it gives States, the right to choose whether or not to submit to international humanitarian law, insofar as it goes beyond customary law. In this respect they are in a fundamentally different legal position from insurgents in a non-international armed conflict: if the State in whose territory such a conflict takes place is a Party to the Conventions and to Protocol II, Article 3 common to the Conventions and, as the case may be, Protocol II, will bind all the Parties to that armed conflict straightaway." [58]

D. Are National Liberation Movements and their Participants Criminals, Terrorists, Freedom Fighters or Revolutionaries?

So how should national liberation movements be considered in international law, particularly with respect to international humanitarian law?

The following observation is illustrative:

"Unfortunately, many of the states involved in attempting to militarily obliterate the peoples with valid self-determination claims try to reduce these conflicts to "terrorism". So depending on which side of the fence you are on, group A is either a terrorist or a freedom fighter. Some of these regimes' friends either acquiesce or actively support this erroneous assertion.

"Apart from the mud-slinging, the tragedy is that states are in open violation of their *jus cogens* and *erga omnes* obligations to defend the principle of self-determination. And also, very sadly, not enough people know sufficiently both the law of self-determination and the law of armed conflict to properly redirect the dialogue. The defenders of self-determination are in a very vulnerable position, charged with terrorism. The supporters of the groups fighting for the realization of national liberation may also be labeled or unduly burdened by laws against terrorism at the extremely serious expense of not only human rights but rights under the Geneva Conventions, other treaties and customary laws of armed conflict."[59]

The peculiarities of wars of national liberation was pointed out in this connection:

"Wars of national liberation are a typical example of what is sometimes called (in 'peace research' and 'strategic studies') 'asymmetrical conflicts'. These are

conflicts between radically unequal parties in terms of the resources they command. The one controls the State machinery with all that goes with it, including the administration, the judiciary and the police, as well as modern means of communication and modern army disposing of powerful and sophisticated weapons. The other is composed of irregular combatants whose only asset is their high motivation and strong faith in the justice of their cause, reflecting popular aspirations which cannot be freely and democratically expressed and pursued.

"In these conditions liberation movements have no choice but to carry on a 'poor man's war', by resorting to non-conventional or guerrilla warfare, which calls on man's ingenuity and cunning to beat the machine and compensate for material inferiority. It is a special kind of warfare which has its own characteristics and internal logic."[60]

One commentator noted:

"Some of the organizations included in this section represent the internationally recognized opposition movements within countries where there is a civil war (e.g. Iran) or a war of national liberation (e.g. Sri Lanka). Under the U.N. charter and international treaties, the principle of self-determination provides that historically united groups of people (e.g. the Palestinians) have a right to determine their own form of government. In South Africa, for instance, the black majority was denied self-determination under the apartheid system. Today, there are many different ethnic national groups (like the Karenni in Burma, the Kurds in Iraq, the Kashmiris in Kashmir and the Tibetans in Tibet) who are denied self-determination in violation of international law.

"When armed resistance groups meet certain tests and follow the rules set out by the Geneva Conventions and other humanitarian (armed conflict) law, they are not considered terrorist organizations or mercenaries, but legitimate parties to a conflict. Therefore, like the African National Congress in South Africa during apartheid, they have recognized legal status, granting them specific rights, such as to be treated as prisoners of war if apprehended (i.e. not subject to criminal proceedings for shooting a soldier or for treason)."[61]

On the other hand, a critical view of the traditional concept on national liberation movements was made:

"Revolutionaries, vanquished, are outlaws; victorious, they are the state. The orthodox framework in interpreting the international legal consequences of revolution hinges upon one determinant factor: the extent of effective control by parties to the conflict, as ascertained on a geo-military scale. Upon this factual determination rests the resolution to key juridical issues – the status to be conferred upon the rebels, i.e. whether they are mobs in a leve'e en masse, insurgents, or full-fledged belligerents; the rights and obligations arising therefrom; and the liability of the rebels, and conversely, the extent of state responsibility, for injuries

caused by the conduct of hostilities. Success, in this case, is rebellion's sole justification. Of war, to paraphrase Seneca, the law asks the outcome, not the cause.

"The chief flaw of this framework is that while the world community has evolved international legal safeguards to minimize the human costs of armed conflict *[referring to international humanitarian law on human rights and on armed conflicts]*, international law itself – by its stubborn insistence on the strict categorizing of rebel groups based primarily on their effective strength – has precluded the application of these legal restraints in those cases where they are needed most, i.e. in internal armed conflicts, where there is an appalling asymmetry between the protagonists in terms of men, organization and firepower."

"For unless the rebels have attained the requisite degree of success, international law is deemed inapplicable, deferring to the presumptive primacy of the domestic jurisdiction of the sovereign state. Until then, therefore, the rebels are subject to the impunity of a fevered state whose national security so-called is gravely threatened. Thus, international law comes to the rebel's succor precisely when those rebels are strong enough to demand that it do so. Law, as always, is on the side of the heaviest battalions."[62]

In seeking to ascertain the legal mode by which international legal protection can be made applicable to erstwhile internal armed conflicts, focus can be made on the development of the concept of the national liberation movement and that they have a privileged status under international law.

"Hence, a rebel group thus classified may be entitled to *locus standi* as an international person regardless of its geo-military standing. That insurrectionary movement is at once placed under an entirely different regime of law. It may enjoy the benefits of international humanitarian protection as a matter of right, and not merely at the forbearance of the established government. It shall furthermore be freed of the handicaps inherent in the application of domestic jurisdiction, under which a liberation movement is presumed to be criminal and subversive, unless it otherwise proves to be ultimately successful. "[63]

A rebel group may be entitled to *locus standi* as an international person regardless of its politico-military standing.

"The international status of a national liberation movement, therefore, springs not from a geo-military capacity to assume responsibility for its obligations to the international community; it is based upon a people's inherent eligibility to enjoy an international right, i.e.

self-determination, and to demand of the world community that it respects that right."

"To the criticism that the national liberation framework is but an ideology in legal garb, suffice it to say –

(T)hat no political system has an a priori absolute and universal validity, that liberal capitalism just as authoritarian capitalism or socialism in all its different forms, may well be detested by some and preferred by others; that the right of peoples to self-determination is not linked to any pre-determined system; that freedom has many meanings, and each people has the exclusive right to decide which meaning they will give it...." [64]

1. Just war vs. Terrorism

The following view was espoused on this point:

"Throughout history, the world has known political violence and war. For centuries political and religious thinkers from many traditions have wrestled with two key questions. When is the use of force acceptable? What principles govern how force that may be used? These two questions are central to something known as "just war" theory.

"These two questions and the concepts of just war theory may also be useful in considering terrorism. In past debates about terrorism, some have suggested that one person's terrorist is another's freedom fighter. Are these terms merely labels that have to do with whether one agrees or disagrees with the cause? Or is the distinction based on more concrete and objective grounds?

"Today, just war theory underlies much of accepted international law concerning the use of force by states. International law is explicit about when states may use force. For example, states may use force in self-defense against an armed attack. International law also addresses how force may be used. For example, force may not be used against non-combatants. Despite these laws and norms, there are those who oppose the use of violence under any circumstances. For example, this commitment to non-violence led Mohandas Gandhi to build a movement of national liberation in India organized around the practice of non-violent resistance.

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"After the Second World War, the use of violence in struggles for self-determination and national liberation fueled a new aspect of the debate on legitimate use of force – the differences between freedom fighters and terrorists. For example, newly independent Third World nations and Soviet bloc nations argued that any

who fought against the colonial powers or the dominance of the West should be considered freedom fighters, while their opponents often labeled them terrorists."[65]

Indeed, "all liberation movements are described as terrorists by those who have reduced them to slavery. ...[The term] terrorist [can] hardly be held to persons who were denied the most elementary human rights, dignity, freedom and independence, and whose countries objected to foreign occupation." [66]

"International standards do not provide a clear-cut answer to every possible question, but there are borderline cases that may be open to differing solutions. For example, a faction opposing an indisputedly undemocratic government that denies the most elementary human rights, resorts to forms of terrorism, such as taking hostage members of the army or government to obtain by force, greater respect for human rights. Is this action at odds with the doctrine enshrined in such basic international instruments as the Universal Declaration of Human Rights, the Covenant, and article 3 common to the 1949 Conventions? The contention could be made that the action might be considered legitimate as long as certain strict requirements are fulfilled: the incumbent authorities are unquestionably oppressive and do not leave any room for democratic change; the sole purpose of the "terrorist" action is to achieve some degree of freedom; no innocent civilian is among the victims; and no inhumane or degrading treatment is meted out to the people attacked.

"In summary, international standards of a universal character usually do not allow or condone terrorism, notwithstanding the motivation or ideological matrix of its origin. Rebellion against tyranny and oppression is allowed as a last resort, whether it is a struggle for national liberation or a rebellion against an authoritarian nondemocratic government that allows no form of democratic change. Neither freedom fighters nor rebels, however, are permitted to resort to terrorism." [67]

On the other hand, instead of endeavoring to define terrorism yet again, a different analytical framework for evaluating both private and public political violence under international law was proposed.

"The proposed framework sets forth a method for determining when, and under what conditions, political violence constitutes impermissible conduct or "terrorism"

Under the analytical framework presented, impermissible political violence consists of acts committed by government or private actors who violate fundamental human rights without justification or excuse. Terrorism, therefore, is committed by use of impermissible methods; reliance on impermissible motivations, or attacks on impermissible targets. This framework, unlike those previously proposed, applies to violence undertaken by states as well as by private actors."

"For their part, the governments of the democratic capitalist nations, led by the United States, have generally rejected the notion that the political context of anticolonial or revolutionary situations should comprise a factor in determining the contours of terrorism. In addition, these governments have accused Third World and communist states of fomenting terrorism. However, in marked contradiction to their espoused "antiterrorist" rhetoric, a number of democratic capitalist states have provided material aid or moral support to private actors or states that engage in impermissible acts of violence x x x x" [58]

A further clarification was made in this wise:

"In short, anti-colonial and anti-racist liberation struggles are legally equivalent to war (read: international armed conflicts), likewise guerrillas are equal to soldiers in such conflicts. It is irrelevant whether or not the (colonial or racist) state accepts this. Declarations of war are equally irrelevant.

"Neither the Geneva Conventions nor the additional Protocols make use of the term "terrorism" to exclude certain groups from the humanitarian rights of people in war. The only preconditions - stated in Art. 4 of the Third Geneva Convention - are a certain degree of regulated means of struggle and compliance with the rules of war (Art. 4A/ 2d of the Third Convention). It goes without saying that such rules of war include attacks on the enemy's instruments of war or the killing of enemy combatants x x x x."

Neither the Geneva Conventions nor the additional protocols make use of the term "terrorism" to exclude certain groups from the humanitarian rights of people in war.

"Criminal law not only has the ability to make members of a party in the civil war "criminals", it can also punish them on a moral level by not seeing them as opponents in a war but rather as morally inferior criminals. Both of these are means of criminalizing political opponents. [59]

In the "Geneva Declaration On Terrorism" of March 21, 1987 which was issued at the end of the conference of the International Progress Organization (IPO), the following comments are edifying:

Against this background of suffering and struggle, the international debate in the media and elsewhere concerning terrorism is being distorted and manipulated by the ruling powers: The public are misled into thinking that terrorism is solely carried out by victims of the system. We would like to make it clear that terrorism is almost always

an expression of the ruling structures and has little to do with legitimate resistance struggles. The trademark of terrorism is fear and this fear is stimulated in the population through horrifying forms of violence. The worst form of international terrorism is the preparation for nuclear war, in particular the expansion of this arms race into outer space, as well as the development of first-strike weapons. Terrorism includes state-organized holocausts against the people of the world. The terrorism of modern states and their high-technology weapons is far worse than the political violence practiced by groups who want to end oppression and live in freedom. [60] *[Underscoring supplied.]*

"This definition of terrorism is an accurate one and is fully in line with the criteria of the rights of people in war. The humanitarian rights of people in war forbids the use of violence against uninvolved civilians with the aim of spreading fear. Of course, it is impossible to deny that some political targets are attacked with violence during liberation struggles, thus spreading fear among uninvolved persons - hijacking airliners, for example - but this does not contradict the fact that guerrilla attacks against persons and objects connected to the colonialist war machine carried out in armed independence struggles against colonialism are in full accordance with contemporary rules of war.

x x x

"We shouldn't confuse the question of the legitimacy of armed operations by guerrillas in an anti-colonial independence struggle under international law with a moral question or with the question of their use of effectiveness. According to the Geneva Declaration On Terrorism:

To say this more clearly: We recommend that non-violent resistance be used whenever possible, and we respect the genuine efforts made by the liberation movements in South Africa and elsewhere to avoid the use of violence as much as possible in their struggle for justice. We condemn [illegible] mode of struggle which inflict violence on innocent civilians. We don't want [illegible], but we must emphasize that the terrorism of nuclear weapons, criminal doctrines, state atrocities, attacks with high-technology weapons on Third World peoples, and the systematic violation of human rights are far, far worse. It is a cruel extension of the scourge of terrorism to classify the struggle against terrorism as "terrorism". We support these struggles and we call for clear political terminology together with the liberation of humanity. *[Underscorings supplied.]*

V. CONCLUSION

From all the foregoing, it is clear that there are strong bases - backed up by existing international instruments, international reality and practice and increasingly progressive views and trends in international law and international humanitarian law - that would support the proposition that national liberation movements have acquired and posses a level of legitimacy.

Necessarily, their use of armed force can also be recognized as a legitimate means in pursuit of their right to self-determination against colonial domination, alien occupation, racist regimes and against all other forms of neo-colonialism, systemic and systematic oppression and repression of peoples.

The dangerous tack after September 11 in different state, bilateral and multilateral laws, agreements and policies and the arbitrariness of putting into various "terrorist" lists what are otherwise legitimate national liberation movements and their alleged leaders run counter to the above doctrines and trends in international law and are therefore legally untenable when measured by the standards, principles, and practice that have gained hitherto universal acceptance.

Admittedly, the available legal materials and commentaries on these points used in this legal opinion did not deal unequivocally with the lawfulness or legitimacy of national liberation movements but only in relation to humanitarian questions.

However, the point worth considering and determining is whether - irrespective of the international or non-international character of national liberation movements - they adhere and conform to international conventions and practice on human rights and international humanitarian law as gauged from an examination of their activities, policies and pronouncements.

It is, therefore submitted, by way of legal opinion and as a logical consequence of all these views that national liberation movements their alleged members and participants cannot be validly regarded as criminals or terrorists insofar as international law and international political and diplomatic perspectives are concerned. #

Footnotes

[1] Abridged version of an 80-page "Legal Opinion on the Status of National Liberation Movements and Their Use of Armed Force in International Law" originally submitted on November 17, 2002 upon request to Messrs. Ian Fermon, Hans Langenberg, and Dundar Gurses, Esqs. It was included as part of the Appendix to the Application for the Removal in the EU "Terrorist List" and for damages filed by Prof. Jose Ma. Sison in the European Court of Justice (First Instance) in Luxembourg on February 6, 2003.

This version was presented to the annual Board Meeting of the IAPL in Antwerp, Belgium on November 26-28, 2004.

[2] Georges Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols* (165 Recueil Des Cours, 363-436 (1979-IV).

[3] "Colonial domination" originally refers in this context as classical colonialism or colonies of settlement. "Alien occupation" in said Article 1 has the same meaning as "alien domination" in the United Nations resolutions, namely, colonies of settlement. "Racist regime" is more particularly used to denote cases where race is the exclusive criterion for discrimination, although other different origins between two human groups like religion etc. may also qualify as such. This, according to Abi-Saab, is the contemporary concept.

[4] Raul C. Pangalangan and Elizabeth H. Aguiling, *The Privileged Status of National Liberation Movements Under International Law* (Philippine Law Journal, Vol. 58, pp. 44-65, 1983). Pangalangan is currently the Dean of the University of the Philippines College of Law.

[5] *Ibid.* citing Abi-Saab.

[6] Ibid.

[7] Ibid.

[8] Bruno Zimmermann with the collaboration of Jean Pictet, (Yves Sandoz et. al., eds.),*Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva 1987): p. 52.

[9] Jordan J. Paust, *Human Rights and Human Wrongs: Establishing Jurisprudential Foundation for a Right to Violence: The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, Emory University School of Law, Emory Law Journal, Spring 1083, 32 Emory L.J. 545, citing *Corwin*, The "Higher Law" Background of American Constitutional Law, *42 Harv. L. Rev. 149, 408 (1929.)*

[10] *In re Anastaplo, 366 U.S. 82, 113 (1961) (Black, J., dissenting.)*

[11] Paust, op.cit.

[12] Ibid.

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[11] Ibid.

[14] *In re* Anastaplo, op. cit.

[15] Paust, *op.cit.*, citing Sumida, *The Right of Revolution: Implications for International Law and Order,* Power and Law 130, 135 (Barker ed. 1971), *reprinted in* M. McDougal & W. M. Reisman, International Law Contemporary Perspective – The Public Order of the World Community 168 (1981).

[16] *See for instance, International Terrorism and Political Crimes* xii, xxi (M. Bassiouni ed. 1975), setting forth the conclusions of a conference of 38 experts from 18 countries. Also, Friedlander, *Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?,* 13 Case W. Res. J. Int'L L. 281, 284-86 (1981); Kittrie, *Patriots and Terrorists: Reconciling Human Rights With World Order,* 13 Case Res. Int'L L. 291, 304-05 (1981); Kutner, *A Philosophical Perspective on Rebellion,* in International Terrorism and Political Crimes, 61 (M. Bassiouni ed. 1975).

[17] Paust, *op. cit.*

[18] Pangalangan, op. cit. ,Citing Sumada, op. cit.

[19] Abraham Lincoln, *First Inaugural Address* (March 4, 1861), in Lincoln's Stories and Speeches 212 (E. Allen ed. 1900); American Communic. Ass'n v. Douds, 339 U.S. 382, 440 n.12 (1950) (also quoting Lincoln's 1848 speech before the House of Representatives).

[20] Pangalangan, op. cit. Citing Sinco, Philippine Political Law, 7 (1962).

[21] Ibid.

[22] Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Framework* .; Associate, Cravath, Swaine & Moore, New York City; J.D.1989, Yale Law School; B.A.1986, State University of New York, College at Old Westbury.; Vermont Law Review Winter, 1992.

[23] Heather Wilson, *International Law and the Use of Force by National Liberation Movements*, Natalino Ronzitti, University of Pisa, Book Review, The American Society of Intern ational Law; The American Journal International Law; October, 1990 ; 84 A.J.I.L. 981. Edited by Gerald Blake, at p. 136.

[24]Pangalangan, *op. cit.*

[25] Abi-Saab, *op. cit.*, at p. 369.

[26] *Ibid. at pp. 369-370.*

[27] Pangalangan, *op. cit.*

[28] Abi-Saab, *op. cit. at pp. 371-372.*

[29] Ibid.

[30]Pangalangan, *op. cit.*

[31] Ibid.

[32]Ibid.

[33] Abi-Saab, op. cit. *at pp. 373-374.*

[34] 1986 American Society of International Law, Washington, D.C. International Legal Materials, Volume 25, Number 1 , January, 1986 , 25 I.L.M. 239; (1986).

[35]*I.C.J. Advisory Opinion on Namibia, (1971) I.C.J. at 31, quoted in Advisory Opinion on Western Sahara (1975), I.C.J. at 31-35.*

[36]Abi-Saab, *op. cit.*, at p. 372.

[37] Karen Parker, Presentation to the First International Conference on the Right to Self-Determination ,United Nations, Geneva (August 2000) entitled *Understanding Self-Determination: The Basics*

[38] Western Sahara Case, 1975 International Court of Justice 12, 31.

[39] Paust, *op. cit.*

[40] Ibid.

[41] Ibid. citing *Marcuse,* Ethics and Revolution, *in Revolution and the Rule of Law 46 (E. Kent ed. 1971).*

[42] Antonio Cassese , *Terrorism and Human Rights;* American University Law Review; Summer, 1982; Conference; The American Red Cross—Washington College of Law Conference: International; Humanitarian Law; Human Rights and Humanitarian Law; Washington College of Law of The American University.

[43] Abi-Saab, *op. cit.*, at p. 407.

[44]Ibid., at p. 400, citing Dictionnaire de la terminologic du droit international, 1960, p. 492, Puissance.

[45]Ab-Saab., *op. cit.*

[46] Ibid., *at pp. 412-413*

[47] Ibid., *[at pp. 407-414]*

[48] Ibid., at pp. 414. Article 43 of Protocol I provides: 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. x x x

[49] Zimmermann, *op. cit. at p.54-55*

[50] George H. Aldrich, Symposium: *The Hague Peace Conferences: The Laws of War on Land*, Edited by George H. Aldrich and Christine M. Chinkin, The American Society of International Law; The American Journal International Law ; January, 2000; 94 A.J.I.L. 42.

[51] Wil D. Verwey, *The International Hostages Convention and National Liberation Movements* , The American Society of International Law, The American Journal International Law; January, 1981 ; 75 A.J.I.L. 69.

[52] Abi-Saab, *op. cit.*, at pp. 397-398

[53] Ibid. at p. 432.

[54] Ibid., *at pp. 433-434*

[39] Pangalangan, *op. cit.*

[40] Ibid.

[41] Wilson, *op. cit.*

[42] Zimmermann, *op. cit.* at pp. 1089-1090)

[43] Parker, *op. cit.*

[44] Abi-Saab, *op. cit.*, at p. 416.

[45] Cf. Verwey, *op. cit.*

[46] Pangalangan, *op. cit.*

[47] Ibid.

[48] *Ibid.*, quoting Chaumont, *A Critical Study of American Intervention in Vietnam*, 2 Falk, The Vietnam War and International Law, 125-157 (1969) at 149.]

[49] *Responding to Terrorism: Challenges for Democracy*, August 2002, Choices for the 21st Century Education Program, [Watson Institute for International Studies, Brown University.

[50] UN Ambassador from Mauritania Moulaye el-Hassan

[51] Cassese, *op. cit.*

[52] Greene, *op. cit.*

[53] Schubert, *op. cit.* Citing in Politische Prozesse ohne Vertnidigung, Berlin 1975, p.18.

[54]Geneva Declaration On Terrorism, 21.3.1987, translated from Janssen and Schubert, Staatssicherheit, p.187ff., the first people to sign this declaration were Nobel Prize winner and former Irish Foreign Minister Sean MacBride, former U.S. Justice Secretary Ramsey Clark, Dr. Johann Galtung, peace researcher at Princeton University, and Dr. Richard Falk, also of Princeton University.

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Excuus als dit meerdere keren langskomt. Ik stuur het aan al mijn e-maillijsten en kan die niet met elkaar vergelijken. Het gaat om hoe wij de nederlandse rechtsstaat en handhaving van de mensenrechten in Nederland zien.

Beste mensen,

Terecht grote verontwaardiging in Nederland naar aanleiding van de onterechte veroordelingen in de Schiedamse en Puttense moordzaken. Zo iets zal je maar gebeuren. Een soortgelijke behandeling ondergaan honderden asielzoekers in Nederland die zonder bewijs beschuldigd worden van oorlogsmisdaden. Daar hoor je tot nog toe bijna niemand over. Dat komt omdat veel politieke partijen bang zijn om stemmen te verliezen aan extreem rechts. Zo worden de mensenrechten van de betrokken asielzoekers en hun familieleden geschonden. Help hier wat aan te doen, teken de petitie op www.IkSchaamMeVoorNederland.nl, en laat de Tweede Kamer weten dat de Nederlands rechtsstaat niet om zeep mag worden geholpen uit angst voor extreem rechts.

Het enige dat van de Kamer gevraagd wordt is de rug te rechten en in te stemmen met het standpunt van het Nederlands Juristen Comité voor de Mensenrechten. Dit standpunt is puur gebaseerd is op de Nederlandse wetgeving en op het door Nederland ondertekende Internationale Verdrag voor de Rechten van de Mens. Daar moeten toch alle politieke partijen vóór zijn.

Dat oorlogsmisdadigers moeten boeten voor hun daden staat boven twijfel. Maar dat wil niet zeggen dat allerlei mensen die misschien in de buurt waren toen mogelijk een oorlogsmisdaad gepleegd werd ook maar voor oorlogsmisdadigers moeten worden uitgemaakt. Zij moeten beoordeeld worden zoals wij zelf ook beoordeeld willen worden: op basis van relevante feiten en niet op basis van algemene beweringen en vaak zelfs aantoonbare onwaarheden. Het Nederlandse beleid in deze is doorgeschoten en niet meer in overeenkomst met de beginselen van een rechtsstaat.

Ik ben persoonlijk betrokken bij twee zogenaamde 1F-ers, asielzoekers die medeverantwoordelijkheid worden gehouden voor oorlogsmisdaden in hun land van oorsprong. In beide gevallen zijn de argumenten van de Nederlandse overheid gebaseerd op aantoonbare onwaarheden. In het ene geval heeft de overheid na acht(!) jaar de beschuldigingen laten vallen. Acht verloren jaren, want meneer kwam verder wel in aanmerking voor vluchtelingstatus. In het andere geval wachten we al meer dan een jaar op een inhoudelijke reactie op onze tegenargumenten, waar de IND tot nog toe niet op ingegaan is. Ik kan me niet goed voorstellen dat de IND op deze manier zijn eigen geloofwaardigeheid wil ondergraven.

Deze petitie wordt op korte termijn bij een landelijke demonstratie aangeboden aan de Tweede Kamer. Teken hem en geef daarmee de Kamerleden de steun in de rug die sommige van hen kennelijk nodig hebben. Alles wat gevraagd wordt is dat de betrokken asielzoekers behandeld worden op een rechtvaardige manier, zoals wij zelf bij verdenking ook behandeld zouden willen worden. www.IkSchaamMeVoorNederland.nl

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Joost Brouwer

Joost Brouwer
Asielzoekerssteungroep Hartekreet, Jozefschool, Wageningen
en Taakgroep Wereld Doopsgezinde Gemeente Wageningen e.o.
Wildekamp 32
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[Non-text portions of this message have been removed]

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26-10-2008

Rb: geen ongewenstverklaring maar ook geen status voor 1F-er die duurzaam niet terug kan

Eiser is tot ongewenst vreemdeling verklaard. Vastgesteld wordt dat eiser geen verblijfstitel is verleend wegens de tegenwerping van artikel 1(F) Vluchtelingenverdrag, maar dat hij, zoals door verweerder is erkend, evenmin kan worden uitgezet in verband met artikel 3 EVRM. De vraag of eisers ongewenstverklaring onder deze omstandigheden proportioneel is te achten, beantwoordt de rechtbank ontkennend. Immers, nu eiser door de toepasselijkheid van artikel 1(F) Vluchtelingenverdrag in zijn asielprocedure een verblijfsvergunning is onthouden, staat hij reeds als zogenaamde '1F-er' gesignaleerd in het zogenaamde Schengeninformatie-systeem. De toegevoegde waarde van een ongewenstverklaring is met name gelegen in het uitoefenen van druk op de betrokkene om Nederland uit eigen beweging te verlaten. Dit belang speelt in een geval als het onderhavige, waarin niet in geschil is dat eiser niet uit Nederland kan vertrekken, omdat hij niet kan terugkeren naar Algerije en hij aantoonbaar geen verblijf kan verkrijgen in de landen van eerder verblijf, geen rol. Aan de zijde van eiser spelen echter zwaarwegende belangen. Als gevolg van zijn ongewenstverklaring staat hij immers doorlopend bloot aan strafvervolging. Beroep gegrond, vernietiging van het bestreden besluit en met toepassing van artikel 8:72 lid 4 Awb gegrondverklaring van het bezwaar en herroeping van het besluit in primo.

Ten aanzien van het beroep op artikel 3 EVRM in de asielprocedure oordeelt de rechtbank dat, ondanks het feit dat artikel 3 EVRM zich duurzaam verzet tegen eisers terugkeer naar het land van herkomst en eiser ook niet naar een ander

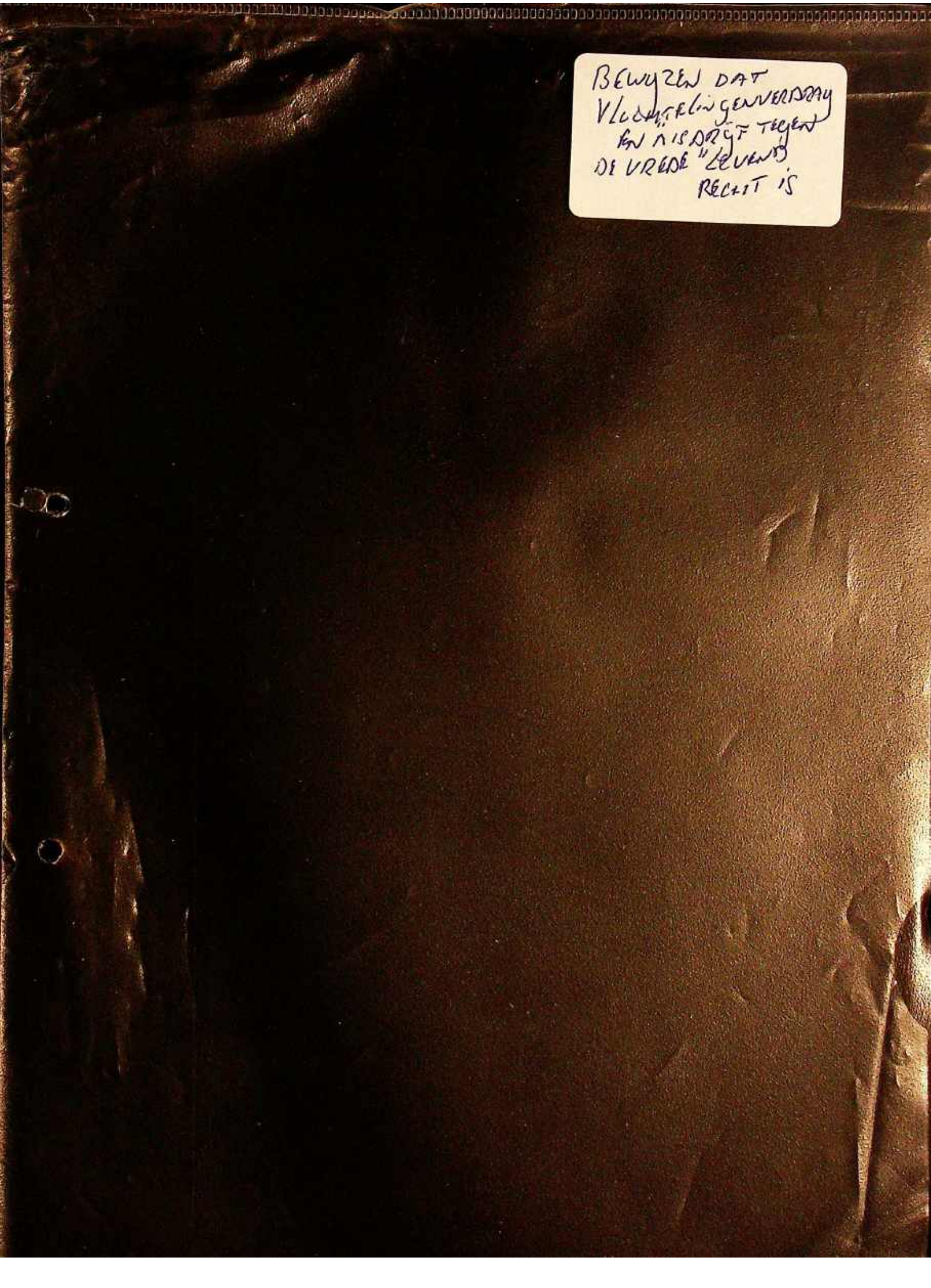
VLUCHTELINGEN VERDRAG, WAARIN EXCLUSIE VAN PLEGERS VAN OORLOGSMISDADEN & AGRESSIE, IS GEWOON RECHT, TOEPASBAAR

→ TOEGEPAST RECHT

RIS- Procedure

15 sept 2015

Aperçu sur une nouvelle, collègues
Le vrai récit, où quand l'école commence
Un de Lorenz RIS- Procedure. Mais
dans réalité les Orientierungsstufe dans
Zurich et Bernhard - oberstufe Schulhaus,
Ende 31 Um de Conclusion und Abschluss
in der Zurich. Liegt Lehrer in de
Primarschule - Zurich, oder so.


BEWIJZEN DAT
VLOEIBAAR GEWEERSPRAY
EEN AFSCHRIK TEGEN
DE VREDE "LEVENS
RECHT IS

Sagittarius

Van: "Wessel Koopmans"
Aan: <sluitkampzeist@lists.puscii.nl>
Verzonden: woensdag 21 mei 2008 3:29
Onderwerp: [sluitkampzeist] morgen advies over 1F-verdachten
http://www.sluitkampzeist.nl/?q=node/456

morgen advies over 1F-verdachten
20-5 Nova: Adviescommissie vreemdelingenzaken komt met advies over 1F-verdachten

Kommentaar: Uit de toelichting bij Nova begreep ik dat de 1F verdachten volgens dit advies na 10 jaar niet berecht te zijn geweest een verblijfsvergunning krijgen. Hun minderjarige kinderen krijgen echter geen zelfstandig verblijfsrecht volgens dit voorstel. Te vrezen valt dat dit verhaal nog lang niet afgelopen is. Terwijl het toch zo simpel is: Wie ergens van verdacht wordt moet een rechtszaak krijgen. Wie vrijgesproken is is onschuldig. Kan het OM de zaak niet rond krijgen dan mag men niet eeuwig gebrandmerkt blijven als verdachte. En verder: Verdacht of veroordeeld op niet, wie te vrezen heeft voor zijn veiligheid zou altijd asiel moeten krijgen. De kinderen van de 1F-verdachten al helemaal! Die zijn hier opgegroeid en vaak ook geboren, volledig ingeburgerd en gegarandeerd onschuldig. Kortom het "artikel 1F" is een slechte zaak en Nederland moet daar zo snel mogelijk vanaf, in plaats van met een halfhartig pardon (altijd beter dan niks natuurlijk) de zaak in de doofpot te stoppen. Wessel Koopmans.

By Wessel at 21.05.2008 - 02:25 | Nieuws & Info | add new comment | 2 reads

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http://www.novatv.nl/index.cfm?ln=nl&fuseaction=videoaudio.details&reportage_id=6051

ASIEL AANVRAGEN IN NEDERLAND MAAR OOK VERDACHT VAN OORLOGSMISDADEN

Nederland slaagt er maar niet in om naar Nederland gevluchte oorlogsmisdadigers, die asiel aanvragen, te vervolgen of uit te zetten.

Ook terugsturen gaat vaak niet omdat dat indruist tegen Europese verdragen. In de tussentijd verblijven deze mensen - in de regel zonder rechten - in Nederland. De Adviescommissie voor Vreemdelingenzaken (ACVZ) heeft een groot onderzoek gedaan naar de groep van meer dan zevenhonderd vermeende oorlogsmisdadigers - en hun gezinnen - in Nederland.

Morgen krijgt staatssecretaris Albayrak voor Vreemdelingenzaken het advies uitgereikt. In NOVA de belangrijkste conclusies.

MEER INFORMATIE OVER DIT ONDERWERP

04-09-07 Mensen gedwongen illegaal in Nederland

22-11-01 Afghaanse oorlogsmisdadigers in Nederland smeken om een proces

05-09-07 Onderzoek oorlogsmisdadigers in Nederland

Situatie 1F-vluchtelingen <http://www.groene.nl/2007/50/De_situatie_van_1f-vluchtelingen>

VN-Vluchtelingenverdrag <http://www.vluchtelingenwerk.org/vluchtverdrag.htm>

Vluchtelingenwerk Nederland <http://www.vm-n.nl/nl/nieuws/bericht/179>

Europees Verdrag voor de Rechten van de Mens (Wikipedia)
<http://nl.wikipedia.org/wiki/Europees_Verdrag_voor_de_Rechten_van_de_Mens>

ACVZ <http://www.acvz.com/>

http://www.novatv.nl/index.cfm?ln=nl&fuseaction=artikelen.details&achtergrond_id=9824

ONDERZOEK OORLOGSMISDADIGERS IN NEDERLAND

5 september 2007

De Adviescommissie voor Vreemdelingenzaken (ACVZ) start in 2008 een groot onderzoek naar een groep van meer dan duizend vermeende oorlogsmisdadigers – en hun gezinnen – in Nederland.

"Dit onmogelijke dilemma moet op de één of andere manier worden opgelost. Je kunt geen mensen hier vijftig jaar laten, je kunt geen kinderen hier laten opgroeien en vervolgens tot in eeuwigheid illegaal laten zijn.", aldus de voorzitter van de ACVZ in NOVA.

De vermeende oorlogsmisdadigers vallen niet onder de pardonregeling van staatssecretaris van justitie Albayrak. Het gaat voornamelijk om Afghanen die werkten voor de geheime dienst van het communistisch bewind. Ze krijgen geen asiel, omdat ze van oorlogsmisdaden worden verdacht. Maar ze kunnen in de meeste gevallen ook niet worden uitgezet, omdat ze te vrezen hebben voor hun veiligheid in het land van herkomst. Toch uitzetten zou een schending van het Europees Verdrag voor de Rechten van de Mens betekenen.

De voorzitter van de ACVZ, het belangrijkste adviesorgaan van staatssecretaris Albayrak, vindt dat het na tien jaar zo niet langer kan. Hij wil opnieuw bekijken of een deel van de groep niet toch terug kan. "Ik denk dat in een aantal gevallen, en dat zou ook best eens voor het huidige Afghanistan kunnen gelden, dat er goede afspraken tussen Nederland en de Afghaanse regering kunnen worden gemaakt. Als je zo'n overeenkomst kan bereiken, dan zou dat naar mijn idee inhouden dat die groep terug moet.", aldus Van Os van den Abeelen. Het gaat dan om een garantie dat mensen niet ter dood worden veroordeeld, dat ze een fatsoenlijk proces krijgen waar Nederland waarnemers naartoe kan sturen en dat het Rode Kruis een situatie van gevangenhouding mag beoordelen en mag monitoren.

Tegelijkertijd moet er ook een oplossing komen voor de groep die hier wél achter zal blijven. Daarbij gaat het om mensen die tot in lengte van jaren hier niet te verwijderen zijn en hier gezinnen en kinderen hebben. Van Os van den Abeelen: "Als je het te aantrekkelijk maakt, zal Nederland toevluchtsoord voor dit soort lieden worden. Als je eeuwig een situatie van verstotenen creëert, dan doe je iets wat naar sommige mensen niet uit te leggen is. En daar zullen we een evenwicht in proberen te vinden."

De directeur van de Immigratie- en Naturalisatiedienst (IND), Peter Veld, zei een paar weken geleden nog in Trouw dat er voor deze groep geen oplossing komt. Veld: "We accepteren dat we dit stukje van het probleem niet oplossen." Van Os van den Abeelen is het daar niet mee eens. "Het zou veel beter zijn als we daar toch wel een oplossing voor hebben en naar mijn vaste overtuiging is nog lang niet alles gedaan om die oplossing te realiseren."

Staatssecretaris Albayrak zegt het advies van de ACVZ af te wachten.

Sagittarius

Van: "Cees van Veelen"
Aan: <voorvluchtelingen@yahoogroups.com>
Verzonden: woensdag 21 mei 2008 8:01
Onderwerp: [v-v] Toruw: Legaliseren soms de enige uitweg

Justitie moet naar Nederland gevluchte 'oorlogsmisdadigers' zo snel mogelijk uitzetten. Maar wie echt niet terug kan, verdient een verblijfsstatus. Dit advies ontvangt staatssecretaris Albayrak vandaag.

Nederland moet én kan veel meer vermoede oorlogsmisdadigers uitzetten. Daarvoor zijn terugkeerafspraken nodig met de landen van herkomst. Wanneer een 'oorlogsmisdadiger' zonder zijn tegenwerking gedurende tien jaar niet uitzetbaar blijkt, moet worden berust in verblijf. Voor hun meerderjarige kinderen is die termijn vijf jaar.
Dat schrijft de Adviescommissie voor Vreemdelingenzaken (ACVZ) vandaag
aan staatssecretaris Albayrak (justitie). Uit recente cijfers van de Immigratie- en Naturalisatiedienst (IND) blijkt dat zeker 350 verdachte oorlogsmisdadigers en vele honderden gezinsleden in Nederland verblijven; de meesten illegaal. Hun wordt een verblijfstatus geweigerd op basis van artikel 1F van het VN-vluchtelingenverdrag. Justitie slaagt zelden in pogingen iemand strafrechtelijk te vervolgen. Het land uitzetten lukt bij een minderheid, tot onvrede van de Tweede Kamer.
De ACVZ wil dat Justitie een einde maakt aan de 'toestand van rechteloosheid'. Volgens de commissie worden zeker 180 '1F'ers' ten onrechte met rust gelaten. Zij hebben in hun geboorteland niets te vrezen en kunnen dus terug.
Nederland moet diplomatieke druk op Afghanistan uitoefenen om hun onderdanen terug te nemen, aldus de commissie. Veruit de meeste 1F'ers zijn Afghaan. Zij werkten in de jaren tachtig voor het communistische regime en sloegen op de vlucht voor de moedjahedien. De commissie vindt dat Nederland de 'oorlogsmisdadigers' tijdelijk in aparte opvanglocaties moet plaatsen. Daardoor blijven ze in het zicht van Justitie. De afgelopen tien jaar zijn zeker 220 1F'ers spoorloos verdwenen.
Een beperkt aantal verdachten kan niet worden teruggestuurd. Zij lopen aantoonbaar gevaar in hun moederland. Volgens het Europees verdrag voor de rechten van de mens mogen zij dan niet worden uitgezet. Daardoor verblijven ze als gedoogde illegalen in een juridisch vacuüm. Een onwenselijke situatie, vindt de ACVZ. Zij schrijft:
'Verblijfsaanvaarding is op den duur onvermijdelijk'.

De aanwezigheid van de honderden gezinsleden maakt het 1F-probleem schrijnend en extra gecompliceerd. Veel kinderen zijn hier geboren of getogen. Toch vindt de commissie dat ook voor hen uitzetting prioriteit moet hebben. Wanneer vertrek echt niet mogelijk is, rest legalisatie. De ACVZ vindt dat de 1F'er en zijn partner daarvoor minimaal tien jaar in Nederland moeten zijn. Voor kinderen is dat vijf jaar, mits ze dan volwassen zijn. Anders zouden de ouders verblijfrecht kunnen claimen op basis van de vergunning van hun minderjarige kind.
Albayrak komt nog deze maand met het kabinetsstandpunt over 1F. Daarin wordt dit advies van de ACVZ meegenomen.

—
21-05-08
Vriendelijke groet,

Cees van Veelen,
Amsterdam

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Van: "Cees van Veelen" <cees@vanveelen.xs4all.nl>
Aan: <voorvluchtelingen@yahoogroups.com>
Verzonden: woensdag 21 mei 2008 8:05
Onderwerp: [v-v] Trouw Commissie: Aan de 'mort civil' moet een eind

Het probleem dat tien jaar lang heeft voortgesukkeld, moet nu worden opgelost. Rond de vermoede oorlogsmisdadigers is een 'schurende juridische werkelijkheid' ontstaan, vindt de Adviescommissie voor Vreemdelingenzaken (ACVZ).

In Nederland lopen honderden vreemdelingen rond met een zeer bedenkelijke reputatie, zoals ACVZvoorzitter Teun van Os van den Abeelen
het omschrijft. Zij ontvluchtten de brandhaarden in het voormalig Joegoslavië, Irak, Congo, Rwanda en met name Afghanistan.
Hier werd hun artikel 1F van het vluchtelingenverdrag tegengeworpen. Daarin staat dat het verdrag niet van toepassing is op mensen van wie het onvermijdelijk wordt geacht dat ze zich schuldig hebben gemaakt aan een 'misdrijf tegen de vrede, een oorlogsmisdrijf of een misdrijf tegen de menselijkheid'. Hard bewijs is daarvoor niet nodig; een ernstige verdenking is voldoende.
Vervolgens is van gedwongen uitzetting of strafrechtelijke vervolging nauwelijks werk gemaakt. Volgens Justitie zijn wel 120 1F'ers aantoonbaar vertrokken. Tweehonderd zijn spoorloos verdwenen. Er zitten nog 350 namen in het bestand van de Immigratie- en Naturalisatiedienst (IND), van wie er 250 onrechtmatig in Nederland verblijven. Zij hebben samen 800 gezinsleden.
De 1F'ers en hun gezinnen zijn in feite 'mort civil', zegt Van Os van den Abeelen. Ze hebben geen verblijfsrechten, geen opvang en geen financiële ondersteuning. Die situatie duurt soms al tien tot vijftien jaar. Daar moet dringend een einde aan komen."
De oplossing ligt vooral in gedwongen uitzetting, vindt de commissie. Ten onrechte was het beeld ontstaan dat de terugkeer van 1F'ers in bijna alle gevallen conflicteert met het Europees Verdrag van de rechten van de mens (EVRM). Artikel 3 verbiedt uitzetting wanneer het gevaar van foltering in het moederland dreigt.
De cijfers van de IND verbaasden de ACVZ, zegt Van Os. Daaruit blijkt namelijk dat artikel 3 EVRM slechts in maximaal 30 procent van de gevallen uitzetting in de weg staat. Waarom is er dan zo weinig werk gemaakt van gedwongen terugkeer? Van Os van den Abeelen: ?Ik kan dat niet precies verklaren. Als artikel EVRM niet van toepassing is, moet een land nog wel meewerken aan de terugkeer. Daar zit bij sommige landen
niet veel beweging in." U doelt op Afghanistan. Daar komen veruit de meeste 1F'ers vandaan, maar bijna niemand keert terug. ?Ik vind het onbestaanbaar dat een land waar wij vele honderden miljoenen euro's ontwikkelingshulp in pompen, waar wij militairen naartoe sturen voor hún veiligheid, weigert om onderdanen terug te nemen. Nederland moet diplomatieke druk gebruiken om tot een regeling met Afghanistan te komen." De commissie pleit wel voor nieuw onderzoek waarbij gekeken wordt of de verdenking tegen alle Afghanen nog steeds terecht is. Moet ook worden ingezet op strafrechtelijke vervolging? ?Het getuigt van zelfoverschatting als Nederland daarop zou aandringen. Ons land is niet de politieagent van de wereld. 1F'ers moeten Nederland uit, dat is het belangrijkste. Maar als ze alleen hier berecht kunnen worden, moeten we dat zeker niet nalaten." Mogen kinderen wel blijven? Hun kunnen de daden van de ouder moeilijk worden aangerekend. ?Dat is het duivelse dilemma. Als je alleen naar het kind kijkt, aarzel je niet. Die mag blijven. Maar dat kan niet, vanwege de aanzuigende werking. De prioriteit ligt bij terugkeer samen met de ouders. Dat is pijnlijk, ja.

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e maken wel een kleine uitzondering. Wanneer de ouder de uitzetting iet tegenwerkt en echt niet terugkan, dan pleiten wij voor legalisatie van het meerderjarig kind na vijf jaar verblijf." Datzelfde geldt voor de 1F'er zelf, maar dan na tien jaar. Daar zullen mensen moeite mee hebben. ?Vast. Maar zo iemand laten voortleven zoals nu gebeurt, is ook onmenselijk. Overdreven gezegd: dan verhongert iemand hier in de goot. Lost uw advies alle problemen op? ?Nee. Er zullen ongetwijfeld 1F'ers zijn die zich blijven verzetten tegen terugkeer. Dan geldt de termijn van tien jaar niet en kan van een vergunning nooit sprake zijn. Dan zal er niets veranderen. Het is niet anders."

—

21-05-08
Vriendelijke groet,

Cees van Veelen,
Amsterdam

Persoonlijke homepage: http://www.ceesvanveelen.nl

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April 2008

Rb (vovo): bijstand voor 1F-er tijdens procedure tegen ongewenstverklaring

Als gevolg van vaste Afdelingsjurisprudentie inzake besluiten tot ongewenstverklaring en de daaruit voortvloeiende gevolgen voor een lopende verblijfsprocedure is thans ten aanzien van verzoekers de situatie ontstaan dat hun verblijfsrecht is beeindigd zonder dat er een rechterlijk oordeel is gegeven over de rechtmatigheid daarvan. De tegenwerping van artikel IF van het Vluchtelingenverdrag, die ertoe heeft geleid dat de verblijfsvergunningen zijn ingetrokken, kan thans immers slechts in de procedures inzake de ongewenstverklaring worden beoordeeld. De materiele gevolgen van de besluiten in die verblijfsrechtelijke procedures stralen echter uit naar de onderhavige procedure. In de verblijfsrechtelijke procedures heeft de voorzieningenrechter overigens als voorlopig oordeel gegeven dat het bezwaar een redelijke kans van slagen heeft, zodat verzoekers de behandeling van dit bezwaar in Nederland mogen afwachten.

De situatie waarin verzoekers thans verkeren, namelijk zonder enige inkomsten om in hun eigen onderhoud te voorzien en een daarmee gepaard gaande dreigende verwijdering uit hun woning, is onaanvaardbaar, immers zonder dat in rechte is komen vast te staan dat de tegenwerping van artikel 1F van het Vluchtelingenverdrag rechtmatig is. In het kader van de toets aan internationale verplichtingen, door Nederland onder meer onderschreven in de ondertekening van het EVRM, komt de voorzieningenrechter in het kader van haar voorlopig oordeel in de onderhavige procedure tot de slotsom dat deze casus daarmee elementen bevat die de conclusie zouden kunnen dragen dat sprake is van een behandeling in strijd met artikel 3 van het EVRM.

De voorzieningenrechter ziet, gelet op hetgeen hiervoor is overwogen, aanleiding om het besluit van verweerder van 18 maart 2008 te schorsen tot vier weken nadat verweerder heeft beslist op het bezwaar tegen dat besluit.

(vluchtweb week 18 Rb Utrecht, SBR 08/967 16.4.08)

4-6-2008

Conferentie Toepassing van artikel 1F in Nederland, 19 juni Leiden

De uitsluiting van een verblijfstatus van personen die van mensenrechtenschendingen worden verdacht en hun gezinsleden staat volop in de belangstelling.

Op deze conferentie zullen verschillende thema's aan de orde komen:

- De juridische spagaat tussen niet toelaten, maar ook niet uitzetten
- De consequenties van de ongewenstverklaring van 1-Fers
- De bewijslast bij verdenking van mensenrechtenschendingen in zowel de asielprocedure als de strafrechtelijke procedure
- De positie van gezinsleden van 1-Fers.

Deelname bedraagt 495 euro (dit is inclusief materiaal, koffie, thee en lunch).

Info via Cristine Sahakian 071-5277535, immigrationlaw@law.leidenuniv.nl

www.immigrationlaw.nl.

staat ... is geen grond voor ingrijpen'

15-7-2004

Van onze verslaggever
AMSTERDAM

Voor falende staten kan geen uitzondering worden gemaakt op het internationale geweldsverbod. Het falen van staten is op zich 'geen eigenstandige grond voor ingrijpen door de VN of andere staten', stellen de twee belangrijkste adviesorganen inzake buitenlands beleid in een rapport dat vandaag wordt aangeboden aan het kabinet.

In falende staten, zoals Somalië, is het staatsgezag verpulverd; er is geen sprake meer van een overheid die de rechtsorde en openbare diensten kan garanderen. Niettemin blijft de staat als juridische entiteit bestaan, volgens het rapport. De internationale regels voor het gebruik van geweld blijven daarom geldig. Dat wil zeggen: alleen in geval van zelfverdediging, of met instemming van de Veiligheidsraad.

De Adviesraad Internationale Vraagstukken (AIV) en de Commissie van Advies inzake Volkenrechtelijke Vraagstukken (CAVV) kregen in mei 2003 een adviesaanvraag van de regering, omdat '11/9' het fenomeen van de falende staten 'in een nieuw daglicht heeft geplaatst'. Het kabinet wil weten welke middelen de internationale gemeenschap heeft om het in[illegible]storten van staten te voorko[illegible] of falende staten op de been te helpen.

AIV en CAVV noemen nog een derde optie voor het gebruik van geweld, de 'humanitaire interventie', in heel bijzondere gevallen zonder instemming van de Veiligheidsraad. Maar ook deze grond kan niet vanzelf worden ingeroepen om ingrijpen in falende staten te rechtvaardigen, aldus het advies. Humanitaire interventie kan een noodmaatregel zijn bij 'grootschalige schending van de fundamentele mensenrechten'. Hiervan is in falende staten niet per se sprake.

Ook een 'bedreiging van de vrede' – een mogelijke grond voor VN-ingrijpen – is niet altijd aan de orde. De adviesraden noemen Somalië als voorbeeld, waar de staat op een lager niveau min of meer is ge[illegible]biliseerd, zonder dat er grote aantallen slachtoffers vallen en zonder dat de buurlanden veel last ondervinden.

Anderzijds kan militair ingrijpen in een falende staat juist al veel eerder nodig zijn dan als laatste redmiddel, menen AIV en CAVV. Interventie moet dan verdere desintegratie voorkomen. Maar zulke militaire actie, zoals het preventief stationeren van troepen, moet in VN-verband gebeuren, of in ieder geval met het fiat van de VN.

In het rapport wordt gepleit voor een permanente commissie van de Veiligheidsraad voor falende staten, die de beschikking krijgt over een speciaal fonds.

Het rapport gaat ook uitgebreid in op de oorzaken van het falen van staten. Het voorkómen van het falen van staten en het herstellen van deze staten maken 'geïntegreerd beleid nodig', menen de adviesraden. Maatregelen in de sfeer van ontwikkelingssamenwerking, diplomatie, politiek, economie en defensie moeten worden ingezet. 'Het tegengaan van de onmetelijke schade die het falen van staten met zich meebrengt is een legitiem beleidsdoel, ook gezien de Nederlandse belangen.'

Omdat centraal staatsgezag ontbreekt, is de rol van niet-statelijke actoren des te belangrijker. Waar de staat faalt, kan een beroep worden gedaan op maatschappelijke instellingen die nog wel functioneren. Er moet gewerkt worden aan de bouw van een krachtige 'civil society', aldus AIV en CAVV. Onder niet-gouvernementele organisaties 'vindt men de bondgenoten voor de opbouw'.

Het internationale bedrijfsleven kan volgens het rapport zowel een constructieve als een kwalijke rol spelen. Multinationals kunnen 'bijdragen aan het instandhouden van corrupte regimes en gewapende oppositiegroepen'. Anderzijds kunnen bedrijven die hun maatschappelijke verantwoordelijkheid nemen, bijdragen aan de opbouw.

Voor ontwikkelingssamenwerking geldt iets dergelijks. In sommige gevallen werkt hulp conflicten in de hand, bijvoorbeeld als de positie van de ene groep door de hulp sterker wordt, ten koste van de andere.

Verhagen: wel mandaat Irak

11-7-2007

IRAK. Een volkenrechtelijk mandaat dat de inval van de Amerikanen in Irak in 2003 rechtvaardigde was er wel degelijk. Dat vond het kabinet toen en dat vindt het nog steeds. De inval voldoet ook aan de criteria die het kabinet thans wil hanteren voor steun aan militair optreden.

Dat zei minister Maxime Verhagen (Buitenlandse Zaken) gisteren tijdens een debat met de Eerste Kamer. Volgens de minister was de inval, die politieke steun van Nederland kreeg, legitiem op grond van een 'samenstel' van resoluties van de VN-Veiligheidsraad. Hij weersprak dat er sprake was van een "grabbelton van resoluties", zoals D66 beweerde. De uitspraak van Verhagen staan haaks op eerdere uitlatingen van Wouter Bos, toen die nog PvdA-fractievoorzitter was. ANP



Verhagen: legitiem

Inzet van Duitse Tornado's mag in Afghanistan

2007

BERLIJN, 4 JULI. De inzet van Duitse Tornado-jachtvliegtuigen in Afghanistan is niet in strijd met de Duitse grondwet. Dat heeft de hoogste Duitse rechtbank gisteren bepaald. De zaak was aanhangig gemaakt door Die Linke, een inmiddels gefuseerde, linkse fractie die het pacifisme uitdraagt. De Duitse grondwet schrijft voor dat de Bundeswehr alleen ingezet mag worden in het 'euro-atlantische' gebied zoals vastgelegd onder NAVO-regels. Volgens het Bundesverfassungsgericht valt Afghanistan hier onder, omdat de operatie daar de veiligheid hier dient. Er zijn zes Tornado's actief in Afghanistan. Ze voeren verkenningsvluchten uit voor de stabilisatiemacht ISAF. (AP)

Blair: na Irak meer oorlogen

- Premier zegt dat strijd tegen terrorisme generatie zal duren.
- 'Groot-Brittannië moet bereid zijn meer oorlogen te voeren.'

Van onze correspondent
Peter de Waard

LONDEN Tony Blair is niet afgeschrikt door de enorme problemen die de oorlog in Irak heeft veroorzaakt. De premier zei gisteren dat Groot-Brittannië bereid moet zijn nog meer oorlogen te voeren. De strijd tegen het terrorisme zal nog een generatie duren, zo voorspelde hij in een rede die hij hield op een oorlogsschip in de haven van Portsmouth.

Hij zei dat nu terugtrekken uit de oorlog tegen het terrorisme catastrofale gevolgen zal hebben. 'Groot-Brittannië moet kiezen of zij in de vuurlinie wil liggen of zich wil beperken tot de rol van vredeshandhaver. Mijn keuze is dat onsleger bereid is tot een moeilijke, zware en uitdagende campagne door zowel oorlogsvoerder te zijn als vredeshandhaver. Terreur kan niet alleen worden verslagen met militaire middelen, maar het kan zeker niet worden verslagen zonder die middelen.'

Met zijn rede zet Blair zijn vrijwel zekere opvolger als premier Gordon Brown onder druk. Brown heeft minder uitgesproken standpunten over de oorlog in Irak. Blair: 'Er zijn politici die het allemaal te lastig vinden en liever vervallen tot passief disengagement. In plaats van doen wat juist is, doen ze wat hen makkelijk uitkomt.'

De premier erkende wel dat er meer geld moet worden geïnvesteerd in de Britse defensie als het land een oorlogvoerende taak wil blijven spelen. Groot-Brittannië geeft 2,5 procent van zijn BNP uit aan het militaire apparaat. Dat is 1,5 procentpunt minder dan de VS en minder dan Frankrijk.

Het Britse leger is te klein om tegelijkertijd in Irak en in Afghanistan strijd te voeren. En in de afgelopen weken hebben soldaten massaal geklaagd over de gebrekkige accommodaties waarin zij worden ondergebracht.

Blair zei ook dat de oorlog tegen het terrorisme het volk meer verdeelt dan de conventionele oorlogen van vroeger.

Marcel van Dam | Oorlog en democratie

Het is mooi dat 60 procent van de kiezers in Irak toch is gaan stemmen. Maar wat het betekent voor de vestiging van een democratie in dat land, laat staan in de regio, is bij benadering niet in te schatten. Vrije algemene verkiezingen zijn niet het begin van een democratiseringsproces maar het sluitstuk. Kijk naar de geschiedenis van de democratie.

Om het succes van de verkiezingen in Irak te zien als een succes voor de democratisering is op zijn minst voorbarig. Verkiezingen kun je namelijk ook houden om een tirannie in stand te houden, denk aan het Derde Rijk. Of juist om te voorkomen dat een democratie ontstaat. Zo moet nog maar worden afgewacht of de winnaars van de verkiezingen in Irak, de shi'ieten, hun democratisch verworven macht zullen gebruiken om andere religieuze en etnische groepen voldoende vrijheid te gunnen om aan het democratisch proces te kunnen deelnemen.

Niet alleen voorbarig, eerder absurd, zijn de pogingen die door de voorstanders van de oorlog in Irak worden gedaan om het relatieve succes van de verkiezingen daar als een rechtvaardiging achteraf te zien van die oorlog. Zoals Arie Elshout deed in zijn column van maandag jongstleden. Hij is van mening dat alle tegenstanders van de oorlog in Irak door het 'succes' van de verkiezingen zich opnieuw moeten gaan bezinnen op de vraag: 'Kan er uit een foute oorlog dan ooit iets goeds voortkomen?'

Moet bijvoorbeeld 'links', dat het verdwijnen van een dictatuur en het vestigen van een democratie toch zou moeten toejuichen, 'toch nog eens nadenken of zijn idealistische doelstellingen onder bepaalde voorwaarden niet gebaat kunnen zijn bij het aanwenden van "rechtse" middelen'? Waaronder Elshout kennelijk ook een 'foute' oorlog verstaat.

Het antwoord is wat mij betreft heel simpel: uit alles wat niet deugt kan iets goeds voortkomen, dus ook uit een oorlog. Maar dat is geen rechtvaardiging om dingen te doen die niet deugen, laat staan een 'foute' oorlog te voeren. Stel je voor dat het Wetboek van Strafrecht zou bepalen dat op moord weliswaar de zwaarste straf staat die we hebben, maar dat die niet wordt opgelegd als uit de moord



iets goeds voortkomt. Het gevolg zou zijn dat iedereen die iemand om zeep helpt, met kracht van argumenten proberen aan te tonen dat uit de moord iets goeds is voortgekomen. Of neem de aanslag op de Twin Towers: voor de vernietigde torens komen in ieder geval veel mooiere gebouwen in de plaats.

Dus president Bush moet zich volgens Arie Elshout eens bezinnen op de vraag of er uit het opblazen van gebouwen door terroristen toch niet iets goeds kan voortkomen.

Een niet gelegitimeerde, dus onrechtvaardige oorlog, is de ultieme misdaad. Het maakt altijd en overal het allerslechtste in mensen los. Door de onvoorspelbaarheid van de gebeurtenissen is het kwaad dat kan worden aangericht niet te overzien. Welk 'goeds' er ook uit voortkomt, niets rechtvaardigt het beginnen van een 'foute' oorlog. Dus al vormen de verkiezingen in Irak het begin van een duizendjarig rijk van melk en honing in de hele regio en daarbuiten, dan nog is Bush medeschuldig aan de dood van tienduizenden Irakezen die als gevolg van die 'foute' oorlog het leven hebben gelaten.

Niet alleen moreel, maar ook uit een oogpunt van *Realpolitik* is een 'foute' oorlog verwerpelijk. Zodra het van staten geaccepteerd wordt dat zij niet gelegitimeerd door de internationale gemeenschap een oorlog mogen beginnen om ergens de democratie te vestigen, is dat het einde van de internationale rechtsorde. Want er is geen begrip zo rekbaar als 'democratie' en vooral als er eigenbelang in het geding is, zal een staat gauw de neiging hebben elders gewapenderhand de democratie te brengen.

Zo is Zuid- en Midden-Amerika in de hele geschiedenis een broeinest geweest van de meest verderfelijke autoritaire regiems. De VS zijn altijd met de grofste dictators goede maatjes geweest. Maar niet als de dictatuur 'links' was of dreigde te worden. Zelfs wat Amerika bereid een democratisch gekozen linkse regering als die van Allende om zeep te helpen en te verrallen voor een rechtse dictatuur als dat in het vermeende eigenbelang was.

En wat Amerika mag om de democratie te verspreiden, mag een ander land natuurlijk ook. Waarom zou Poetin, die immers ook democratisch is verkozen, als het zo uitkomt de democratie niet mogen exporteren naar een paar Kaukasische landen waar toevallig ook olie in de grond zit?

Een duurzame vrede in de wereld is niet te bereiken door het verspreiden van democratie met 'foute' oorlogen, maar door het versterken en respecteren van het internationale recht. Zowel om idealistische redenen als uit een oogpunt van *Realpolitik*.

Powell: Beleid VS blijft agressief

Van onze buitenlandredactie
AMSTERDAM

President Bush heeft een mandaat van het Amerikaanse volk gekregen om door te gaan met het voeren van een 'agressief' buitenlands beleid. Dat zegt de Amerikaanse minister van Buitenlandse Zaken Colin Powell in een interview met de Engelse krant *Financial Times*.

'De president zal de teugels niet laten vieren en niet terugtrekken', zei Powell. 'Het is een voortzetting van zijn principes, zijn beleid, zijn overtuiging.' Volgens Powell is Bush gekozen op het mandaat om een buitenlands beleid na te streven dat de nationale belangen van de VS dient.

Dergelijk beleid is volgens Powell ook in het belang van vrienden en bondgenoten. En hoewel dat beleid 'van nature multilateraal is', zei Powell dat de VS bereid zijn om desnoods eenzijdig op te treden. Of Powell ook in de nieuwe regering van Bush minister blijft, wilde hij niet zeggen.

Het buitenlands beleid van de VS is volgens Powell 'agressief in de zin dat we uitdagingen aangaan'. Dat geldt volgens Powell niet alleen voor de invasie van Irak en het verdrijven van de Taliban in Afghanistan, maar ook de aanpak van aids en de ontwikkelingshulp.

De situatie die in het Midden-Oosten ontstaat nu de Palestijnse leider Yasser Arafat in het ziekenhuis ligt, biedt volgens Powell kansen. 'We staan klaar om actief van deze mogelijkheid gebruik te maken.' Volgens Powell zien vele het vredesproces als het meest opvallende onderdeel van het buitenlands beleid.

Over de samenwerking met de EU ten aanzien van Iran zei Powell dat er nog geen overeenkomst is tussen de grote drie van de Europese Unie (Groot-Brittannië, Duitsland en Frankrijk) en Iran over het nucleaire programma van dat land. Powell blijft sceptisch over het Europese initiatief, maar zegt dat de VS niet tot doel hebben de Iraanse regering omver te werpen.

10-5-2006

Brief inhoud, ondertekend door Rudolphus Lodge de Nieuwe Oorlog, dat Oorlog tegen Irak is verklaard (illegitieme) + agressie → Plaats van Sleutel-Generaal, + commissies + ministers → Bijeenkomst in te lichten of te zien → bevestiging Sovjet defensie-belasting

→ Consultatie tegen Benelux + SG
i.v.m. Afghanistan.

Cel voor Britse militair die Irak-dienst weigerde

EEN BRITSE militaire arts die heeft geweigerd naar Irak te gaan, is gisteren veroordeeld tot acht maanden celstraf. Een militaire rechtbank achtte hem schuldig aan dienstweigering. Dat meldde de BBC gisteren. De 37-jarige Malcolm Kendall-Smith, die behalve het Britse staatsburgerschap ook een Nieuw-Zeelands paspoort heeft, weigerde in 2005 naar Irak te vertrekken. Hij had toen al twee keer gediend in Irak. ANP



WEIGERENDE BRIT VOOR KRIJGSRAAD

Een Britse militair die niet naar Irak wil moet zich voor de krijgsraad verantwoorden. De luitenant was twee keer in Irak, maar weigert een derde keer. Hij voert als reden aan dat er geen wettige reden was om Irak binnen te vallen. ANP

23-3-2006 TEr20

Sagittarius

Van: "Meindert Stelling" <meindert.stelling@planet.nl>
Aan: "Erik Hummels" <ehummels@xs4all.nl>; "Nico Steijnen"
Verzonden: woensdag 11 januari 2006 13:00
Onderwerp: Wetenschappelijke reflectie op ons werk

Beste vrienden,

Soms vraag je je af waar al ons juridisch verzet tegen de Staat in zaken van oorlog en vrede toe leidt. Vandaag kreeg ik een publicatie in handen, waarmee ik erg tevreden ben. Het gaat om het preadviezen van Nollkaemper en Fleuren inzake "De nationale rechter en het internationale recht" (Mededelingen van de Nederlandse Vereniging voor Internationaal Recht nr. 131, uitgegeven bij Asser Press: Den Haag november 2005).

Op blz. 130 schrijft Fleuren: "Kortom, ik meen dat de wijze waarop tot nu toe in de jurisprudentie is gemotiveerd dat particulieren voor de rechter geen beroep kunnen doen op het geweldverbod, de toets der kritiek niet kan doorstaan."

[redacted]n naar aanleiding van onze rechtszaak tegen de Staat betreffende de nieuwe oorlog schrijft hij op blz. 131: "De Hoge Raad onderzoekt niet of de politieke besluitvorming de toets aan artikel 90 kan doorstaan. Hopelijk wordt hiermee geen trend ingezet."

Ik heb hier slechts de kernpunten weergegeven. Maar ik denk dat wij ook hierom onze procedures moeten blijven voeren. Vanuit de wetenschap moet de kritiek op de rechterlijke macht worden geuit. Zo dragen we bij aan de rechtshandhaving.

Vriendelijke groet,

Meindert

4-8-2005

In het Keulse Vaccin-comm
legeerde het Hof, zonder dat
daarom door partijen gevraagd was, dat
de Kosovo-oorlog en Duitslands
deelname daaraan, legaal waren

→ Het Duitse hof maakt dus
dat wél in de argumentering
geheeld lijkt worden

1.0 HISTORY
See: 6.23 (pp. 351-356)

1.203 CONFLICT BETWEEN INTERNATIONAL LAW AND NATIONAL LAW
See also: 4.73; 5.37; 6.113; 6.23 (pp. 356-361); 12.273

State Secretary for Finance v. X., Supreme Court, 12 May 1999, *NJ* (2000) No. 170,[1] *BNB* (1999) No. 271.[2]

— The increases in the employed person's allowance in 1992 and 1994, which entail a net income gain for employed persons, constitute unequal treatment within this group. There is no objective or reasonable justification for this unequal treatment and it is therefore contrary to Article 26 of the International Covenant on Civil and Political Rights[3] and Article 14 of the European Convention on Human Rights,[4] in conjunction with Article 1 of Protocol I to that Convention.[5]
— The courts cannot provide effective legal protection from this unequal treatment by not applying the scheme in question. This would not benefit the interested party.
— Whether the courts should themselves make up for the legal deficit caused by the scheme or whether they should leave this to the legislature depends on the weighing up of two different interests. An argument in favour of steps by the courts to make up for the legal deficit themselves is that they would then immediately provide the interested party with effective protection, but an argument against this is that, in view of the system of constitutional relations, the courts should be cautious about intervening in a statutory scheme.

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1. Note by A.R. Bloembergen.
2. Note by P.J. Wattel; LJN No. AA2756 (www.rechtspraak.nl); summarised in *NJB* (1999) No. 43, p. 1008; discussed by J.W. Zwemmer in *AA* (1999) p. 668, and by S.K. Martens, 'De grenzen van de rechtsvormende taak van de rechter' [The limits of the law-making function of the courts], *NJB* (2000) pp. 747-758, at pp. 750 et seq.
3. 999 *UNTS* p. 171; *ILM* (1967) p. 368; *Trb.* 1969 No. 100. Art. 26 reads: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
4. 213 *UNTS* p. 221; *ILM* (1984) p. 1027; *ETS* No. 5; *Trb.* 1951 No. 54. Art. 14 reads: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'
5. 213 *UNTS* p. 262; *ETS* No. 9; *Trb.* 1952 No. 80. Art. 1 reads: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

NETHERLANDS JUDICIAL DECISIONS INVOLVING QUESTIONS OF PUBLIC INTERNATIONAL LAW, 2000-2001*

L.A.N.M. Barnhoorn**

The decisions in this survey are taken from the date base Repertory of Netherlands Judicial Decisions on Public International Law of the T.M.C. Asser Instituut, which now contains abstracts from approximately 5250 decisions dating from 1839 to the present day. (www.asser.nl) Most of the texts are taken from various Reports and Journals, but the Institute also receives the texts of decisions involving questions of public international law directly from the Courts concerned by special agreement between the Institute, the Ministry of Justice, and the Courts. If the decision has not (yet) been published elsewhere, the source of the text is given as 'Institute's Collection' followed by the administrative sequence number.

Not all the decisions in the data base are included in this survey. Some are left out because they contain very minor points of (international) law. Those decisions which are included are given either in an extensive form, with verbatim extracts from the judgment, or in a summarized form, depending on their relevance to international law.

A two-year period is covered by the survey, one year of which overlaps the period covered by the survey in last year's volume of the NYIL. This is made necessary by the fact that the text of the decisions is sometimes available only after a considerable time. This is also why, by way of exception, decisions are occasionally included although given at a time prior to the period covered by the survey.

The Yearbook surveys are also available in consolidated way in a separate database on www.asser.nl.

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* This section has been translated by P. Kell, with the exception of the verbatim extracts of the case under 12.273: these were made available by the Ministry of Foreign Affairs.

** Senior Research Officer, Department of Public International Law, T.M.C. Asser Instituut.

Netherlands Yearbook of International Law
Volume XXXIII – 2002 – pp. 317–381

— The courts themselves may make up for the legal deficit if it is sufficiently clear from the system of the legislation, the cases regulated in it and the principles underlying it how this is to be done. In cases in which various solutions are conceivable and the choice from among them is partly dependent on general considerations of government policy or important choices of a politico-legal nature have to be made, the courts should leave the choice to the legislature.

— However, the possibility cannot be excluded that the result of the weighing up may be different if the legislature is aware that a given scheme would unjustly result in unequal treatment within the meaning of the above-mentioned treaty provisions, but still fails to take steps to end the discrimination.

— Since it is not clear in the present case how the courts should make up for the legal deficit and since various solutions are conceivable and the choice from among them depends in part on general considerations of government policy, the courts should, for the time being, leave it to the legislature to make up for the legal deficit. This weighing up could, however, lead to a different result in the future. The Supreme Court therefore assumes that the government will present, with all due speed, a bill that does justice to the treaty obligations to which the State of the Netherlands is subject.

The Facts: X., the interested party, had deductible expenses totalling Dfl. 2,362 in 1994. In her income tax return she added a sum of Dfl. 1,050 for employment expenses on the grounds that the employed person's allowance had been increased by that amount since 1991 (i.e., from Dfl. 1,036 to Dfl. 2,089) and that this increase was based not on an actual increase in employment expenses but on the desire of the legislature to provide a net income gain for those persons who were in receipt of earned income but did not have more than Dfl. 1,036 in deductible expenses. She argued that she too was entitled to this extra amount on the grounds of Article 26 of the International Covenant on Civil and Political Rights. The Inspector of Direct Taxes refused to allow the deduction. However, the Court of Appeal of Leeuwarden upheld X.'s appeal. The Court of Appeal held that as a result of the increases in the employed person's allowance in 1992 and 1994, a distinction had been made between employed persons having high employment expenses and those having low employment expenses and that this distinction within the category of employed persons amounted to unequal treatment. The unequal treatment could not be based on the fact that the cases differed, and no objective and reasonable justification could be given. In order to end the inequality, the Court of Appeal held 'in accordance with the intentions of the legislature' that since the employment expenses actually incurred by X. exceeded the allowance, she was entitled to deduct the increase of Dfl. 1,050, which was not based on tax grounds (judgment of 4 April 1997). The State Secretary for Finance appealed in cassation against this judgment to the Supreme Court. He put forward two grounds of appeal: first, he challenged the ruling of the Court of Appeal to the effect that the treatment was unjust and unequal, and second, he challenged the granting of the deduction of Dfl. 1,050.

Held: '... 3.3. The Supreme Court will assess the grounds of appeal partly by reference to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (referred to below as 'the Convention') in conjunction with Article 1 of Protocol I. As regards the question whether there is unequal treatment as prohibited by

this provision and by Article 26 of the International Covenant on Civil and Political Rights, it should be stated at the outset that these provisions do not prohibit every unequal treatment of equal cases, and instead prohibit only treatment which must be regarded as discrimination because there is no objective and reasonable justification for it. In addition, the legislature should have a degree of discretion in deciding whether cases should be regarded as equal for the purposes of these provisions and whether, if the answer is in the affirmative, there is nonetheless an objective and reasonable justification for regulating them differently.

3.4. The employed person's allowance provided for in Article 37, paragraph 1(a), of the Income Tax Act 1964 (referred to below as 'the Act') was originally established as a system of an evidential law nature under which, according to the Explanatory Memorandum to the Act, 'the deduction of costs resulting from the scheme (would be) limited to relatively modest amounts, which approximate as closely as possible to the reality for the majority of the taxpayers involved. It is, however, certainly not the intention of the scheme to change the basic rule that Dutch income tax is levied on the income actually received, i.e., income after deduction of the expenses actually and demonstrably incurred. For this reason, the [Finance Ministers] consider it necessary always to set a maximum limit on the scheme which corresponds to the objective of the scheme, namely to avoid, both for the taxpayers and for the tax authorities, a disproportionate amount of work and trouble for small amounts' (Parliamentary Papers II 1962/63, 5380, No. 19, p. 52).

3.5. The increase in the employed person's allowance with effect from 1992 was not a result of the intention indicated in 3.4. As is evident from the history of the Act as described in the opinion of the Advocate General at 2.8 and 2.9, the legislature was aware at that time that there was no (compelling) tax reason for the increase in the allowance and that 90-95% of the taxpayers in receipt of earned income were already covered by the scheme. In their case the increase would not cover actual expenses and would therefore be a net income gain. The increase in the allowance was therefore intended to achieve an aim other than a tax aim, namely to encourage participation in paid work and to improve the employment situation.

3.6. According to the history of the Act as described in the opinion at 2.11 and 2.12, the latter aim was also behind the increase in the allowance that was introduced in 1994. The government recalled in this connection that it had already observed in 1992 that 'the limits for sparing earned income by these means had by now been reached' and that 'further use of the employed person's allowance for this purpose (...) would not be in keeping with the structure of the tax system'. The government also stated that the current allowance was sufficient for 95% of taxpayers as compensation for expenses incurred. Although the government stated that a slight increase in this percentage could be expected, the real reason for the increase lay in the intended impact on the labour market.

3.7. In accordance with the objective of the legislature as set out in 3.5 and 3.6, the increase in the employed person's allowance on 1 January 1992 and 1994 provided a net income gain for employed persons. Viewed from this perspective, this increase constitutes unequal treatment within the group of employed persons, contrary to the submission in the first ground of appeal. After all, the increased allowance for employed persons was wholly or partly negated in the case of the approximately 5% of taxpayers whose expenses exceed the old (real) allowance by the fact that could already deduct such expenses; this meant that, in reality, they would receive no compensation or lower compen-

sation and would thus be treated less favourably than the majority of employed persons. There is no relevant difference in this respect between the two groups of employed persons for the purpose of the levy of income tax. It follows that there is no apparent basis for the submission in the ground of appeal that these cases are not equal.

3.8. The starting point when deciding whether the unequal treatment of these cases is justified is that the intended incentive for persons not active in the labour market to join the labour market through the granting of a net income gain to employed persons is, in itself, a valid means of achieving an aim of government policy. Even if one disregards the arguments mentioned in the opinion of the Advocate General at 5.8, 5.13 and 5.14 that the chosen form is not effective, no justification can be found in the efforts to achieve that aim for the inequality created by the chosen form among the group of employed persons.

3.9. The arguments derived from the original objective of the employed person's allowance as described in 3.4, which are used in the ground of appeal to refute the objections referred to in 3.7, are not valid. After all, it follows from the history of the Act referred to in 3.5 and 3.6 that, in so far as the original objective of the employed person's allowance was already served by the increases in 1992 and 1994 and that some so-called 'simplification benefit' was also intended by extension of the group to which the allowance applied, this was a secondary effect which was negligible even in the view of the legislature. The history of the Act also shows the incorrectness of the submission that these increases were intended merely as an adjustment in line with inflation since 1971 and that the employed person's allowance was fixed even after that in such a way as to approximate as closely as possible to reality. Incidentally, this submission completely ignores the fact that the area of deductible expenses was greatly curtailed by changes to the law from 1990 onwards.

3.10. The ground of appeal submits, rightly in itself, that allowance schemes such as this one are bound to have an element of the rough and ready about them. The employed person's allowance meant, even in its original form, that employed persons who actually incurred expenses amounting to (not more than) the allowance could not deduct more costs than employees who had no deductible expenses (or fewer deductible expenses). This aspect of allowance schemes can, however, constitute a justification for the consequent inequality only in so far as the original limits of the allowance were set at an amount intended to approximate reality. After all, for the purposes of the criterion referred to at 3.3, it is not merely a question of whether the scheme serves a reasonable aim but also whether there is a reasonable relationship between this aim and the inequality caused by the achievement of this aim in the design chosen for the scheme. It follows, however, from the findings above that after the increases in 1992 and 1994 no attempt whatever was made to approximate reality.

3.11. As the unequal treatment relates to a difference in the deduction of (not more than) Dfl. 1,050 it cannot be argued that the amount concerned is of such insignificance in quantitative terms that it is possible to acquiesce in the unequal treatment for this reason. Nor has the Supreme Court found any other grounds which could justify the unequal treatment.

3.12. It follows from the findings at 3.7-3.11 that, even if the discretion referred to in 3.3 is taken into account, the legislature cannot reasonably have concluded that these are unequal cases here or that a reasonable and objective justification exists for

the unequal treatment of these cases. The first ground of appeal therefore fails.

3.13. The second ground of appeal submits that the Court of Appeal exceeded the limits of the law-making function of the courts by ruling that the interested party was entitled, in view of the inequality found to exist by the Court of Appeal (since the employment expenses actually incurred by the interested party exceeded the allowance), not only to deduct these expenses but also to an extra deduction equal to the amounts of the increase in the allowance not introduced on fiscal grounds and fixed by the Court of Appeal at Dfl. 1,050. This ground of appeal faces the Supreme Court with the question of whether and, if so, how the courts can provide effective legal protection in this case, given the finding that the present statutory scheme results in unjustified and unequal treatment.[6]

3.14. In this case such protection cannot consist in non-application of the discriminatory scheme (the compensation for employed people provided by the increases in the employed person's allowance). This would not benefit the interested party. This gives rise to the question of whether the courts can offer effective legal protection by making up in some other way for the legal deficit caused by the scheme or whether they should leave this to the legislature. In such situations two interests should be weighed against each other, taking account of the nature of the legal field in which the question arises. An argument in favour of measures by the courts to make up for the legal deficit is that they would then immediately provide the interested party with effective protection, but an argument against this is that in view of the system of constitutional relations the courts should be cautious about intervening in a statutory scheme.

3.15. In the light of this finding, the courts themselves will generally make up for the legal deficit if it is sufficiently clear from the system of the legislation, the cases regulated in it and the principles underlying it how this is to be done. In cases in which various solutions are conceivable and the choice from among them is partly dependent on general considerations of government policy or important choices of a politico-legal nature have to be made, it is reasonable to assume that the choice will for the time being be left to the legislature since the courts are reluctant to intervene in view of the constitutional situation referred to in 3.14 and their limited powers in this field.

However, the possibility cannot be excluded that the result of the weighing up may be different if the legislature is aware that a given scheme would unjustly result in unequal treatment within the meaning of the above-mentioned treaty provisions, but still fails to take steps to end the discrimination.

3.16. On the assumption that the legislature in any event wished to encourage people to engage in paid work (including second jobs) and to maintain the compensation referred to in 3.7 for this purpose, one way of ending the inequality in this case would be, in accordance with the decision of the Court of Appeal, to grant the compensation to all employed persons eligible for it. Since, as is apparent from the above findings, there was no

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6. The Supreme Court does not indicate in this finding or in subsequent findings how it arrives at the conclusion that there is a right to effective legal protection. The Advocate General refers in his opinion in this connection to Art. 2(3) of the International Covenant on Civil and Political Rights. According to Martens, when the judgment of the President of the Supreme Court was given, the Supreme Court also took account of Art. 13 of the European Convention, see *supra* n. 2, p. 750.

reason to alter the maximum of the employed person's allowance applicable in 1991 from the point of view of reimbursement of expenses, since the maximum then applicable was sufficient for almost all employed persons, the extent of the compensation in 1992 and subsequent years could be fixed at the amount by which the maximum of the increased employed person's allowance exceeds the maximum for 1991 calculated annually on the basis of Article 66b of the Act. This solution could then be applied in such a way that those persons whose deductible expenses exceed this maximum should, if they waive the (increased) employed person's allowance, be given a deduction equal to the amount of their deductible expenses actually incurred, plus the amount of the compensation calculated in the manner referred to above.

3.17. However, as explained in the opinion of the Advocate General at 6.4.5, other solutions are conceivable which fall outside the law-making possibilities of the courts. Perhaps the legislature might wish to extend the compensation to all employed persons eligible for it, but to fix it at a lower amount when weighing up the labour market incentive against the budgetary scope. Moreover, in view of the arguments referred to in 3.8 against the effectiveness of an increased employed person's allowance, other methods of promoting participation in the labour market might be preferred. For example, various statements by the Government quoted in the opinion show that a so-called 'employment deduction' was and is being considered as an alternative. According to the 'Building Blocks' policy document presented by the State Secretary to the Lower House of Parliament in July 1994 (see the opinion at 2.14), this employment deduction could be achieved in various ways: a flat rate deduction or a percentage deduction, which could take effect either in the rate structure or in the assessment basis, depending on the amount of the deduction and the budgetary framework. This could be supplemented by what is known as 'flanking policy' and could possibly be combined with the tax allowance for commuters. It is assumed in this connection that self-employed persons would also be eligible for the employment deduction, subject to some adjustment of the scheme for the professional assistance deduction.

3.18. In view of the above, the situation in the present case is that it is not clear how the courts should make up for the legal deficit caused by the discriminatory scheme, and that various solutions for ending the discrimination are conceivable and that the choice from among them depends in part on general considerations of government policy. It follows that the courts themselves should not immediately make up for the legal deficit, but should leave this for the time being to the legislature. The ground of appeal is therefore well-founded. Reference should, however, be made to the possibility referred to in 3.15 that the weighing up may lead to a different result in the future. The Supreme Court assumes that the government will submit, with all due speed, a bill that does justice to the treaty obligations to which the State of the Netherlands is subject in this respect.

3.19. The judgment of the Court of Appeal cannot be upheld. The Supreme Court can dispose of case ...'

1.204 SELF-EXECUTING PROVISIONS OF TREATIES OR DECISIONS OF INTERNATIONAL ORGANISATIONS

See: 6.113

2.4 JUDICIAL DECISIONS AS SOURCE OF INTERNATIONAL LAW
See: 12.273

2.72 ACTS AND DECISIONS OF INTERNATIONAL ORGANIZATIONS AS SOURCE OF INTERNATIONAL LAW
See: 4.73; 6.23; 12.2704; 12.273; 13.223

3.1141 IMMUNITY OF FOREIGN STATES
See: 4.31

3.2112 POWERS OF INTERNATIONAL ORGANIZATIONS
See: 12.273

3.21122 PROCEDURE OF DECISION-MAKING OF INTERNATIONAL ORGANIZATIONS
See: 6.113

3.2113 PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS
See: 12.273

3.213 LEGAL EFFECT OF ACTS OF INTERNATIONAL ORGANIZATIONS
See: 6.23 (pp. 356-361); 12.2704; 12.273; 13.223

3.221 INTERNATIONAL CIVIL AVIATION ORGANIZATION
See: 6.113

3.221 UNITED NATIONS
See: 12.2704; 12.273; 13.223

3.223 EUROPEAN COMMUNITIES
See: 4.73; 9.121; 13.223

25-6-2005

Procedure begonnen dat voldoet vrijwel
Zijn om medewerking in de vrijwillige oorlog
te vragen, net zo goed als Leuda (chemtech
kunnen!

23-6-2005

DUITSE OFFICIER MOCHT BEVEL WEIGEREN OM IRAK

Een Duitse officier had in 2003 het recht een bevel te weigeren omdat hij vreesde dat zijn werk zou worden gebruikt voor de Amerikaanse aanval op Irak. Ook een beroepsmilitair kan zich in zo'n situatie beroepen op de grondwettelijk gewetensvrijheid, aldus het Federale Administratieve Hof in Leipzig gisteren.

ANP/DPA

Van: "Klaus von Raussendorff" <redaktion@aikor.de>
Aan: "Klaus von Raussendorff"
Verzonden: vrijdag 24 juni 2005 11:40
Onderwerp: Soldaten gegen den illegalen Irak-Krieg

Liebe Leute,

zum Urteil des Bundesverwaltungsgerichts über Dienstverweigerung im Irak-Krieg und zu einem parallelen Fall in den USA:

SOLDATEN GEGEN DEN ILLEGALEN IRAK-KRIEG -
TRANSATLANTISCHE WERTEGEMEINSCHAFT VON UNTEN
.....UND VON OBEN
(Zitate aus Medien aufgelesen und zusammengestellt von Klaus v. Raussendorff)

Mit internationalistischen Grüßen
Klaus von Raussendorff

Anti-Imperialistische Korrespondenz (AIKor) -
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Anlage

SOLDATEN GEGEN DEN ILLEGALEN IRAK-KRIEG -
TRANSATLANTISCHE WERTEGEMEINSCHAFT VON UNTEN
.....UND VON OBEN
(Zitate aus Medien aufgelesen und zusammengestellt von Klaus v. Raussendorff)

Deutschland: Der Bundeswehrmajor Florian Pfaff eröffnete "am 20. März 2003, als er morgens im Fernsehen die Bilder vom amerikanischen Bombenangriff auf Bagdad sah, seinem Vorgesetzten im Streitkräfteamt in Bonn, dass er seinen Job als Software-Spezialist nicht mehr ausüben könne. Es sei nicht auszuschließen, dass mit seiner Arbeit an einem Computer-Projekt eine Beteiligung der Bundeswehr am Irak-Krieg unterstützt werde, den er für völkerrechtswidrig halte". (Süddt. Ztg. v. 24.6.05) Am Mittwoch, den 22. Juni 2005 konnte sich Florian Pfaff vor Gericht durchsetzen. "Der Wehrdienstsenat des Bundesverwaltungsgerichts sprach den Offizier vom

Vorwurf des Dienstvergehens frei und hob die vom Truppengericht Nord verfügte Herabsetzung zum Hauptmann auf. Der Disziplinaranwalt der Bundeswehr hatte sogar die Entlassung des Offiziers aus dem Dienst gefordert." (Die Welt v. 23.6.05)

USA: Der Angehörige der US-Marine Pablo Paredes (23) verweigerte am 6. Dezember 2004 den Befehl, an Board des US-Kriegsschiffes "Bonhomme Richard" zu gehen, das mit zwei anderen Schiffen mit 3000 Matrosen und Marineinfanteristen an Bord in San Diego in Richtung Persischer Golf auslief. Ein Marinerichter verurteilte ihn zu zwei Monaten Beschränkungen im Dienst, drei Monaten Schwerarbeit und einer Degradierung vom Unteroffizier 3. Klasse zum einfachen Marinerekruten. Das Urteil war dennoch ein Erfolg für den Angeklagten, und dies nicht nur, weil die Anklage neun Monate Gefängnis und die unehrenhafte Entlassung gefordert hatte. (People's Weekly World Newspaper v. 19.5.05.)

Illegalität des Irak-Krieges

Deutschland: "Der 1957 geborene Offizier hatte nicht nur seine Mitarbeit an der militärischen Computer-Software verweigert, sondern auch das Verhalten der Bundesregierung im Irak-Krieg kritisiert. Er hatte unter anderem die Stationierung von Bundeswehr-Angehörigen in Kuwait mißbilligt. Außerdem hatte er kritisiert, daß deutsche Soldaten an Flügen von Awacs-Aufklärungsmaschinen teilgenommen und US-Liegenschaften in Deutschland bewacht hätten. Außerdem hatte er die Überflug- und Landerechte für US-Flugzeuge in Deutschland kritisiert. Der Offizier hielt dies für verfassungs- und völkerrechtswidrige Unterstützungsleistungen Deutschlands für die USA im Irak-Krieg." (Die Welt v. 23.6.05)

USA: "Unter Berufung auf 'eine höhere Pflicht gegenüber meinem Gewissen und dem obersten Recht des Landes' hatte Paredes (23) Angebote einer leichteren Strafe im Gegenzug gegen ein Schuldeingeständnis abgelehnt. Er erklärte dem Richter, ‚Meine Schuld ist zu glauben, dass dieser Krieg illegal ist. Meine Schuld ist zu glauben, dass Krieg in allen Formen unmoralisch und unnütz ist, meine Schuld ist zu glauben, dass ich als Angehöriger der Streitkräfte die Pflicht habe, mich zu weigern, an diesem Krieg teilzunehmen, weil er illegal ist.' " (People's Weekly World Newspaper v. 19.05.05)

Gewissensentscheidung und Rechtspflicht

Deutschland: Das Bundesverwaltungsgericht war der Ansicht ".der Befehl zur Fortführung seiner Arbeit sei für Pfaff "unverbindlich" gewesen. Das Grundrecht auf Gewissensfreiheit gehe der Anordnung vielmehr vor. Auch ein Soldat, der keinen Antrag auf Wehrdienstverweigerung gestellt hat, könne sich im Einzelfall auf die Gewissensfreiheit berufen. Pfaff habe die ‚Ernsthaftigkeit seiner Gewissensentscheidung glaubhaft' gemacht..Florian Pfaff hatte sich allerdings gar nicht auf sein Gewissen berufen, sondern auf die Rechtslage. Nach seiner Ansicht war der von ihm verweigerte Befehl generell unzulässig. So weit ging das Bundesverwaltungsgericht nun aber nicht. Das Urteil enthält keine juristische Bewertung des Irak-Kriegs." (Kölner Stadtanzeiger v. 23.6.05) "Vordergründig hat das Bundesverwaltungsgericht nur über die Möglichkeit geurteilt, daß auch Angehörige der Bundeswehr berechtigt sind, Gewissensentscheidungen zu treffen. Tatsächlich ist die Entscheidung des Gerichts allerdings weitreichender, was über den Umweg der "glaubhaften" Darlegung von Gewissensgründen geschah. Zweifellos würde auch ein deutscher Soldat, der

ngesichts vorrückender Feinde seine Waffe von sich wirft und das Hasenpanier ergreift schuldig gesprochen werden, auch wenn er "plötzliche Gewissensbisse" geltend machen würde. Der grundlegende Unterschied sind also offenbar die unterschiedlichen Umstände, was letztlich dazu führt, daß das Bundesverwaltungsgericht sich zumindest stillschweigend der Ansicht angeschlossen hat, daß der Angriffskrieg gegen den Irak völkerrechtswidrig war." (freace.de v. 22.6.05)

USA: "Im Verfahren gegen Paredes in der Verhandlung über das Strafmaß wurde die Rechtsprofessorin Marjorie Cohn, Vizepräsidentin der National Lawyers Guil und Vertreterin der USA beim Exekutivkomitee der American Association of Jurist, als sachverständige Zeugin der Verteidigung angehört. Sie erklärte dem Richter, dass der Krieg der USA im Irak die VN-Charta verletze, und dass die von US-Personal in irakischen Gefängnissen ausgeübten Folterungen und Misshandlungen gegen die Genfer Konventionen verstoßen und gemäß dem US-amerikanischen Statut über Kriegsverbrechen als Kriegsverbrechen anzusehen sind. Daher, sagte sie, habe Paredes die Pflicht gehabt, Befehlen zum Einsatz den Gehorsam zu verweigern. Im Kreuzverhör verschaffte die Anklage Marjorie Cohn ferner die Gelegenheit, darauf hinzuweisen, dass die Krieg in Jugoslawien und Afghanistan ebenfalls die VN-Charta verletzten, da keiner in Selbstverteidigung oder mit Zustimmung des Sicherheitsrats geführt wurde. Der Richter merkte dazu an: ‚Ich denke, das die Regierung erfolgreich nachgewiesen hat, dass jeder Angehörige der Streitkräfte hinreichend Grund hat zu glauben, dass die Kriege in Jugoslawien, Afghanistan und Irak illegal waren.' Die Anmerkung des Richters ist ‚außerordentlich wichtig', sagte Lynn Gonzalez, eine ehrenamtliche Rechtsberaterin beim San Diego Militärberatungsprojekt. ‚Es ist ein Präzedenzfall', der sich auf künftige Verweigerer auswirken wird, erklärte sie öffentlich." (People's Weekly World Newspaper v. 19.5.05)

Doch vereint an einem Tische, ...Anerkennung des illegalen Status quo

Am selben Tag, da das Bundesverwaltungsgericht in Leipzig unausgesprochen die Illegalität des Irak-Krieges unterstellte, berichteten die Medien von der "internationalen Irakkonferenz" in Brüssel, die auf Betreiben des US-Präsidenten George W. Bush unter Beteiligung von 85 Ländern und internationalen Organisationen einberufen wurde,:".die Europäische Union erklärt, sie wolle die letztlich von den USA eingesetzte ‚irakische Regierung' und den dortigen ‚demokratischen Prozeß' unterstützen. Ferner "wurden die angrenzenden Staaten des Iraks in einer gemeinsamen Erklärung aufgefordert, ihre Grenzen schärfer zu kontrollieren, um ‚die grenzüberschreitende Unterstützung von Terroristen zu verhindern'. Nicht nur, daß hiermit den Anschuldigungen der USA, insbesondere Syrien würde seine Grenzen nicht ausreichend kontrollieren - während auf irakischer Seite praktische keine Kontrollen stattfinden - Recht gegeben wird, es wird auch offen die Brandmarkung irakischer Widerstandskämpfer als ‚Terroristen' wiederholt, obschon es sich bei der Eroberung und Besatzung des Iraks durch die USA zweifellos um einen völkerrechtswidrigen Angriffskrieg handelt." (freace.de v. 22.6.05)

Quellen:

Peter Blechschmidt, Reaktionen auf Urteil - Bunter Vogel in der olivgrünen Truppe - Ein Soldat verweigerte wegen des Irak-Krieges den Dienst - die Bundeswehr wollte das nicht dulden in Süddeutsche Zeitung v. 24.6.05. http://www.sueddeutsche.de/,tt311/deutschland/artikel/508/55453/

Gewissensentscheidung entbindet Soldaten von der Gehorsamspflicht Bundesverwaltungsgericht spricht Major frei in Die Welt v. 23.0605; http://www.welt.de/data/2005/06/23/735531.html

Susan Webb, Victory For Sailor Who Said 'No' To War in People's Weekly World Newspaper v. 19.05.05.; http://www.pww.org/article/view/7066

Christian Rath, Berufssoldat darf Befehl verweigern in Kölner Stadtanzeiger v. 23.06.05 http://www.ksta.de/html/artikel/1119422373665.shtml

Zwei Seiten einer Münze - Ansichten zur Rechtmäßigkeit des Irakkriegs (22.06.2005) http://www.freace.de/artikel/200506/220605b.html

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ENDE

25-2-2004

Slotenbrief aan de Kamer over het Amerikaanse standpunt ten aanzien van het Guantanamo kamp.

→ hoe dus ga ik de vragen beantwoord krijgen!

Grote stukken zwart gelakt in de Amerikaanse brief aangaande Guantanamo Bay in het Afghanistan archief (2003):

Point 6 (blz 13): "Notwithstanding the situation in Guantanamo, the U.S. Administration recognises the need to act in conformity with the rule of law and with international law". It is the policy of the United States Government to pursue human rights and the rule of law as a central element of foreign policy. The U.S. approach to countering terrorism does not conflict with or violate this policy." (Amnesty International, United States of America – The Threat of a Bad Example 1 (July 2003), at HTTP://WEB.AMNESTY.ORG/AIDOC/AIDOC_PDF.NSF/INDEX/AMR511402003ENGLISH/$FILE/AMR5111403.PDF, quoting LETTER to Amnesty Int'l SEC'Y GEN. IRENE KHAN, dated 11 July 2003, FROM LORNE W. CRANER, ASS'T SEC'Y FOR DEMOCRACY, Human Rights and Labor, U.S. DEP'T OF STATE (JULY 11, 2003)

Commenting on the U.S. efforts in the war on terrorism, the Pentagon General Counsel stated that the administration will not "compromise its commitment to human rights in accordance with the law" in the conduct of this war against

2.02

a ruthless and unprincipled foe." Letter from William J. Haynes II, Gen. Counsel, Pentagon, to Sen. Patrick ~~Leahy~~ Leahy (June 25, 2003) at HTTP://WWW.HRW.ORG/PRESS/2003/06/LETTER-TO-LEAHY.PDF.)

25-2-2004

We zouden natuurlijk een amicus curiae
brief door deskundige van de H.R. laten
sturen met het verweer agressie oorlog
juridisch te beoordelen.

→ Zie de amicus curiae brief over
guantanamo-Bay in de bijl.

A. Zyhanstra

Mr. N.M.P. Steijnen
Advocaat en Prokureur
Couwenhoven 52-05
3707 ER Zeist
tel. 03404 - 5 68 67

16-1-2004

Ontvelsbrunkent ayessie

Rechtsvraag met de rechtsvraag: Is de vraag of de dood van de RTS-mensen, uitgaande van de veronderstelling van de Staat dat dit een rechtmatige aanval geweest zou zijn overeenkomstig het recht van de Belle, een rechtmatige was in deze zin van art 15 lid 2 EVRM, indien de orders en ayessie overlay was, zoals in Vedovic wordt gezegd gezegd, een rechtsvraag die door de Belle Leerhuurd moet worden?

(2) Is zijn dood een rechtmatige dood in de zin van art 15 lid 2 EVRM?

(Er zijn daar ook nog onderscheidt wordt gemaakt tussen verschillende de specifieke zin van art 15 lid 2 EVRM en "andersoms overtuiging" → dwz. in strijd met de grondwettelijke regel artikel dat 15 EVRM → recht op leven.

"Het gezelschapslied is customary law"

15-7-2004

can only be made through access gates, which are opened infrequently and for short periods.

* *

86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" (hereinafter "resolution 2625 (XXV)"), in which it emphasized that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal." As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law (see *I.C.J. Reports 1986*, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which "Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination." Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

The Court would recall that in 1971 it emphasized that current developments in "international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]". The Court went on to state that "These developments leave little doubt that the ultimate objective of the sacred trust" referred to in Article 22, paragraph 1, of the Covenant of the League of Nations "was the self-determination . . . of the peoples concerned" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, paras. 52-53). The Court has referred to this principle on a number of

12-6-2004

Artikel 1 Tweede Verdrag betreffende de Status van Vluchtelingen (Verdrag van Genève)

stelt:

"De lidstaten van dit Verdrag zijn niet van toepassing op een persoon ten aanzien van wie ernstige redenen zijn om te veronderstellen dat:

a) hij een misdrijf tegen de vrede, een oorlogsmisdrijf of een misdrijf tegen de menselijkheid zoals begrepen zijn omschreven in de internationale overeenkomsten welke zijn opgesteld om bepalingen met betrekking tot deze misdrijven in het leven te roepen".

→ Dit betekent dat het van de zaak betrokken moet zijn of er een misdrijf tegen de vrede is gepleegd.

Art 28 Universele Verklaring van de Rechten van de Mens luidt:
"Een ieder heeft het recht op een sociale en internationale orde, waarin de rechten en vrijheden van deze Verklaring volledig kunnen worden verwezenlijkt."

Vluchtelingenwet 1967, blz 1113-1115. "De universele Verklaring van de Rechten van de Mens bevat thans bindend volkenrechtelijk recht dat artikel vreemdelingenrechtelijke werking toekomen.

2.02.

Hof wijst beschikkend:

"4.2. De mogelijke schending van deze recht kan niet los worden gezien van de vraag of het toegepaste onbepaald en onvoorwaardelijk is met art 2 lid 4 Handvest, nu, zoals VJV c.s. ook zelf stellen, aanbevolen dat gevaarlijke is op grond van art 2 lid 4 Handvest een rechtvaardiging kan opleveren voor schending van de door VJV c.s. beroepen fundamentele vrijheden. Nu de vraag of art. 2 lid 4 Handvest is of dreigt te worden geschonden niet ter beoordeling van het Hof staat, kan dit hof daarom niet in de beoordeling of sprake is van een aangevochten inbreuk op genoemd recht."

→ Hieruit volgt dat het Hof de klacht van de klagende partij niet gegrond acht en de zaak terug verwijst naar de rechtbank om te beoordelen of de gevorderde voorziening op grond van het Unierecht moet worden toegewezen.

29-5-2004

De opstelling van de H/R beleidsdat instructies minister niet mogen weigeren of zelf niet meer te doen wat opgelegd wordt door IRAK

(Tenzij het hen zelf in moeilijkheden brengt.)

of the four judges that were against the rejection
Yugoslavia. There is a clear pattern here.

6.2. Jus Cogens and Erga Omnes

As has been seen earlier in this paper, the prohibition of the use of force is part of *jus cogens*, that is, a peremptory norm of international law. It can be argued that the violation of such a rule gives rise to an obligation *erga omnes*, gives rise to erga omnes obligations of protection that bind all states and generates effects to third parties, including private persons.[44]

In the present case, that would mean that the Court could not have dabbled with a norm of *jus cogens* by the pseudo-argument that Yugoslavia recognized the jurisdiction too late, and since the wording of the recognition spoke only disputes from the date of recognition onwards, Yugoslavia had excluded the Court's jurisdiction to deal with the issue. The important point is, however, that if the non-use of force is a norm of *jus cogens* which gives rise to an obligation *erga omnes*, then the NATO countries would have had enforceable obligations towards Yugoslavia, even if the recognition of the jurisdiction had been lacking

CONSEQUENTIES VAN DE AGRESSIE-OPVATTINGVAN DE HOGE RAAD

Een consequentie van de opvatting van de Hoge Raad over de toetsbaarheid van agressie is dat de rechter geen oordeel kan ovellen over de rechtmatigheid van een mogelijke bezetting van Nederland, stel daartoe door een Ned. Staatsburger daarom gevraagd. Dat zou de Hoge Raad dus niet kunnen doen tijdens deze bezetting, al zou dan, achtte de HR zich daar wél toe in staat, een de beztter onwelgevallig oordeel waarschijnlijk wel uitblijven, zo leert de geschiedenis. Maar ook na zo'n bezetting zou de HR daar geen oordeel over kunnen geven, hoeveel dood en verderf een dergelijke bezetting ook zou hebben veroorzaakt.
De HR was niet alleen toen fout, maar is het ook nu !

Sagittarius

Van: "Sagittarius"
Aan: "Sagittarius"
Verzonden: woensdag 12 mei 2004 12:53
Onderwerp: aangifte

Advocatenkantoor Steijnen & Olof
Couwenhoven 52-05
3703 ER Zeist
tel. 030-6956867
fax 030-6957830
sagitar@hetnet.nl

Aan de Hoofdofficier van Justitie
de heer mr. H.J. Moraal MPA
Paleis van Justitie
Prins Clauslaan 60
2595 AL Den Haag

12 mei 2004

Geachte heer Moraal,

Hierbij doe ik aangifte van dood door schuld ten aanzien van de Nederlandse militair Steensma in Irak, dan wel van medeplichtigheid aan het tegen Steensma gerichte misdrijf tegen het leven.
Deze aangifte richt zich tegen de stafchef van het Nederlandse leger, de admiraal L. Kroon, alsmede tegen minister-president J.P. Balkenende en de minister van defensie W. Kamp.

Ik verzoek u terzake vervolging in te stellen tegen de genoemde personen vanwege dood door schuld ten aanzien van het overlijden van de genoemde Nederlandse militair Steensma in Irak, dan wel terzake van medeplichtigheid aan het tegen Steensma gerichte misdrijf tegen het leven.

De zaak ligt eenvoudig.

Aangezien de oorlog tegen Irak elke legitimiteit in het volkenrecht ontbeerde, nu een resolutie van de Veiligheidsraad om dit land met militair geweld te lijf te gaan ontbrak, moet deze oorlog mitsdien als een agressie-oorlog moet worden aangemerkt.

Agressie is het ergst denkbare misdrijf dat het recht kent.
Reeds bij de processen van Neurenberg is vastgesteld:

"To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."
(H.M. Attorney-General (ed.); The Trial of the German Major War Criminals, Part 22, HSMO (London 1959), p. 421).

Dat deze opvatting van Neurenberg allerminst obsoleet is geworden, blijkt ook uit het Statuut van het Internationale Strafhof, waarin artikel 5 agressie aanmerkt als een van de 'most serious crimes'.

Voor het plegen van agressie zijn na de Tweede Wereldoorlog hoge Japanse en Duitse functionarissen opgehangen.

Artikel 1 van de United Nations General Assembly Resolution on the Definiton of Aggression, Resolutie 3314

(XXIX) van 14 december 1974, luidt:

"Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition

En artikel 3 van deze definitie-Resolutie luidt dan:

"Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:
a. The invasion or attack by armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof."

Bezetting, volgend op onrechtmatig gebruik van oorlogsgeweld, is dus evenzeer aan te merken als agressie als de onrechtmatige aanvallen zelf.

In tegenstelling tot veelvuldig en met graagte verkondigde pseudo-juridische bewering dat een agressie-oorlog en onrechtmatige bezetting achteraf door enige resolutie
van de Veiligheidsraad alsnog zouden kunnen worden gelegitimeerd, is dit een volkenrechtelijke onmogelijkheid.
De resolutie van de Veiligheidraadsraad achteraf kan een dergelijke agressie niet alsnog disculperen, dit alleen al vanwege het feit dat het verbod van agressie van dwingendrechtelijk volkenrechtelijk karakter is en als zodanig on aantastbaar boven alle andere recht uitstijgt.

De Veiligheidsraad is derhalve niet bij machte om het volstrekt onrechtmatige karakter van agressie en daarop volgende illegale bezetting op te heffen.
Medewerking aan militaire aspecten van een illegale bezetting blijft dan ook te allen tijde fundamenteel in strijd met het volkenrecht.
En al zou de Veiligheidsraad anders (willen) bepalen, ze zou daartoe niet in staat zijn.
Dit laat natuurlijk onverlet dat de Veiligheidsraad eventueel andere landen oproept om, op grond van humanitaire overwegingen, de Occupying Power(s) bij de wederopbouw van enig onrechtmatigerwijs bezet land bij te staan met civiele hulpverlening.
Een 'mandaat' van de Veiligheidsraad om de Occupying Power(s) militair bij te staan, zou echter juridisch volstrekt krachteloos zijn. Want fundamenteel in strijd met de essenties van het volkenrecht op dit punt.

In tegenstelling tot de bedrieglijke voorspiegelingen van de zijde van de regering, is er van een zodanig mandaat van de Veiligheidsraad ook geen sprake.
De bestaande Veiligheidsraadsresoluties kunnen onmogelijk te goeder trouw zo worden geinterpreteerd als zouden zij een verzoek behelzen om de Occupying Powers in Irak militair te hulp te komen.
Toch baseren Kroon, Balkenende en Kamp de uitzending van Nederlandse militairen naar Irak op een dergelijke perfide interpretatie van de Veiligheidsraadsresoluties.

Dat zij hierin ook zelf in feite niet geloven, blijkt uit hun recenhte roep om een 'duidelijker VN-mandaat'.

Nederland knapt in een deel van Irak het militaire werk op van de Occupying Powers.
Daarmee is Nederland onmiskenbaar en onloochenbaar zelf Occupying Power geworden.
Enkele toegepaste organisatorische kunstgrepen vormen alleen maar een bedroevende poging om dit harde feit te verhullen.

De in Irak aanwezige onderdelen van het Nederlandse leger vormen dus een bezettingsleger.
Een illegaal bezettingsleger, want de bezetting van Irak is, als uitvloeisel van een eedere agressie-oorlog, volstrekt onrechtmatig.

De Nederlandse militaire bezetters in Irak vormen, juist vanwege het onrechtmatige karakter van deze bezetting, een gerechtvaardigd doelwit voor Iraakse verzetsbewegingen.
Het volkenrecht kent immers uitdrukkelijk aan de bevolkingen van bezette en gekoloniseerde landen het recht toe op gewapend verzet en gewapende vrijheidsstrijd, mits daarbij zekere regels en beperkingen in acht worden genomen.

De aanslag op de Nederlandse militairen vormde dan ook een, naar maatstaven van internationaal recht, volkomen gerechtvaardigde aanval op de bezetter.
Als zodanig bestaat er, kwalitatief-juridisch gezien, geen enkel fundamenteel verschil tussen aanslagen die

in de Tweede Wereldoorlog door het Nederlandse verzet op de Duitsers werden uitgevoerd en deze aanval die hier op de Nederlandse soldaten werd uitgevoerd, hoezeer deze aanslag ook menselijkerwijs diep valt te betreuren.

Ook het veronderstelde temporele karakter van de bezetting in Irak brengt hierin geen verandering, zoals in artikel 3 van de agressie definitie-Resolutie duidelijk wordt gestipuleerd.
Wie overigens gelooft dat de Amerikanen nu Irak hebben bezet om er weer weg te gaan, maakt zich schuldig aan ongelooflijke naiviteit. Bij enigerlei 'soevereiniteits-overdracht' zullen zij hoogstens een marionetten-regering dulden, zoals zij indertijd ook jarenlang in Vietnam op de been hielden. Die een permanente aanwezigheid van Amerikaanse bases geen strobreed in de weg zal leggen.

Naar volkenrechtelijke maatstaven hebben derhalve Iraakse verzetsgroepen, mits zij daarbij bepaalde door het recht gestelde grenzen niet overschrijden, alle recht van de wereld de Nederlandse illegale bezetttingstroepen in Irak gewapenderhand te bestrijden.
Niet zij zitten daarmee verkeerd, maar de Nederlandse bezetter.

Niet hen vallen de Nederlandse doden en gewonden die bij gewapende acties van het Iraakse verzet vallen primair aan te rekenen, maar de Nederlandse autoriteiten die er de oorzaak van zijn dat Nederlandse militairen, onrechtmatigerwijs, aan dergelijke gewapende verzetsakties worden blootgesteld.

Agressie is het meest ernstige misdrijf dat het recht kent. Voor oorlogsmisdrijven en het misdrijf van agressie is het allang, sedert Neurenberg, een volkomen in het recht geintegreerd uitgangspunt dat zowel zij die zich daaraan direct schuldig maken als degenen die zich hieraan medeplichtig maken hiervoor een persoonlijke verantwoordelijkheid moeten dragen en rechtstreeks aansprakelijk zijn.

Dat geldt dus ook voor de chefstaf van Nederlandse leger, de admiraal Kroon, die de militaire eindverantwoordelijkheid draagt voor de Nederlandse participatie in de illegale bezetting van Irak.
Evenzeer als voor Balkenende en Kamp, die hiervoor politiek de meest rechtstreeks verantwoordelijken zijn.

Door hun optreden worden de levens en gezondheid van Nederlandse militairen permanent onrechtmatigerwijs in de waagschaal gesteld.
Hieraan behoort onmiddelijk een einde te worden gesteld !

Hun treft tevens dood door schuld terzake van het overlijden van de Nederlandse militair Steensma.
Indien en zover de aanslag van het Iraakse verzet zou worden beschouwd als een misdrijf gericht tegen het leven van Steensma, treft Kroon, Balkenende en Kamp tevens
het verwijt van medeplichtigheid hieraan op basis van artikel 48 jo. artikel 78 Wetboek van Strafrecht, nu zij Steensma opzettelijk en wederrechtelijk in een positie hebben gebracht waarin hij het risico liep het slachtoffer te worden van een dergelijk misdrijf.

Ik verzoek u om mij omtrent het verdere verloop met betekking tot deze aangifte, annex dit verzoek om vervolging, op de hoogte te houden.
Tevens verzoek ik u om een ontvangstbevestiging

12-5-04

Sagittarius

Van:
Aan: <J.Willems@IR.unimaas.nl>
Verzonden: <sagitar@hetnet.nl>; <humwie@knoware.nl>; <diederikgosewehr@planet.nl>
Onderwerp: maandag 8 maart 2004 10:14
FW: Commentaar arrest HR 6 februari 2004 inzake de "oorlog tegen het

-----Original Message-----
From: Willems J (IR)
Sent: maandag 8 maart 2004 10:12
To: 'Meindert Stelling'
Subject: RE: Commentaar arrest HR 6 februari 2004 inzake de "oorlog tegen het terrorisme"

beste Meindert,

misschien is het een goed idee voor een NJB stuk contact op te nemen met Nico Schrijver : zie zijn 'Kroniek van het internationaal publiekrecht' in NJB 6 maart 2004 www.njb.nl :

""Hoge Raad over Nederland en de oorlog tegen Afghanistan

De inhoud van het begrip 'gewapende aanval' en de vereisten van noodzaak en proportionaliteit bij zelfverdediging figureerden ook in een proces dat een serie vredesgroepen, waaronder de Vereniging Juristen voor de Vrede, hadden aangespannen tegen de Staat der Nederlanden. In oktober 2001 vorderden zij in kort geding dat de Nederlandse regering werd verboden om deel te nemen aan enigerlei militaire actie, zolang daartoe geen opdracht of machtiging van de VN-Veiligheidsraad was verleend onder artikel 42 van het VN-Handvest. Bovendien eisten de verenigingen dat dit standpunt kenbaar zou worden gemaakt aan de VS en de VN en dat de Nederlandse regering hierover ook een ontwerp-resolutie bij de VN zou indienen. Zij waren van mening dat 'elf september' geen gewapende aanval op de VS vormde en zo dat al het geval was, meenden zij dat gebruik van of dreiging met geweld niet noodzakelijk en disproportioneel zou zijn omdat de aanval niet meer gaande was. Op 26 oktober 2001 verklaarde de president van de Haagse rechtbank de eisers ontvankelijk onder verwijzing naar de overeenkomst tussen hun statutaire doelstellingen ter bevordering van wereldvrede en versterking van de internationale rechtsorde en doelstellingen van artikel 90 Gw.
Desalniettemin wees de president de vorderingen af omdat hij meende dat de aanslagen van 11 september 2001 wel een gewapende aanval op de VS vormden en de rechtvaardiging voor de militaire acties van de VS en het VK derhalve wel in artikel 51 VN-Handvest gevonden kon worden. Derhalve constateerde hij dat de steun van de Nederlandse regering aan die acties geen schending van artikel 90 Gw vormde.
In hoger beroep bekrachtigde het Gerechtshof te Den Haag op 16 mei 2002 het vonnis van de president van de rechtbank. Daarop tekenden eiseressen cassatie aan. Op 6 februari 2004 stelde de Hoge Raad eiseressen evenwel opnieuw in het ongelijk, waarbij de heldere analyse en conclusies van advocaat-generaal Langemeijer tot verwerping van het beroep werden overgenomen. Interessant zijn de beschouwingen van de Hoge Raad over het karakter van artikel 90 Gw als 'een instructie aan de regering om de internationale rechtsorde te bevorderen'. Dit artikel bepaalt niet de wijze hoe dat dient te gebeuren. Dat zal in sterke mate afhangen van de politieke afwegingen door de regering. De Hoge Raad acht het niet aan de burgerlijke rechter om deze politieke afwegingen te maken en op verlangen van burgers de

regering bepaalde handelingen ter uitvoering van buitenlandse politiek of defensie te verbieden of op te leggen. Daarmee bevestigde de Hoge Raad ook de opvatting van het Hof en de A-G inzake de trias politica. De Raad onderschreef aldus dat de artikelen 2, lid 4 (geweldverbod), 42 (collectieve militaire actie) en 51 (zelfverdediging) van het VN-Handvest geen bepalingen zijn die een ieder naar hun inhoud kunnen verbinden in de zin van artikel 93 Gw en waarop de burger een beroep kan doen voor de nationale rechter. Terecht bevestigde de Hoge Raad dat dergelijke bepalingen uitsluitend rechten en verplichtingen met zich meebrengen in de betrekkingen tussen staten.""

hartelijke groet,
Jan

-----Original Message-----
From: Meindert Stelling [mailto:meindert.stelling@planet.nl]
Sent: zaterdag 6 maart 2004 12:48
To: Erik Hummels; Nico Steijnen
Cc: Diederik Gosewehr; Jan Willems
Subject: Commentaar arrest HR 6 februari 2004 inzake de "oorlog tegen het terrorisme"

Beste mensen,

Bijgaand zend ik jullie mijn opmerkingen bij het teleurstellende arrest van de Hoge Raad inzake de "oorlog tegen het terrorisme", die ik cursief - inspringend in de tekst van dat arrest heb ingetypt (er zijn twee versies bijgevoegd: een Word bestand en een WordPerfect bestand, zodat je altijd één kunt bezien). Ik wil hierover een artikel schrijven voor het Nederlands Juristenblad.

Graag verneem ik jullie reactie op mijn commentaar, zodat ik ervan verzekerd ben geen misslagen te zullen maken. Aanvullende opmerkingen verneem ik uiteraard even graag.

Bij voorbaat mijn dank voor jullie spoedige reactie.

Vriendelijke groeten,

Meindert

Deze e-mail is door E-mail Virus Scan van Het Net gecontroleerd op virussen. Zie voor meer informatie: http://www.hetnet.nl/evs/

Sagittarius

Van: "Sagittarius" <sagitar@hetnet.nl>
Aan: "Meindert Stelling" <meindert.stelling@planet.nl>; "Erik Hummels" <humwie@knoware.nl>
CC: "Diederik Gosewehr" <diederikgosewehr@planet.nl>; "Jan Willems" <j.willems@ir.unimaas.nl>
Verzonden: zaterdag 6 maart 2004 16:32
Onderwerp: Re: Commentaar arrest HR 6 februari 2004 inzake de "oorlog tegen het terrorisme"

Hoi Meindert,

Je commentaar-alinea, beginnend met:
"Het is volstrekt duidelijk dat het geweldverbod zich richt tot staten."
Ik zou dat zo niet formuleren. Dat is de kat op het spek binden. De link naar: dat is een bevestiging dat het geweldverbod zich uitsluitend tot staten richt, is dan snel gelegd. Hoogstens kan je zeggen: "Het is volstrekt duidelijk dat de specifieke contekst waarin het artikel 2 lid 4 handvest het geweldverbod aan de orde stelt zich specifiek op staten richt, maar overigens moet met klem benadrukt blijven worden dat het geweldverbod zich tot alles en iedereen richt. Met name ook tot individuele personen, zoals artikel 5 van Het Statuut van het Internationaal Strafhof impliciet herbevestigt.
De kern van de zaak is hier dat de Hoge Raad ziich maximale inspanningen blijft getroosten om, desnoods ten koste van de grootst mogelijke juridische onzin, de Staat een onbegrensde vrije ruimte te garanderen om, zorgvuldig afgeschermd van elke rechterlijke toetsing, naar believen al of niet agressie te plegen
Hoe ver de Hoge Raad bereid is eventuele agressie van de Staat niet alleen de vrije teugel te laten door een ijzeren juridisch cordon te leggen rond elke mogelijkheid van juridische toetsing terzake en hoever de Hoge Raad daarbij zelfs bereid is om de grondslagen van het recht aan te tasten, komt nog aan de orde bij de bespreking van het vervolg van het arrest.

De commentaar-alinea, beginnend met de zin:
"Deze laatste stelling is aperte onzin."
Ik zou daarvan maken: "Deze laatste stelling raakt, in meerdere opzichten juridisch kant noch wal. De Hoge Raad tast hiermee de grondslagen van onze rechtsordening aan. En hij doet dat willens en wetens.
Dat er enig strafrechtelijk beginsel zou kunnen bestaan waarvoor de Staat (het OM) een individuele burger strafrechtelijk verantwoordelijk zou kunnen houden, waarop door diezelfde burger jegens diezelfde Staat geen beroep in rechte zou kunnen worden gedaan, is al honderden jaren, sinds de afschaffing van het absolutisme, ondenkbaar en onbestaanbaar. Bovendien komt de Hoge Raad hier tot een ontkenning van Neurenberg. Indien de Staat aan burgers of militairen zou opdragen om mee te doen...etc." (jouw tgeklst verder).

En ik zou willen besluiten met:

"In de Tweede Wereldoorlog was de Hoge Raad zo fout als maar zijn kan. Van deze juridische decofiture heeft de Hoge Raad kennelijk niets geleerd, nu opnieuw oorlogen klaarblijkelijk het onafhankelijke oordeelsvermogen van de Hoge Raad grondig blijken te aan te vreten."

beste groeten aan iedereen

Rabobank Zeist,
rekeningnr. 37.52.38.832
gironummer Rabobank: 21 71 31

LJN-nummer: AN8071 Zaaknr: C02/217HR
Bron: Hoge Raad der Nederlanden 's-Gravenhage
Datum uitspraak: 6-02-2004
Datum publicatie: 6-02-2004
Soort zaak: civiel - civiel overig
Soort procedure: cassatie

6 februari 2004
Eerste Kamer
Nr. C02/217HR
JMH/AT

Hoge Raad der Nederlanden

Arrest

in de zaak van:
1. VERENIGING VAN JURISTEN VOOR DE VREDE,
gevestigd te Utrecht,
2. Politieke partij DE GROENEN,
gevestigd te Utrecht,
3. VROUWEN VOOR VREDE,
gevestigd te Amersfoort,
4. HAAGS VREDESPLATFORM,
gevestigd te 's-Gravenhage,
5. NIEUWE COMMUNISTISCHE PARTIJ - NCPN,
gevestigd te Amsterdam,
EISERESSEN tot cassatie,
advocaat: mr. J. Groen,

t e g e n

DE STAAT DER NEDERLANDEN (Ministeries van Algemene Zaken, van Defensie en van Buitenlandse Zaken),
gevestigd te 's-Gravenhage,
VERWEERDER in cassatie,
advocaat: mr. G.J.H. Houtzagers.

1. Het geding in feitelijke instanties

Eiseressen tot cassatie - verder te noemen: VJV c.s. - hebben bij exploot van 9 oktober 2001 verweerder in cassatie - verder te noemen: de Staat - in kort geding gedagvaard voor de president van de rechtbank te 's-Gravenhage en - zakelijk weergegeven - gevorderd bij vonnis, uitvoerbaar bij voorraad:
I. de Staat te verbieden medewerking te verlenen aan de dreiging met of het gebruik van militair geweld door (bondgenoten van) de VS tegen personen die door de VS in verband worden gebracht met de aanslag van 11 september 2001, dan wel de Staat te verbieden zelf dat geweld te gebruiken of daarmee te dreigen, een en ander zolang de Veiligheidsraad niet door middel van een nadere resolutie op grond van artikel 42 van het Handvest opdracht daartoe heeft verleend;

Deze zakelijke weergave is al enigszins merkwaardig, want het element dat agressie inhoudt, is hieruit verdwenen. Het gaat hierbij om de zinsnede "die zich bevinden op het grondgebied van andere soevereine staten".

Mr. N.M.P. Sleijnen

II. de Staat te bevelen terstond aan de regering van (bondgenoten van) de VS, de Veiligheidsraad, de Algemene Vergadering en de secretaris-generaal van de VN mee te delen dat iedere dreiging met of het gebruik van militair geweld door (bondgenoten van) de VS tegen personen die door de VS in verband worden gebracht met de aanslag van 11 september 2201, onverenigbaar is met het geweldverbod, met het Handvest en met beginselen en regels van internationaal gewoonterecht, alsmede aan de Veiligheidsraad, de Algemene Vergadering en de secretaris-generaal van de VN een ontwerp resolutie te doen toekomen waarin die mededeling is verwoord.

Deze "zakelijke weergave" maakt een karikatuur van onze vorderingen. Alsof militair geweld tegen een persoon of tegen personen in het algemeen, bijvoorbeeld op het eigen territoir, in het eigen luchtruim of in eigen territoriale wateren, iets te maken zou hebben met agressie of met het volkenrechtelijk geweldverbod.

De Staat heeft de vordering bestreden.
De president heeft bij vonnis van 26 oktober 2001 de vordering afgewezen.
Tegen dit vonnis hebben VJV c.s. hoger beroep ingesteld bij het gerechtshof te 's-Gravenhage. De Staat heeft incidenteel hoger beroep ingesteld.
Bij arrest van 16 mei 2002 heeft het hof het vonnis waarvan beroep bekrachtigd.
Het arrest van het hof is aan dit arrest gehecht.

2. Het geding in cassatie

Tegen het arrest van het hof hebben VJV c.s. beroep in cassatie ingesteld. De cassatiedagvaarding en het herstelexploot zijn aan dit arrest gehecht en maken daarvan deel uit.
De Staat heeft geconcludeerd tot verwerping van het beroep.
De zaak is voor partijen toegelicht door hun advocaten en voor de Staat mede door mr. M.W. Scheltema, advocaat bij de Hoge Raad.
De conclusie van de Advocaat-Generaal F.F. Langemeijer strekt tot verwerping van het beroep.
De advocaat van VJV c.s. heeft bij brief van 23 november 2003 op deze conclusie gereageerd.

3. Beoordeling van de middelen

3.1 In cassatie kan worden uitgegaan van de feiten vermeld in de conclusie van de Advocaat-Generaal onder 1.1.

3.2 In het onderhavige kort geding hebben VJV c.s. de hiervoor in 1 weergegeven vorderingen ingesteld. De president heeft deze vorderingen afgewezen, welke beslissing is gebaseerd op zijn oordeel dat de militaire acties van de VS op grond van art. 51 van het Handvest van de Verenigde Naties niet in strijd kunnen worden geacht te zijn met dwingende beginselen en regels van het volkenrecht, hetgeen meebrengt dat de steun van de Staat aan die acties ook niet in strijd is met art. 90 Gr.w.
Het hof heeft in het incidentele appel van de Staat overwogen dat de door VJV c.s. ingeroepen bepalingen van internationaal recht, meer in het bijzonder art. 2 lid 4, 42 en 51 van het Handvest van de Verenigde Naties, geen bepalingen zijn die naar hun inhoud een ieder kunnen verbinden in de zin van art. 93 Gr.w. en waarop de burger voor de nationale rechter een beroep kan doen, zodat hier voor de nationale, burgerlijke rechter geen taak is weggelegd. Het Hof heeft geoordeeld dat de desbetreffende grief in het incidentele appel doel treft en dat de in het principale appel voorgedragen grieven falen bij gebrek aan belang, en het heeft het vonnis van de president bekrachtigd.

3.3 Middel I verwijt het hof te zijn uitgegaan van een verkeerde lezing van de vorderingen van VJV c.s., doordat het heeft miskend dat VJV c.s. tevens hebben gevorderd dat de regering mededeling doet aan de Verenigde Staten en haar bondgenoten en aan de Verenigde Naties dat het onderhavige optreden onverenigbaar is met het geweldverbod, het Handvest van de Verenigde Naties en met beginselen en regels van internationaal gewoonterecht. Het middel kan bij gebrek aan feitelijke grondslag niet tot cassatie leiden. Het hof heeft kennelijk deze vorderingen op het oog waar het in zijn samenvattende weergave van de vorderingen van VJV c.s. spreekt van "nevenvorderingen" en het heeft op de in zijn rov. 3 vermelde gronden ook deze vorderingen als ongegrond aangemerkt.

Het eerste middel was erop gericht om volstrekt duidelijk te houden waar het in de kern van het geding over ging. Ons geding ging niet uitsluitend over Afghanistan, maar over de agressie tegen alle landen die door president Bush waren bedreigd in verband met diens "oorlog tegen het terrorisme". Het Hof had, door uitsluitend te spreken over de agressie tegen Afghanistan, ons petitum dus te beperkt uitgelegd.
De Hoge Raad gaat wel op een zeer merkwaardige manier om met deze kritiek op de beperking van het geding tot één geval van Amerikaans-Britse agressie door het Hof. Daarbij doet de Hoge Raad alsof wij ons zouden hebben verzet tegen de invulling van het woord "nevenvorderingen". Onze schriftelijke toelichting van 16 mei was in ieder geval ook volstrekt helder. Daar is gesteld:

> Het gaat en ging ..... niet uitsluitend om de beoordeling van de steun van de Staat aan agressie van de Verenigde Staten van Amerika (VS) en het Verenigd Koninkrijk (VK) tegen Afghanistan. Het gaat om de beoordeling van de rechtmatigheid van Nederlandse steun, in welke vorm dan ook, aan eigenmachtig gewelddadig militair optreden van de VS alleen of tezamen met andere bondgenoten tegen derde staten met het oog op het tegengaan van terrorisme.

Wanneer je dit hebt gelezen en je interpreteert het eerste middel dan op de manier waarop de Hoge Raad dit doet, dan begin ik aan de intellectuele vermogens van de leden van de Hoge Raad te twijfelen.

3.4 In art. 2 lid 4 van het Handvest van de Verenigde Naties is onder meer het tot de lidstaten gerichte verbod neergelegd geweld te gebruiken tegen de territoriale integriteit of de politieke onafhankelijkheid van een staat. Dit geweldverbod strekt derhalve tot bescherming van staten en het hof heeft dan ook met juistheid geoordeeld dat een burger voor zijn nationale rechter geen beroep kan doen op deze bepaling en evenmin op de nauw hiermee samenhangende art. 42 en 51 van het Handvest (vgl. HR 29 november 2002, nr. C01/027, NJ 2003, 35, rov. 3.5).

Het is volstrekt duidelijk dat het geweldverbod zich richt tot staten. Maar daarmee is bepaald niet gezegd dat dat verbod uitsluitend tot doel heeft om staten te beschermen. Wanneer het Handvest van de Verenigde Naties te goeder trouw wordt uitgelegd, dan is het volstrekt helder dat het geweldverbod met name ook tot doel heeft om de individuele staatsburgers te beschermen. Gewezen kan worden op de preambulaire overwegingen van het Handvest van de Verenigde Naties, waarin wordt aangegeven dat met het oog op onder meer de "waardigheid en waarde van de menselijke persoon" de VN is opgericht. Met andere woorden: de VN is opgericht met het oog op de behartiging van fundamentele mensenrechten. Die rechten worden gediend door vrede en veiligheid te handhaven.
Bovendien is in dit verband art. 28 van de Universele Verklaring van de Rechten van de Mens van belang, waarop de VJV c.s. uitdrukkelijk hebben gewezen: "Een ieder heeft

recht op het bestaan van een zodanige maatschappelijke en internationale orde, dat de rechten en vrijheden, in deze Verklaring genoemd, daarin ten volle kunnen worden verwezenlijkt." In samenhang met de preambulaire overwegingen van het Handvest van de Verenigde Naties is het duidelijk dat hiermee tevens wordt gewezen op het individuele mensenrecht op een internationale orde waarin het geweldverbod wordt gerespecteerd.
Een derde steunpunt voor deze opvatting is te vinden in nota bene de conclusie van de procureur-generaal. Deze citeert de toelichting op art. 90 Grondwet:

> De tegen de achtergrond van deze overtuiging (...) in 1953 in de Grondwet opgenomen bepaling inzake de bevordering der internationale rechtsorde doet dan ook in de eerste plaats uitkomen, dat in het Nederlandse constitutionele bestel de nationale soevereiniteit niet als een absolute norm wordt beschouwd. Tegelijkertijd omvat het streven naar een op universeel geldende rechtsnormen gebaseerd internationaal stelsel ook naar onze mening het bevorderen van universele verwezenlijking van de rechten van de mens, en wel in de breedste zin van het woord, dat wil zeggen zowel de burgerrechten en politieke rechten als de economische, sociale en culturele rechten. Uit dien hoofde kan ook de bevordering van het welzijn der wereldbevolking hieronder worden begrepen.

Uit dit citaat blijkt heel duidelijk dat, ook in de visie van de wetgever, art. 90 Grondwet de belangen van de individuele mens beoogt te dienen.

Art. 90 Gr.w., waarop VJV c.s. hun vorderingen mede hebben gegrond, leidt niet tot een ander oordeel. Weliswaar behelst dit artikel een instructie aan de regering de internationale rechtsorde te bevorderen, maar noch dit noch enig ander artikel bepaalt op welke wijze hieraan uitvoering moet worden gegeven. In dit verband merkt de Hoge Raad op dat de onderhavige vorderingen van VJV c.s. betrekking hebben op vragen betreffende het beleid van de Staat op het gebied van buitenlandse politiek en defensie, welk beleid in sterke mate zal afhangen van politieke afwegingen in verband met de omstandigheden van het geval. Het is, ook waar het het geweldverbod betreft, niet aan de burgerlijke rechter om deze politieke afwegingen te maken en op verlangen van een burger de Staat (de regering) bepaalde handelingen ter uitvoering van politieke besluitvorming op het gebied van buitenlands beleid of defensie te verbieden of hem te gelasten op dit gebied een bepaalde gedragslijn te volgen.

Hier raken we de kern van de zaak. De Hoge Raad doet het voorkomen alsof er op het terrein van de buitenlandse politiek geen wettelijke - in de zin van in het internationaal publiekrecht vastgelegde - grenzen zijn gesteld aan die beleidsvrijheid. Die wettelijke grenzen zijn er wel degelijk, waaronder het volkenrechtelijk geweldverbod. De VJV c.s. hebben van de rechter dan ook stellig niet om een politiek oordeel van de rechter gevraagd. Alleen al de suggestie die hierin ligt besloten, dat de VJV c.s. een politiek oordeel van de rechter zouden hebben gevraagd, getuigt al van een volstrekte minachting voor het maatschappelijk en juridisch inzicht van de VJV c.s.; deze rechtspersonen zouden nog niet eens het inzicht hebben verworven dat de rechter uitsluitend een rechtmatigheidsoordeel kan geven.
In tegenstelling tot hetgeen de Hoge Raad suggereert, hebben de VJV c.s. geen politiek oordeel gevraagd, maar een rechtsoordeel. Indien de Staat besluit tot gebruik van militair geweld of tot steun aan een andere Staat die is overgegaan tot gebruik van militair geweld, kan de rechter dit gedrag van de Staat wel degelijk toetsen aan de terzake geldende rechtsnormen. De Hoge Raad doet het voorkomen alsof er wat dit betreft alleen sprake zou kunnen zijn van een politiek oordeel. Dit is een verbluffende ontkenning van de rechtsvraag die wel degelijk aan de orde is gesteld door de VJV c.s. Temeer nu het volkenrechtelijk geweldverbod deel uitmaakt van het ius cogens.
De overwegingen van het Internationaal Gerechtshof in onder meer de Advisory Opinion van 8 juli 1996 inzake kernwapens zou de Hoge Raad tot voorbeeld kunnen strekken. In paragraaf 13 van die Opinion heeft het Internationaal Gerechtshof overwogen:

> De vraag die aan het Hof is gesteld door de Algemene Vergadering is inderdaad een rechtsvraag, aangezien het Hof gevraagd wordt zich er over uit te spreken of de bedreiging met of het gebruik van kernwapens verenigbaar is met de toepasselijke beginselen en regels van internationaal recht. Om dit te doen, moet het Hof de bestaande beginselen en regels aanwijzen, ze interpreteren en toepassen op de bedreiging met of het gebruik van kernwapens, en op deze manier een op het recht gebaseerd antwoord geven op de gestelde vraag.
> Het feit dat deze kwestie ook politieke aspecten heeft, zoals uiteraard het geval is met veel kwesties die spelen op internationaal terrein, is niet voldoende om haar het karakter van "rechtsvraag" te ontnemen en "het Hof een bevoegdheid te ontnemen die het uitdrukkelijk door zijn Statuut wordt verleend" (*Verzoek om herziening van uitspraak nr. 158 van het Administratief Tribunaal van de Verenigde Naties, Advies, I.C.J. Reports 1973, p. 172, § 14).*

Het feit dat de vraag naar het gebruik van militair geweld ook politieke aspecten heeft, ontneemt aan de vraag of bepaald militair optreden al dan niet in overeenstemming is met het volkenrechtelijk geweldverbod niet het karakter van rechtsvraag en ontneemt aan de Hoge Raad ook niet de bevoegdheid om daarover te oordelen indien dit noodzakelijk is in het kader van een burgerrechtelijke procedure op grond van onrechtmatige daad.

Het betoog van VJV c.s. dat het geweldverbod in verband met het beginsel van individuele verantwoordelijkheid betreffende misdrijven tegen de vrede een volkenrechtelijke norm is die een ieder verbindt, doet hieraan niet af. Dat ook een individuele burger ingevolge dit beginsel verantwoordelijk kan worden gehouden voor handelen in strijd met het geweldverbod, betekent nog niet dat een individuele burger op grond van dit beginsel jegens de Staat in rechte een beroep op het geweldverbod kan doen.

Deze laatste stelling in deze formulering is aperte onzin. Indien de Staat aan burgers of militairen zou opdragen om mee te doen aan agressie, dan zijn zij op grond van de beginselen van Neurenberg verplicht een dergelijke opdracht naast zich neer te leggen. Zij kunnen zich op deze verplichting tegenover de Staat beroepen, want - zoals het Internationaal Militair Tribunaal van Neurenberg heeft geoordeeld - voor iedereen geldt:

> ... individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law.

Wellicht dat nog enige nuancering zou kunnen worden aangebracht, in die zin dat mogelijkerwijs zou kunnen worden betoogd dat niet iedere burger voldoende belang zou hebben tegenover de Staat om in rechte op te komen tegen iedere schending door de Staat van het volkenrechtelijk geweldverbod. Hoewel een dergelijk stellingname buitengewoon twijfelachtig zou zijn, zou de redenering kunnen worden gevolgd dat, indien een bepaald gebruik van militair geweld geen enkel onmiddellijk gevolg heeft voor de individuele staatsburger en die individuele staatsburger nog nooit enige activiteit heeft ondernomen met het oog op de handhaving van de internationale rechtsorde, dat in een dergelijk geval die staatsburger geen belang bij een juridische procedure tegen de Staat heeft. Ikzelf zou deze redenering niet tot de mijne willen maken, maar hij is in ieder geval nog binnen de grenzen van het redelijke te verdedigen. Dit laatste neemt uiteraard niet weg dat in een dergelijke de VJV c.s. wel degelijk voldoende belang hebben bij een procedure tegen de Staat, vanwege de voortdurende aandacht die zij besteden aan de internationale rechtsorde en de internationale vrede en veiligheid.

Het betoog van VJV c.s. dat het geweldverbod en art. 90 Gr.w. strekken tot bescherming van fundamentele rechten als het recht op een vreedzame internationale orde, het recht op leven en het recht op ongestoord genot van persoonlijke bezittingen, en dat dit rechtstreeks meebrengt dat de burgerlijke rechter de door VJV c.s. aangevoerde stellingen moet onderzoeken dat de Staat de uit art. 90 Gr.w. voortvloeiende verplichtingen niet nakomt en dat daardoor de belangen van VJV c.s. op onrechtmatige wijze worden aangetast, treft evenmin doel. Dit betoog stuit reeds af op hetgeen hiervoor is overwogen en miskent bovendien dat VJV c.s. in feitelijke instantie niet een inbreuk op deze fundamentele rechten aan hun vorderingen ten grondslag hebben gelegd, en dat de vraag of van zodanige inbreuk sprake is geweest mede een onderzoek van feitelijke aard vergt waarvoor in cassatie geen plaats is.

Hier geeft de Hoge Raad een onjuiste voorstelling van zaken wat betreft de feiten. In de eerste plaats is inherent aan de overtreding van het volkenrechtelijk geweldverbod dat mensenlevens op het spel staan en zaken worden vernietigd of beschadigd. De toepassing van militair geweld kan niet anders dan gepaard gaan met verlies van mensenlevens, verwondingen en verminkingen, alsook grote materiële schade. Wanneer schending van het volkenrechtelijk geweldverbod wordt gesteld, wordt daarmee ipso facto schending van mensenrechten gesteld. De Hoge Raad miskent dit en suggereert dat een oorlog kan worden gevoerd zonder dat mensen in hun leven zouden worden bedreigd. Dit is te gek voor woorden. De Hoge Raad toont zich hiermee een "Furchtbare Richter" in optima forma.
In de tweede plaats is bovendien reeds in de pleitnotitie van 19 oktober 2001 in eerste aanleg, in het kader van een nadere aanduiding van de belangen van de VJV c.s., uitdrukkelijk het volgende gesteld:

> Het gaat ... om de handhaving van fundamentele mensenrechten, van het recht op leven van al die onschuldigen die in Afghanistan en mogelijk elders het slachtoffer dreigen te worden van het onrechtmatige gebruik van geweld door de Verenigde Staten en het Verenigd Koninkrijk. Het gaat om de erkenning dat de in alle opzichten ook disproportionele geweldsontplooiing door de Verenigde Staten en het Verenigd Koninkrijk de ontkenning is van de waardigheid en waarde van iedere persoon.
> Eisers hebben zich de behartiging van die belangen ten doel gesteld. Zij hebben dit gedaan omdat zij zich verbonden weten met de slachtoffers van allerlei vormen van geweld en onrecht, omdat zij wensen vast te houden aan de fundamentele rechten van de mens en omdat zij de waardigheid en waarde van iedere persoon erkennen. Zij hebben dit gedaan omdat een ieder recht heeft "op het bestaan van een zodanige maatschappelijke en internationale orde, dat de rechten en vrijheden, in (de Universele Verklaring van de Rechten van de Mens) genoemd, daarin ten volle kunnen worden verwezenlijkt", een norm die in ieder geval binnen de Europese Unie rechtstreekse werking heeft.

In de memorie van antwoord in het incidenteel appèl dat op 20 december 2001 is ingediend bij het Gerechtshof te Den Haag is dit uitvoerig herhaald.
Nu ervan moet worden uitgegaan dat in cassatie de Hoge Raad kennis neemt van alle stukken die in de feitelijke instanties zijn ingediend, moet de conclusie dan ook luiden dat de Hoge Raad met deze laatste overweging - "dat VJV c.s. in feitelijke instantie niet een inbreuk op deze fundamentele rechten aan hun vorderingen ten grondslag hebben gelegd" - willens en wetens een onjuiste voorstelling van zaken geeft en derhalve valsheid in geschrifte heeft gepleegd.

Op hetgeen hiervoor is overwogen stuiten alle klachten in de onderscheiden onderdelen van middel II af.

3.5 Voor zover middel III klaagt dat het hof slechts een niet ter zake doende vraag heeft beantwoord, te weten of de door VJV c.s. ingeroepen bepalingen naar haar inhoud een

ieder kunnen verbinden in de zin van art. 93 Gr.w., mist het feitelijke grondslag. Het hof heeft immers terecht ook de vraag onderzocht of het gaat om bepalingen waarop een burger voor de nationale rechter een beroep kan doen. Zoals volgt uit hetgeen hiervoor is overwogen, is het oordeel van het hof dat deze vraag ontkennend moet worden beantwoord, tevergeefs bestreden. Met dit een en ander ontvalt de grond aan het aan art 6 EVRM ontleende verwijt dat het hof zich geen eerlijke en onpartijdige rechter heeft getoond, zodat middel III ook voor het overige faalt.

De Hoge Raad gaat hier voorbij aan het gegeven dat wij ons niet rechtstreeks op het geweldverbod hadden beroepen, maar op art. 90 Grondwet. De Hoge Raad geeft een apert onjuiste voorstelling van zaken wanneer hij zegt dat dit derde middel feitelijke grondslag ontbeert. Art. 90 Grondwet garandeert de burger dat de Staat de ontwikkeling van de internationale rechtsorde zal bevorderen en daarmee impliciet dat de Staat in ieder geval, als minimum grens, de internationale rechtsorde - en zeker niet de ius cogens regels van die rechtsorde - niet zal schenden. De vraag of de Staat het internationaal publiekrecht schendt, valt in het geheel niet onder de reikwijdte van art. 93 Grondwet.
Het gaat hier derhalve om een volstrekt verwrongen interpretatie van onze stellingname. De Hoge Raad sauveert dat, niet gehinderd door enig pogen tot waarheidsvinding of tot eerlijkheid en onpartijdigheid. Hij toont zich in alle afschuwwekkendheid een "Furchtbare Jurist" die de politieke wil van de uitvoerende macht niet toetst aan het recht, maar als hoogste wet dwingend oplegt aan de justitiabelen. En juist dit laatste was het grote verwijt dat aan de Duitse rechters werd gemaakt na de beëindiging van de Tweede Wereldoorlog. De Hoge Raad toont zich derhalve op dezelfde manier als de "Furchtbare Juristen" geheel los van ieder moreel en juridisch normbesef.

4. Beslissing

De Hoge Raad:
verwerpt het beroep;
veroordeelt VJV c.s. in de kosten van het geding in cassatie, tot op deze uitspraak aan de zijde van de Staat begroot op € 301,34 aan verschotten en € 1.365,-- voor salaris.

Dit arrest is gewezen door de vice-president P. Neleman als voorzitter en de raadsheren O. de Savornin Lohman, A. Hammerstein, E.J. Numann en F.B. Bakels, en in het openbaar uitgesproken door de vice-president P. Neleman op 6 februari 2004.

Nico S.

----- Original Message -----
From: "Meindert Stelling" <meindert.stelling@planet.nl>
To: "Erik Hummels" <humwie@knoware.nl>; "Nico Steijnen" <sagitar@hetnet.nl>
Cc: "Diederik Gosewehr" <diederikgosewehr@planet.nl>; "Jan Willems" <j.willems@ir.unimaas.nl>
Sent: Saturday, March 06, 2004 12:47 PM
Subject: Commentaar arrest HR 6 februari 2004 inzake de "oorlog tegen het terrorisme"

> Beste mensen,
>
> Bijgaand zend ik jullie mijn opmerkingen bij het teleurstellende arrest van
> de Hoge Raad inzake de "oorlog tegen het terrorisme", die ik cursief -
> inspringend in de tekst van dat arrest heb ingetypt (er zijn twee versies
> bijgevoegd: een Word bestand en een WordPerfect bestand, zodat je altijd één
> kunt bezien). Ik wil hierover een artikel schrijven voor het Nederlands
> Juristenblad.
>
> Graag verneem ik jullie reactie op mijn commentaar, zodat ik ervan verzekerd
> ben geen misslagen te zullen maken. Aanvullende opmerkingen verneem ik
> uiteraard even graag.
>
> Bij voorbaat mijn dank voor jullie spoedige reactie.
>
> Vriendelijke groeten,
>
> Meindert
>
> ==========
> Deze e-mail is door E-mail Virus Scan van Het Net gecontroleerd op virussen. Zie voor meer informatie: http://www.hetnet.nl/evs/
>

De Hoge Raad merkt ook nadrukkelijk dat
de wetshistorie van zijn standpunt dat opzegging
redelijkerwijs slechts is dat er
t.a.v. deze bepaalde categorie van overeenkomsten
in het geval van opzegging die niet in strijd zijn
met het uiterst dwingende recht, dus dat ook hier
zoveel mogelijk ruimte voor contractsvrijheid
moet blijven of dat zij strijdigheden van
overeenkomst met onredelijk bezwarende voorwaarden
in het geval van opzegging alleen niet
wordt in de zin van deze bepaling als of
met volledige afstel is het
2 EURO

De Hoge Raad laat dus aan het
geval volledige duidelijkheid
dat moet dat de wetgever het niet meer
nemen te laten!

6-2-2004

Je hoeft hoogstens te zeggen dat de norm van het agressieverbod zich ook tot staten richt (zoals o.a. tot uitdrukking gekomen in het Handvest), maar niet alleen. Agressie wordt, als andere misdrijven, begaan door mensen zoals Neurenberg als een delict begaan door mensen benoemd. Dat is met het Int. Strafhof dat het zal gelden over 'persons who are in the position to direct ...', herleverbegel.

Iets waarop de Schending betrekking heeft wordt als een misdrijf tegen internationale vrede

verstoorde verhouding



International Law Commission

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*

Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the Seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Abstract: (back)
* Text adopted by the Commission at its second session, in 1950, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the principles, appears in *Yearbook of the International Law Commission, 1950*, vol. II.

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THE CRIME OF AGGRESSION

ORIGINAL: ENGLISH
REPORT OF THE PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

Addendum

CONTENTS

Page

PART ONE. DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT 2

PART TWO. DRAFT FINAL ACT OF THE UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT 168

PART ONE

DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

CONTENTS

Page

PREAMBLE 9

PART 1. ESTABLISHMENT OF THE COURT 10

Article 1. The Court 10

Article 2. Relationship of the Court with the United Nations 10

Article 3. Seat of the Court 10

Article 4. Status and legal capacity 10

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW 11

Article 5. Crimes within the jurisdiction of the Court 11

admissibility of a case 43

Article 18. Ne bis in idem 45

[Article 19]. 46

Article 20. Applicable law 46

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW 48

Article 21. Nullum crimen sine lege 48

Article 22. Non-retroactivity 48

Article 23. Individual criminal responsibility 48

Article 24. Irrelevance of official position 51

Article 25. Responsibility of [commanders] [superiors] for acts of [forces under their command] [subordinates] 51

Article 26. Age of responsibility 52

Article 27. Statute of limitations 53

[Article 28]. Actus reus (act and/or omission) 54

Article 29. Mens rea (mental elements) 55

Article 30. Mistake of fact or of law 56

Article 31. Grounds for excluding criminal responsibility 57

Article 32. Superior orders and prescription of law 59

[Article 33]. Possible grounds for excluding criminal responsibility specifically referring to war crimes 59

Article 34. Other grounds for excluding criminal responsibility 60

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT 61

Article 35. Organs of the Court

..... 61

Article 36. Judges serving on a full-time basis
..... 61

Article 37. Qualification and election of judges
..... 61

Article 38. Judicial vacancies
..... 64

Article 39. The Presidency
..... 64

Article 40. Chambers
..... 65

Article 41. Independence of the judges
..... 66

Article 42. Excusing and disqualification of judges
..... 67

Article 43. The Office of the Prosecutor
..... 67

Article 44. The Registry
..... 69

Article 45. Staff
..... 70

Article 46. Solemn undertaking
..... 71

Article 47. Removal from office
..... 71

Article 48. Disciplinary measures
..... 72

Article 49. Privileges and immunities
..... 72

Article 50. Salaries, allowances and expenses
..... 73

Article 51. Working languages
..... 73

Article 52. Rules of Procedure and Evidence
..... 73

Article 53. Regulations of the Court
..... 74

PART 5. INVESTIGATION AND PROSECUTION
..... 75

Article 54. Investigation of alleged crimes
..... 75

[Article 55]. Information on national investigations or proceedings ... 80

[Article 56]. Deferral of an investigation by the Prosecutor
..... 80

[Article 57]. Functions of the Pre-Trial Chamber in relation with
investigation
..... 81

Article 58. Commencement of prosecution
..... 82

Article 59. Arrest
..... 86

Article 60. Pre-trial detention or release
..... 89

Article 61. Notification of the indictment
..... 91

Further option for articles 58 to 61
..... 93

PART 6. THE TRIAL
..... 99

Article 62. Place of trial
..... 99

Article 63. Trial in presence of the accused
..... 99

Article 64. Functions and powers of the Trial Chamber
..... 103

Article 65. Proceedings on an admission of guilt
..... 105

Article 66. Presumption of innocence
..... 106

Article 67. Rights of the accused
..... 106

Article 68. Protection of the [accused], victims and witnesses
[and
their participation in the proceedings]
..... 108

Article 69. Evidence
..... 109

Article 70. Offences or acts against the integrity of the Court
..... 111

[Article 71]. Sensitive national security information
..... 112

Article 72. Quorum and judgement
..... 115

[Article 73]. Reparations to victims
..... 116

Article 74. Sentencing
..... 118

gopher://gopher.igc.apc.org:70/00/orgs/icc/undocs/rome/statute.txt

PART 7. PENALTIES
..... 119

Article 75. Applicable penalties
..... 119

[Article 76]. Penalties applicable to legal persons
..... 121

Article 77. Determination of the sentence
..... 122

[Article 78]. Applicable national legal standards
..... 123

[Article 79]. Fines [and assets] collected by the Court
..... 123

PART 8. APPEAL AND REVIEW
..... 125

Article 80. Appeal against judgement or sentence
..... 125

Article 81. Appeal against interlocutory decision
..... 126

Article 82. Proceedings on appeal
..... 127

Article 83. Revision of conviction or sentence
..... 128

[Article 84]. Compensation to a suspect/accused/convicted person
..... 130

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE
..... 131

Article 85. General obligation to cooperate
..... 131

Article 86. [Requests for cooperation: general provisions]
..... 131

Article 87. [Surrender] [Transfer] [Extradition] of persons to the Court
..... 133

Article 88. Contents of request for [surrender] [transfer] [extradition]
..... 139

Article 89. Provisional arrest
..... 141

Article 90. Other forms of cooperation [and judicial and legal [mutual] assistance]
..... 143

Article 91. Execution of requests under article 90
..... 147

[Article 92]. Rule of speciality
..... 149

PART 10. ENFORCEMENT
..... 151

Article 93. General obligation regarding recognition [and enforcement] of judgements
..... 151

Article 94. Role of States in enforcement [and supervision] of sentences of imprisonment
..... 151

Article 95. Enforcement of the sentence
..... 152

Article 96. Supervision and administration of sentence
..... 153

Article 97. Transfer of the person upon completion of sentence
..... 153

[Article 98]. Limitation of prosecution/punishment for other offences . 154

[Article 99]. Enforcement of fines and forfeiture measures
..... 154

Article 100. Pardon, parole and commutation of sentences [early release]
..... 155

[Article 101]. Escape
..... 156

PART 11. ASSEMBLY OF STATES PARTIES
..... 157

Article 102. Assembly of States Parties
..... 157

PART 12. FINANCING OF THE COURT
..... 160

Article 103. Payment of expenses of the Court
..... 160

Article 104. Funds of the Court
..... 160

Article 105. Voluntary contributions
..... 161

Article 106. Assessment of contributions
..... 161

Article 107. Annual audit
..... 161

PART 13. FINAL CLAUSES
..... 162

gopher://gopher.igc.apc.org:70/00/orgs/icc/undocs/rome/statute.txt

Article 108. Settlement of disputes 162

Article 109. Reservations 162

Article 110. Amendments 164

Article 111. Review of the Statute 165

Article 112. Signature, ratification, acceptance, approval or accession 166

[Article 113]. Early activation of principles and rules of the Statute 166

Article 114. Entry into force 166

Article 115. Withdrawal 167

Article 116. Authentic texts 167

PREAMBLE/1/

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;/2/

Have agreed as follows:

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

There is established an International Criminal Court ("the Court"), which shall have the power to bring persons to justice for the most serious crimes of international concern, and which shall be complementary to national criminal jurisdictions. Its jurisdiction and functioning shall be governed by the provisions of this Statute.

N.B. Attention should be paid to using the term "Court" throughout the Statute in a consistent manner.

Article 2

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations by an agreement to be approved by the States Parties to this Statute and concluded by the President on behalf of the Court.

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 Assembly of 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 have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide;

(b) the crime of aggression;

(c) war crimes;

(d) crimes against humanity;

(e) ...

N.B. Once a decision is made as to which crimes should be included in the draft Statute, the paragraphs of this introductory article should be adjusted and the subsequent provisions placed in separate articles and numbered accordingly.

Crime of genocide

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For the purpose of the present Statute, the crime of genocide means any of the following acts committed with intent/3/ to destroy, in whole or in part, a national, ethnical, racial or religious group,/4/ as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm/5/ to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group;

[The following acts shall be punishable:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity in genocide.]/6/

[/7/Crime of aggression/8/

Note: This draft is without prejudice to the discussion of the issue of the relationship of the Security Council with the International Criminal Court with respect to aggression as dealt with in article 10.

Option 1

[For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:

(a) planning,

(b) preparing,

(c) ordering,

(d) initiating, or

(e) carrying out

[an armed attack] [the use of armed force] [a war of aggression,] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the

United Nations as determined by the Security Council].]

Option 2

1. [For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.]

[2. [Acts constituting [aggression] [armed attack] include the following:]/9/

[Provided that the acts concerned or their consequences are of sufficient gravity, acts constituting aggression [are] [include] the following:]

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State [, or the use of any weapons by a State against the territory of another State];

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond their termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]]

Option 3

[1. For the purpose of the present Statute [and subject to a determination by the Security Council referred to in article 10, paragraph 2, regarding the act of a State], the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing the political or military action of a State:

(a) initiating, or

(b) carrying out

an armed attack directed by a State against the territorial

integrity or political independence of another State when this armed attack was undertaken in [manifest] contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.]

2. Where an attack under paragraph 1 has been committed, the

(a) planning,

(b) preparing, or

(c) ordering

thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.]

War crimes/10/

For the purpose of the present Statute, war crimes means:

A. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering, or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(f) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement;

(h) taking of hostages.

B. Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely, any of the following acts:

(a)

Option 1

intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option 2

No paragraph (a).

(a bis)

Option 1

intentionally directing attacks against civilian objects which are not military objectives;

Option 2

No paragraph (a bis).

(b)

Option 1

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity;/11/

Option 2

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated;/12/

Option 3

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;/13/

Option 4

No paragraph (b).

(b bis)

Option 1

intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

Option 2

No paragraph (b bis).

(c)

Option 1

attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended;

Option 2

making non-defended localities and demilitarized zones the objects of attack;

(d) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(e) making improper use of flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(f)

Option 1

the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

Option 2

the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 3

(i) the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(ii) the transfer by the Occupying Power of parts its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 4

No paragraph (f).

(g)

Option 1

intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option 2

intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(h) subjecting persons who are in the power of an adverse Party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously

endanger the health of such person or persons;

(i) killing or wounding treacherously individuals belonging to the hostile nation or army;

(j) declaring that no quarter will be given;

(k) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(l) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(m) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(n) pillaging a town or place, even when taken by assault;

(o)

Option 1

employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in th human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxin hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibite the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;

Option 2

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in th human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxin hostile purposes or in armed conflict,

the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,

(v) chemical weapons as defined in and prohibited by

the subject of a comprehensive prohibition pursuant to customary or conventional international law;

(vi) such other weapons or weapons systems as bec

Option 3

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate;

Option 4

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate:

or

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, such as but not limited to:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in th human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxin hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,

(vi) nuclear weapons,

(vii) anti-personnel mines,

(viii) blinding laser weapons,

(ix) such other weapons or weapons systems as bec the subject of a comprehensive prohibition pursuant to customary or conventional international law;

(p)

Option 1

committing outrages upon personal dignity, in particular

humiliating and degrading treatment;

Option 2

committing outrages upon personal dignity, in particular humiliating and degrading treatment as well as practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination;

(p bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(q) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(r) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(s) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(t)

Option 1

forcing children under the age of fifteen years to take direct part in hostilities.

Option 2

recruiting children under the age of fifteen years into armed forces or using them to participate actively in hostilities./14/

Option 3

(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option 4

No paragraph (t).

* * *

OPTION I

Sections C and D of this article apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the

hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(c) taking of hostages;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

D. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(a)

Option 1

intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option 2

No paragraph (a).

(b) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(c)

Option 1

intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option 2

intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(d) pillaging a town or place, even when taken by assault;

(e) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(e bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious

violation of article 3 common to the four Geneva Conventions;

(f)

Option 1

forcing children under the age of fifteen years to take direct part in hostilities;

Option 2

recruiting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

Option 3

(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option 4

No paragraph (f).

(g) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(h) killing or wounding treacherously a combatant adversary;

(i) declaring that no quarter will be given;

(j) subjecting persons who are in the power of another Party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(k) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(l)

Option 1

No provision on prohibited weapons.

Option 2

A reference to arms, in the light of the discussions on paragraph B(o).

OPTION II

Insert the following provisions in section D:

- intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;

- intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

- slavery and the slave trade in all their forms;

OPTION III

Delete the opening clause of sections C and D.

OPTION IV

Delete section D.

OPTION V

Delete sections C and D.

* * *

Elsewhere in the Statute:

Option 1

The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) only when committed as part of a plan or policy or as part of a large-scale commission of such crimes./15/

Option 2

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.2

Option 3

No provision on threshold.

* * *

Article Y

(relating to the part of the Statute dealing with the definition of crimes)

Without prejudice to the application of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

N.B.

- Article Y could constitute a separate article or could be placed in article 5 (Crimes within the jurisdiction of the Court).

- Article 21, paragraph 3 (Nullum crimen sine lege) and article 20 (Applicable law) deal with related issues.

Crimes against humanity

1. For the purpose of the present Statute, a crime against humanity means any of the following acts when committed

[as part of a widespread [and] [or] systematic commission of such acts against any population]:
[as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]:

N.B. In case the second alternative is retained, its relationship with paragraph 1 (h) should be considered.

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) [detention or] [imprisonment] [deprivation of liberty] [in flagrant violation of international law] [in violation of fundamental legal norms];/16/

(f) torture;

(g) rape or other sexual abuse [of comparable gravity,] or enforced prostitution;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds/17/ [and in connection with other crimes within the jurisdiction of the Court];

(i) enforced disappearance of persons;/18/

(j) other inhumane acts [of a similar character] [intentionally] causing [great suffering,] or serious injury to body or to mental or physical health./19/

[2. For the purpose of paragraph 1:

(a) extermination includes the [wilful, intentional] infliction of conditions of life calculated to bring about the destruction of part of a population;

(b) "deportation or forcible transfer of population" means the movement of [persons] [populations] from the area in which the [persons] [populations] are [lawfully present] [present] [resident] [under national or international law] [for a purpose contrary to international law] [without legitimate and compelling reasons] [without lawful justification];

(c) ["torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person [in the

custody or physical control of the accused] [deprived of liberty]; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions [in conformity with international law]]

["torture" as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984];

(d) persecution means the wilful and severe deprivation of fundamental rights contrary to international law [carried out with the intent to persecute on specified grounds];

(e) ["enforced disappearance of persons" means when persons are arrested, detained or abducted against their will by or with the authorization, support or acquiescence of the State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, thereby placing them outside the protection of the law]

*/20/

[Crimes of terrorism

For the purposes of the present Statute, crimes of terrorism means:

(1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;

(2) An offence under the following Conventions:

(a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;

(b) Convention for the Suppression of Unlawful Seizure of Aircraft;

(c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

(d) International Convention against the Taking of Hostages;

(e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;

(f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf;

(3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.]

[Crimes against United Nations and associated personnel

1. For the purpose of the present Statute, "crimes against United Nations and associated personnel" means any of the following acts [when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate]:

(a) murder, kidnapping or other attack upon the person or liberty of any such personnel;

(b) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.]

[/21/Crimes involving the illicit traffic in narcotic drugs and psychotropic substances

For the purposes of the present Statute, crimes involving the illicit traffic in narcotic drugs and psychotropic substances means any of the following acts committed on a large scale and in a transboundary context:

(a) (i) The production, manufacture, extraction, preparation offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

(ii) The cultivation of opium poppy, coca bush or cannabi plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

(iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in subparagraph (i) above;

(iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II of the annex to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(v) The organization, management or financing of any of the offences enumerated in subparagraphs (i), (ii), (iii) or (iv) above;

(b) such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence to evade the legal consequences of his or her actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences.

N.B. The Court's jurisdiction with regard to these crimes will only apply to States parties to the Statute which have accepted the jurisdiction of the Court with respect to those crimes. Refer to article 9, option 1, paragraph 2, or option 2, paragraph 1.]

Article 6

[Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction]

1. The Court [may exercise its] [shall have] jurisdiction [over a person] with respect to a crime referred to in article 5, paragraph [(a) to (e), or any combination thereof] [and in accordance with the provisions of this Statute] if:

[(a) the [matter] [situation] is referred to the Court by the Security Council, [in accordance with article 10] [acting under Chapter VII of the Charter];]

(b) a complaint is lodged by a State Party [two State Parties] [or a non-State Party] in accordance with article 11;

[(c) the matter is brought by the Prosecutor, in accordance with article 12.]

[2. [In the case of paragraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9 and] [if national jurisdiction is either not available or ineffective] [in accordance with article 15] or if [an interested State] [interested States] [those States] have deferred the matter to the Court.]

[/22/Article 7

Preconditions to the exercise of jurisdiction

Opening clause of paragraph 1

Option 1/23/

[In the case of article 6, paragraphs 1 (b) [and (c)],] The Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted [the

exercise of] the jurisdiction of the Court over the crimes referred to in [article 5, paragraphs (a) to (e), or any combination thereof] in accordance with article 9:

Option 2

[In the case of article 6, paragraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted the exercise of the jurisdiction of the Court with respect to a case in question which is the subject of a complaint lodged by a State:

[(a) [the State that has custody of the suspect with respect to the crime ("custodial State")] [by the State on whose territory the person is resident at the time the complaint is lodged] [in accordance with international law];]

[(b) the State on the territory of which the act [or omission] in question occurred [or if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;]

[(c) if applicable, the State that has requested, under an international agreement, the custodial State to surrender a suspect for the purposes of prosecution, [unless the request is rejected];]

[(d) the State of which the victim is a national;]

[(e) the State of which the [accused] [suspect] of the crime is a national;]

[2. If a State whose acceptance is required for the exercise of the jurisdiction by the Court rejects such acceptance, that State shall so inform the Court [giving reasons thereof].]/24/

[3. Notwithstanding paragraph 1, if a State whose acceptance is required has not indicated whether it gives such acceptance or not within a period of (...), then the Court [may] [may not] exercise its jurisdiction accordingly.]/25/

[4. When a State that is not a Party to the Statute has an interest in the acts mentioned in the complaint, this State may, by an express declaration deposited with the Registrar of the Court, agree that the Court shall exercise jurisdiction in respect of the acts specified in the declaration.]]

[/26/Article 8/27/

Temporal jurisdiction

1. The Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute.

[When a State becomes a Party to this Statute after its entry into force, the Court cannot be seized in respect of crimes committed by its nationals or on its territory or against its nationals, unless those crimes have been committed after the deposit by that State of its instrument of ratification or accession.]

[2. The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of

this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]]

N.B. There is an interrelationship between this article and article 22 (Non-retroactivity).

[/28/Article 9

Acceptance of the jurisdiction of the Court

Option 1/29/

1. A State that becomes a Party to this Statute thereby accepts the [inherent] jurisdiction of the Court with respect to the crimes referred to in article 5, paragraphs [(a) to (d), or any combination thereof].

2. With regard to the crimes referred to in article 5 other than those mentioned in paragraph 1, a State Party to this Statute may declare:

(a) at the time it expresses its consent to be bound by the Statute; or

(b) at a later time that it accepts the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.

3. If under article 7 the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 9 of the Statute.]

Option 2

1. A State Party to this Statute may:

(a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) at a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to [such of] the crimes referred to in [article 5, paragraphs (a) to (e), or any combination thereof] as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to [particular conduct or to conduct] [one or more of the crimes referred to in article 5, paragraphs (a) to (e),] committed during a particular period of time./30/

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving a six month's notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute./31/

4. If under article 7 the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration

lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 9 of the Statute.]

[5. A declaration referred to in paragraphs 1 to 3 may not contain other limitations than those mentioned in paragraphs 1 to 3.]]

Further option

Acceptance of the jurisdiction of the Court:

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5, [paragraphs (a) to (d)].

[2. A State that is not a Party to this Statute may, by declaration lodged with the Registrar, accept the obligation to cooperate with the Court with respect to the prosecution of any crime referred to in article 5. The accepting State shall then cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.]

[/32/Article 10

[[Action by] [Role of] The Security Council] [Relationship between the Security Council and the International Criminal Court]

1. [Notwithstanding article 6, [7] [and [9], the Court has jurisdiction in accordance with this Statute with respect to crimes [referred to] [specified] in article 5 [as a consequence of the referral of] [on the basis of a [formal] decision to refer] a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security Council [acting under Chapter VII of the Charter of the United Nations] [in accordance with the terms of such referral].

2. [Notification of] [A letter from the President of the Security Council conveying] the Security Council decision to the Prosecutor of the Court shall be accompanied by all supporting material available to the Council.]

3. The Security Council, on the basis of a formal decision under Chapter VI of the Charter of the United Nations, may lodge a complaint with the Prosecutor specifying that crimes referred to in article 5 appear to have been committed.]

4.

Option 1

[A complaint of or directly related to [an act] [a crime] of aggression [referred to in article 5] may [not] be brought [under this Statute] unless the Security Council has [first] [determined] [formally decided] that the act of a State that is the subject of the complaint, [is] [is not] an act of aggression [in accordance with Chapter VII of the Charter of the United Nations].

Option 2

[The determination [under Article 39 of the Charter of the United Nations] of the Security Council that a State has

committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of aggression.]

5. [A referral of a matter to the Court or] [A determination] [A formal decision] by the Security Council [under paragraph 4 above] shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of the person concerned.

6. [A complaint of or directly related to an act of aggression brought under this Statute and the findings of the Court in such cases is without prejudice to the powers of the Security Council under Chapter VII of the Charter.]

[/33/7. Option 1

No prosecution may be commenced under this Statute arising from a [dispute or] situation [[pertaining to international peace and security or an act of aggression] which [is being dealt with] [actively] by the Security Council] [as a threat to or breach of the peace or an act of aggression] [under Chapter VII of the Charter], [where the Security Council has decided that there is a threat to or breach of the peace and for which it is exercising its functions under Chapter VII of the Charter of the United Nations], [unless the Security Council otherwise decides] [without the prior consent of the Security Council].

Option 2

1. [Subject to paragraph 4 of this article], no prosecution may be commenced [or proceeded with] under this Statute [for a period of twelve months] where the Security Council has [decided that there is a threat to or breach of the peace or an act of aggression and], acting under Chapter VII of the Charter of the United Nations, [given a direction] [taken a [formal and specific] decision] to that effect.

2. [Notification] [A formal decision of the Security Council to the effect] that the Security Council is continuing to act may be renewed at intervals of twelve months [by a subsequent decision].]

3. [Should no action be taken by the Security Council in accordance with Chapter VII of the Charter of the United Nations within a reasonable time, the Court may exercise its jurisdiction in respect of the situation referred to in paragraph 1 of this article.]]]

Article 11/34/

Complaint by State

1.

Option 1

[[A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948] [A State Party [which accepts the jurisdiction of the Court under article 9 with respect to a crime]] may lodge a complaint [referring a [matter] [situation] in which one or more crimes within the jurisdiction of the Court

appear to have been committed to] [with] the Prosecutor [alleging that [a crime of genocide] [such a crime] [a crime under article 5, paragraphs [(a) to (d), or any combination thereof]] appears to have been committed] [and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.]].

Option 2

[A State Party [which accepts the jurisdiction of the Court under article 9 with respect to a crime] [that has a direct interest] listed under (a) to (d) below may lodge a complaint with the Prosecutor alleging that [such a crime] [a crime under article 5, paragraphs [(a) to (d), or any combination thereof]] appears to have been committed:

(a) a State on the territory of which the act [or omission] in question occurred;

(b) a State of the custody;

(c) a State of the nationality of a suspect;

(d) a State of the nationality of victims.]

[2. A State Party, which, for a crime under article 5, paragraph (e), has accepted the jurisdiction of the Court pursuant to article 9 and is a party to the treaty concerned may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.]/35/

[3. As far as possible, a complaint shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.]/36/

[4. The Prosecutor shall notify the Security Council of all complaints lodged under article 11.]

[Article 12/37/

Prosecutor

The Prosecutor [may] [shall] initiate investigations [ex officio] [proprio motu] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under article 5, paragraphs (a) to (d), from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources.]]/38/

N.B. The terms "sufficient basis" used in this article (if retained) and "reasonable basis" in article 54, paragraph 1, should be harmonized.

[Article 13

Information submitted to the Prosecutor

1. Upon receipt of information relating to the commission of a crime under article 5, submitted by victims, associations on their behalf, regional or international organizations or any other reliable source, the Prosecutor shall analyse the seriousness of the information. For this purpose, he or she may seek additional information from States, organs of the United Nations, non-governmental organizations, victims or their representatives or other sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules.

2. If the Pre-Trial Chamber, upon examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, having regard to article 15, it shall authorize the commencement of the investigation. This shall be without prejudice to subsequent determinations by the Court as to the jurisdiction and admissibility of the case pursuant to article 17.

The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence pertaining to the same situation.

3. If, after the preliminary examination referred to in paragraph 1, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with paragraph 1 pertaining to the same situation in the light of new facts or evidence.]

Further option for articles 6, 7, 10 and 11/39/

[Article 6

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 11;

[(b) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 12]; or

(b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council [acting under Chapter VII of the Charter of the United Nations]].

[Article 7

Acceptance of jurisdiction

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. Where a situation has been referred to the Court by a State Party [or where the Prosecutor has initiated an investigation], the Court may exercise its jurisdiction with respect to a crime referred to in article 5 provided that [one of] the following States [are Parties] [is Party] to the Statute or [has] [have] accepted the jurisdiction of the Court with respect to the crime in question in accordance with paragraph 3 below:

[(a) the State that has custody of the suspect with respect to the crime ("custodial State")] [the State of the nationality of the suspect];

(b) the State on the territory of which the act or omission in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.

3. If the acceptance of a State that is not a Party to this Statute is required under paragraph 2 above, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.]

[Article 10

Role of the Security Council

[1. The Court may not exercise its jurisdiction with respect to a crime of aggression unless the Security Council has first determined under Chapter VII of the Charter of the United Nations that the State concerned has committed an act of aggression. A determination by the Security Council shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of any person concerned.]

2. No investigation or prosecution may be commenced or proceeded with under this Statute [for a period of twelve months] after the Security Council[, acting under Chapter VII of the Charter of the United Nations,] has requested the Court to that effect; that request may be renewed by the Council under the same conditions.]

[Article 11

Referral of a situation by a State

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.

3. The Prosecutor shall notify the Security Council of all situations referred under this article.]

Article 14

Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

N.B. This article seems to be unnecessary in view of a similar text in paragraph 1 of article 17 (Challenges to the jurisdiction of the Court or the admissibility of a case) and could therefore be deleted.

Article 15

Issues of admissibility/40/

The following draft text represents the results of informal consultations on article 15 and is intended to facilitate the work towards the elaboration of the Statute of the Court. The content of the text represents a possible way to address the issue of complementarity and is without prejudice to the views of any delegation. The text does not represent agreement on the eventual content or approach to be included in this article.

1. Having regard to paragraph 3 of the preamble,/41/ the Court shall determine that a case is inadmissible where:

(a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

*/42/

(b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) the person concerned has already been tried for conduct which is the subject of the complaint,/43/ and a trial by the Court is not permitted under paragraph 2 of article 18;/44/

**/45/

(d) the case is not of sufficient gravity to justify further action by the Court./46/

2. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

(a) the proceedings/47/ were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in article 5;

(b) there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or partial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

* * *

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

"The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."

[Article 16

Preliminary rulings regarding admissibility

1. When a matter has been referred to the Court pursuant to article 6 and the Prosecutor has determined that there would be a sufficient basis to commence an investigation of the matter, the Prosecutor shall make such referral known by public announcement and by notification to all States Parties.

2. Within [ ] days of the public announcement of such referral, a State may inform the Court that it is investigating its nationals or others within its jurisdiction with respect to criminal acts that allegedly were committed in the context of the matter referred to the Court and that may constitute offences described in article 5. At the request of that State, the Prosecutor shall defer to the State's investigation of such persons unless the Prosecutor determines that there has been a total or partial collapse or unavailability of the State's national judicial system, or the State is unwilling or unable genuinely to carry out the investigation and prosecutions. Before the Prosecutor may commence investigation of such persons, the Prosecutor must obtain a preliminary ruling from a Pre-Trial Chamber confirming the Prosecutor's determination. The Prosecutor's deferral to the State's investigation shall be open for review by the Prosecutor [six months] [one year] after the date of deferral.

3. A preliminary ruling of the Pre-Trial Chamber confirming the Prosecutor's determination may be appealed to the Appeals Chamber by the State concerned. If the preliminary ruling is appealed by the State, [two thirds] [all] of the judges of the Appeals Chamber must confirm that ruling before the Prosecutor may commence the investigation and seek indictments.

4. When the Prosecutor has deferred an investigation pursuant to section 2, the Prosecutor may request that the State concerned report periodically on the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

5. That a State has challenged a preliminary ruling under the

present article shall not prejudice its right to challenge admissibility of a case under article 17/48/ [or to withhold its consent to the exercise of jurisdiction under article 7].]

Article 17

Challenges to the jurisdiction of the Court or the admissibility of a case

1. At all stages of the proceedings, the Court (a) shall satisfy itself as to its jurisdiction over a case and (b) may, on its own motion, determine the admissibility of the case pursuant to article 15./49/

2. Challenges to the admissibility of the case, pursuant to article 15, or challenges to the jurisdiction of the Court may be made by:

(a) an accused [or a suspect];/50/

(b) [A State] [[An interested] State Party] which has jurisdiction over the crime on the ground that it is investigating or prosecuting the case or has investigated or prosecuted/51/

[a State [State Party] of nationality of a person referred to in paragraph 2 (a) [on the ground that it is investigating or prosecuting the case or has investigated or prosecuted]]

[and a State [State Party] which has received a request for cooperation];

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility.
In proceedings with respect to jurisdiction or admissibility, those having submitted the case pursuant to article 6,/52/ [those non-States parties which have jurisdiction over the crimes]/53/ as well as victims, may also submit observations to the Court.

3./54/ The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2.

The challenge must take place prior to or at the commencement of the trial.

In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court as provided in the preceding subparagraph, may only be based on article 15, paragraph 1 (c)./55/

4. A State referred to in paragraph 2 (b) of the present article shall make a challenge at the earliest opportunity./56/

5. Prior to the confirmation of the indictment, challenges to the admissibility of a case or challenges to the jurisdiction of the Court, shall be referred to the Pre-Trial Chamber. After confirmation of the indictment, they shall be referred to the Trial Chamber.

Decisions with respect to jurisdiction or admissibility may be

appealed to the Appeals Chamber./57/

[6. If the Court has decided that a case is inadmissible pursuant to article 15, the Prosecutor, may, at any time, submit a request for a review of the decision, on the grounds that conditions required under article 15 to render the case inadmissible no longer exist or that new facts arose.]

Article 18

Ne bis in idem

1. Except as provided in this Statute,/58/ no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried before another court for a crime/59/ referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3./60/ No person who has been tried by another court for conduct also proscribed under article 5 shall be tried by the Court unless the proceedings in the other court:

.../61/

(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) otherwise were not conducted independently or impartially and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

.../62/

* * *

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

"The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."

[Article 19/63/

Without prejudice to article 18, a person who has been tried by another court for conduct also proscribed under article 5 may be tried by the Court if a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty.]

Article 20

Applicable law

1. The Court shall apply:

(a) in the first place, this Statute and its Rules of Procedure and Evidence;

(b) if necessary, applicable treaties and the principles and rules of general international law [, including the established principles of the law of armed conflict];

(c)/64/

Option 1

failing that, general principles of law derived by the Court from national laws of legal systems of the world [, where those national laws are not inconsistent with this Statute and with international law and internationally recognized norms and standards].

Option 2

failing that, and only insofar as it is consistent with the objectives and purpose of this Statute:

(i) the national law of the State where the crime was committed or, if the crime was committed in the territories of more than one State, the national law of the State where the substantial part of the crime was committed;

(ii) if the laws of the State or States mentioned in subparagraph (i) do not exist, the national law of the State of nationality of the accused or, if the accused does not have a nationality, the national law of the State of his or her permanent residence; or

(iii) if the laws of the States mentioned in subparagraphs (i) and (ii) do not exist, the national law of the State which has custody of the accused.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, which include the prohibition on any adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, or on any other similar criteria./65/

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 21

Nullum crimen sine lege

1. Provided that this Statute is applicable in accordance with article 6, 7, 8, 9 or 10 a person shall not be criminally responsible under this Statute:

(a) in the case of a prosecution with respect to a crime referred to in article 5, paragraphs [(a) to (d)], unless the conduct in question constitutes a crime that is defined in this Statute;

(b) in the case of a prosecution with respect to a crime referred to in article [5, paragraph (e)], unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

[2. Conduct shall not be construed as criminal and sanctions shall not be applied under this Statute by a process of analogy.]

3. Paragraph 1 shall not affect the character of such conduct as being crimes under international law, apart from this Statute.

Article 22

Non-retroactivity

1. Provided that this Statute is applicable in accordance with article 21, a person shall not be criminally responsible under this Statute for conduct committed prior to its entry into force.

[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.]/66/

Article 23

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.]/67/

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.]/68/

N.B. In the context of paragraphs 5 and 6, see also articles 76 (Penalties applicable to legal persons) and 99 (Enforcement of fines and forfeiture measures).

7. [Subject to the provisions of articles 25, 28 and 29,] a person is criminally responsible and liable for punishment for a crime defined [in article 5] [in this Statute] if that person:

(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime

which in fact occurs or is attempted;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 25;]

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;/69/

(e) either:

(i) [intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];]/70/ /71/

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g)/72/ [with the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions./73/

N.B. This article should be re-examined as to the references to the mental element in view of article 29 (Mens rea (mental elements)).

Article 24

Irrelevance of official position

1. This Statute shall be applied to all persons without any discrimination whatsoever: official capacity, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as a government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [per se] constitute a ground for reduction of the sentence.

2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person./74/

Article 25

Responsibility of [commanders] [superiors]/75/ for acts of [forces under their command] [subordinates]/76/

[In addition to other forms of responsibility for crimes under this Statute, a [commander] [superior] is criminally responsible] [A [commander] [superior] is not relieved of responsibility]/77/ for crimes under this Statute committed by [forces] [subordinates] under his or her command [or authority] and effective control as a result of the [commander's] [superior's] failure to exercise properly this control where:

(a) the [commander] [superior] either knew, or [owing to the widespread commission of the offences] [owing to the circumstances at the time] should have known, that the [forces] [subordinates] were committing or intending to commit such crimes; and

(b) the [commander] [superior] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof].

Article 26

Age of responsibility

N.B. In the context of this article, see also article 75, paragraph (a) (Applicable penalties).

Proposal 1

1. A person under the age of [twelve, thirteen, fourteen, sixteen, eighteen] at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute [, unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time].

[2. A person who is between the age of [sixteen] and [twenty-one] at the time of the [alleged] commission of a crime shall be evaluated [by the Court] as to his or her maturity to determine whether the person is responsible under this Statute.]

Proposal 2

[Persons aged 13 to 18 years at the time of the facts shall be criminally responsible but their prosecution, trial and sentence and the regime under which they serve their sentence may give rise to the application of special modalities specified in the Statute.]/78/

Article 27

Statute of limitations

Proposal 1

[1. The period of limitations shall be completed upon the lapse of xx years for the offence of ..., and yy years for the offence of ...

2. The period of limitations shall commence to run at the time when criminal conduct has ceased.

3. The period of limitations shall cease to run on the institution of the prosecution against the case concerned to this Court or to a national court of any State that has jurisdiction on such case. The period of limitations begins to run when the decision of the national court becomes final, where this Court has jurisdiction over the case concerned.]

Proposal 2

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court.]

Proposal 3

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court; but [for those crimes not within the Court's inherent jurisdiction] the Court may decline to exercise jurisdiction if, owing to the lapse of time, a person would be denied a fair trial.]

Proposal 4

[Crimes not subject to limitation

The crimes referred to in article 5, paragraphs (a), (b) and (d), shall not be subject to limitation.

Crimes subject to limitation

1. Proceedings before the Court in respect of the crimes referred to in article 5, paragraph (c), shall be subject to a period of limitation of 10 full years from the date on which the crime was committed, provided that during this period no prosecution has been brought.

2. If a prosecution has been initiated during this period, either before the Court or in a State competent to bring a prosecution under its internal law, the proceedings before the Court shall not be subject to limitation until 10 full years have elapsed from the date of the most recent prosecution.]

Proposal 5

[1. The statute of limitations as established hereunder shall extinguish the criminal prosecution and the punishment.

2. The statute of limitations will be [ ] years and shall commence to run as follows:

(a) in case of instantaneous crime, from the moment of its perpetration;

(b) in case of attempt, from the moment the last act of execution was performed or the due conduct was omitted;

(c) in case of permanent crime, from the moment of the cessation of the criminal conduct.

3. The statute of limitations may be interrupted by the actions taken in the investigation of the crime and its perpetrators. If those actions were stopped, the statute of limitations will run again as of the day the last act of investigation was carried out.

4. The statute of limitations for definitive sanctions will run as of the moment the condemned person escaped and will be interrupted with its detention.]

N.B. The proposals under this article have not been consolidated.

[Article 28

Actus reus (act and/or omission)

1. Conduct for which a person may be criminally responsible and

liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

(a) the omission is specified in the definition of the crime under this Statute; or

(b) in the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute/79/ to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime]./80/

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.]/81/]/82/

Article 29

Mens rea (mental elements)

1. Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the physical elements are committed with intent and knowledge.

2. For the purposes of this Statute and unless otherwise provided, a person has intent where:

(a) in relation to conduct, that person means to engage in the act [or omission];

(b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means to be aware that a circumstance exists or a consequence will occur.

[4./83/ /84/ For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:

(a) the person is aware of a risk that the circumstance exists or that the consequence will occur;

(b) the person is aware that the risk is highly unreasonable to take;

[and]

[(c) the person is indifferent to the possibility that the

circumstance exists or that the consequence will occur.]]

N.B. The inclusion of the notion of recklessness should be re-examined in view of the definition of crimes.

Article 30/85/

Mistake of fact/86/ or of law

Option 1

Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment.

Option 2

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime [charged provided that said mistake is not inconsistent with the nature of the crime or its elements] [, and provided that the circumstances he reasonably believed to be true would have been lawful].

2. Mistake of law may not be cited as a ground for excluding criminal responsibility [, except where specifically provided for in this Statute]./87/

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct:/88/

(a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

[(b) the person is in a state of [involuntary] intoxication [by alcohol, drugs or other means] that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law; [provided, however, that if the person has voluntarily become intoxicated [[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]],/89/ the person shall remain criminally responsible;]

(c) the person [, provided that he or she did not put himself or herself voluntarily into a position causing the situation to which that ground for excluding criminal responsibility would apply,] acts [swiftly and] reasonably [, or in the reasonable belief that force is necessary,] to defend himself or herself or another person [or property] against an [imminent .../90/ use of force] [immediate .../91/ threat of force] [impending .../92/ use of force] and [[unlawful] [and] [unjustified]] use of force in a [not excessive] manner[.] [[not disproportionate] [reasonably proportionate] to the degree of danger to the person [or liberty]

[or property] protected];

(d) [the person reasonably believes that]/93/ there is a threat of [imminent] death or serious bodily harm against that person or another person [or against his or her liberty] [or property or property interests] and the person acts reasonably to avoid this threat, provided that the person's action/94/ [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided;/95/ [however, if the person has [knowingly] [recklessly] exposed him or herself to a situation which was likely to lead to the threat, the person shall remain responsible];

(e) [the person reasonably believes that there are]/96/ [there are] [the person necessarily acts in response to] circumstances beyond that person's control which constitute a [threat of [imminent] death or serious bodily harm] [danger] to that person or another person [or property or property rights]/97/ and the person acts reasonably to avoid the [threat] [danger], [provided that the person intended to prevent a greater harm [and did not intend to cause] [and did not cause] death]/98/ and provided that there exists no other way to avoid such threat].

2. The Court may/99/ determine the applicability of the grounds for exclusion of criminal responsibility [listed in paragraph 1] [permitted by this Statute] [to the case before it]./100/

Article 32

Superior orders and prescription of law

1. The fact that a person's conduct was pursuant to an order of a Government or of a superior [whether military or civilian] shall [not] relieve the person of criminal responsibility [[if] [unless] the order [was known to be unlawful or] appeared to be manifestly unlawful]./101/

[2. The perpetrator of or an accomplice in a crime of genocide [or a crime against humanity] [or a ...] shall not be exempted from criminal responsibility on the sole ground that the person's conduct was pursuant to an order of a Government or a superior, or pursuant to national legislation or regulations.]/102/ /103/

[Article 33]/104/

[Possible grounds for excluding criminal responsibility specifically referring to war crimes]

...

Article 34

Other grounds for excluding criminal responsibility

1. At trial the Court may consider a ground for excluding criminal responsibility not specifically enumerated in this part if the ground:

(a) is recognized [in general principles of criminal law common to civilized nations] [in the State with the most significant contacts to the crime] with respect to the type of conduct charged; and

(b) deals with a principle clearly beyond the scope of the grounds for excluding criminal responsibility enumerated in this part and is not otherwise inconsistent with those or any other provisions of the Statute.

2. The procedure for asserting such a ground for excluding criminal responsibility shall be set forth in the Rules of Procedure and Evidence./105/

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 35

Organs of the Court

The Court consists of the following organs:

(a) a Presidency;

(b) an Appeals Chamber, Trial Chambers and [a Pre-Trial Chamber] [Pre-Trial Chambers];

(c) the Office of the Prosecutor;

(d) a Registry.

Article 36

Judges serving on a full-time basis

The judges composing the Presidency/106/ shall serve on a full-time basis as soon as they are elected. [The judges composing [the] [a] Pre-Trial Chamber shall serve on a full-time basis [once the Court/107/ is seized of a matter] [when required in the view of the President].] [On the recommendation of the Presidency, the States Parties] [The Presidency] may [by a two-thirds majority] decide that the workload of the Court requires that the judges [composing any of the other Chambers] should serve on a full-time [or part-time] basis.

Article 37

Qualification and election of judges

1. Subject to the provisions in paragraph 2, there shall be [...] judges of the Court.

[There shall be no fewer than [...]/108/ judges from each geographical group as established by the General Assembly of the United Nations.]

2. (a) The President, acting on behalf of the Court, [as well as any State Party] may propose an increase [or decrease] in the number of judges, indicating the reasons why this is considered necessary and appropriate. Any such proposal shall be submitted to the Registrar, who shall promptly circulate it to all States Parties;/109/

(b) Any such proposal shall then be considered at a meeting of States Parties to be convened in accordance with article [...]./110/ The adoption and entry into force of any such proposal shall

require a [two-thirds] majority of States Parties [present and voting at that meeting];/111/

(c) The election of additional judges shall then take place at the next session of the Assembly of States Parties. [Any decrease in the number of judges shall however only be given effect as and when the terms of office of the relevant number of existing judges end.]/112/

3. The judges of the Court shall:

(a) be persons of high moral character and impartiality [who possess all the qualifications required in their respective States for appointment to the highest judicial offices]; [and]

(b) have:

(i) [at least ten years'] [extensive] criminal [law] [trial] experience [as a judge, prosecutor or defending counsel]; [or] [and, where possible]

(ii) recognized competence in international law [in particular international criminal law, international humanitarian law and human rights law] [; and

(c) possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 51].

4. Option 1

Each [State Party] [national group appointed for the purpose by a State [Party]] may nominate for election not more than three persons [, all of whom must be nationals of different [States] [States Parties],] [who possess the qualification(s) referred to in paragraph 3] [and who are willing to serve as may be required on the Court].

[The [State Party] [national group] shall indicate which of the qualifications referred to in paragraph 3 (b) the candidate possesses.]

Option 2

(a) When an election is required, the Nominating Committee shall develop a list of candidates, equal in number to the number of positions to be filled.

(b) The Nominating Committee shall be composed by the Assembly of States Parties.

(c) Once the Nominating Committee is established, the Registrar shall provide the Committee, upon request, with any necessary facilities and administrative and staff support.

5. The judges of the Court shall be elected by secret ballot by [an absolute] [a two-thirds] majority vote of the [Assembly of the [States Parties present and voting] [General Assembly of the United Nations] [and the Security Council] from a list of persons nominated in accordance with paragraph 4./113/

[[Two thirds] [One half] of the States Parties shall constitute a quorum at the meeting of the Assembly of States Parties for this purpose.]

[In the event that a sufficient number of judges is not

elected, the Nominating Committee shall provide a further list of candidates and there shall be another election.]/114/

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

[7. [A sufficient number of the judges to constitute the Pre-Trial Chamber and Trial Chambers] [[Two thirds] [A majority] of the judges] shall be elected from among candidates having criminal [trial] [law] experience.]

8. [States Parties] [The General Assembly of the United Nations]/115/ shall, in the election of the judges, [bear in mind] [take into account the need for]:

(a) the representation of the principal legal systems of the world;

[(b) the representation of the main forms of civilization;]

(c) equitable geographical distribution;

[(d) gender balance;]

[(e) the need, within the membership of the Court, for expertise on issues related to sexual and gender violence, violence against children and other similar matters].

[9. A judge may not be over the age of 65 at the time of election.]

10. Judges shall hold office for a term of [five] [nine] years and [are eligible for re-election [for a further term of five years]] [, subject to article 38, paragraph 2, are not eligible for re-election]. At the first election, one third of the judges chosen by lot shall serve for a term of [three] years [and are eligible for re-election]; one third of the judges chosen by lot shall serve for a term of [six] years; and the remainder shall serve for a term of [nine] years./116/

11. Notwithstanding paragraph 10, a judge shall continue in office in order to complete any case the hearing of which has commenced.

Article 38

Judicial vacancies

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 37.

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 three years] is eligible for re-election for a further term].

Article 39

The Presidency

1. The President and the First and Second 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. They shall be eligible for re-election only once.

2. The First Vice-President shall act in place of the President

in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

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

(a) the due administration of the Court [, including the supervision and direction of the Registrar and staff of the Registry and the Court,]/117/ with the exception of the Office of the Prosecutor; and

(b) the other functions conferred on it by this Statute.

[4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern including, for example, the functioning of the Registry and security arrangements for defendants, witnesses and the Court.]

Article 40

Chambers

1. The Appeals Chamber [shall be established as soon as possible after the election of the judges. It] shall consist of [three] [five] [seven] judges to be elected by an absolute majority of the judges of the Court./118/ [At least one third of the judges must possess the qualifications set out in paragraph 3 (b) [(i)] [(ii)] of article 37.]

2. Judges of the Appeals Chamber shall serve [for a period of three years [and may be re-elected]] [until the end of their terms of office as judges of the Court]. They may, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. The Presidency shall assign judges who are not members of the Appeals Chamber to Trial Chambers and [Pre-Trial Chambers] [the Pre-Trial Chamber] in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court]./119/

[4. Judges of the Pre-Trial Chamber or the Trial Chambers, as the case may be, shall serve in their respective Chambers for a period of three years. They may, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.]

5. A Trial Chamber shall consist of [three] [five] judges. [[At least one of] [A majority of] [All] the judges must possess the qualifications set out in paragraph 3 (b) (i) of article 37.]

6. [A] [The] Pre-Trial Chamber shall consist of [one judge] [three judges] and shall perform such pre-trial functions as are assigned to it by this Statute. [The number of judges may be [increased to three] [reduced to one]/120/ in accordance with the Rules of Procedure and Evidence]. [[The judge] [At least two judges] must possess the qualifications set out in paragraph 3 (b) (i) of article 37.]

[7. At the time a Chamber is constituted, alternate judges [may] [shall] be nominated by the Presidency to attend the proceedings of that Chamber and, provided that an alternate judge has been present throughout the proceedings, that judge may act as a member

of that Chamber in the event that a judge of that Chamber dies, is disqualified or otherwise becomes unavailable during the course of the proceedings.]/121/

Article 41

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.

3. Judges serving on a full-time basis shall not engage in any other occupation of a professional nature.

4. Any doubt on the points raised in paragraphs 2 and 3 shall be decided by an absolute majority of the judges of the Court. Where any question concerns an individual judge, that judge shall not take part in the decision.

Article 42

Excusing and disqualification of judges

1. The Presidency may at the request of a judge excuse that judge from the exercise of a function under this Statute, in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court].

2. Judges shall not participate in any case in which their impartiality might reasonably be doubted on any ground. A judge shall be excluded from a case in accordance with this paragraph if, inter alia, he or she has previously been involved in any capacity in that case before the Court or in a related criminal case involving the accused at the national level [, or is a national of a complainant State, [of the State on whose territory the offence is alleged to have been committed] or of a State of which the accused is a national].

3. The Prosecutor [or] the accused [or an interested State] 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 judges of the Court./122/ The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 43

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving [complaints] [or] [referrals] [or any substantiated information related to the alleged commission of a crime under the jurisdiction of the Court], for examining them and for conducting investigations and prosecutions before the Court. A member of the Office of the Prosecutor shall not seek or act on instructions from any external source.

2. The Office of the Prosecutor shall be headed by the Prosecutor. [Without prejudice to article 47, the] [The] Prosecutor shall have full authority over the management and administration of the Office of the Prosecutor, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who are entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities [and represent different legal systems]. They shall [be available to] serve on a full-time basis.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character, be highly competent in and have [at least ten years] [extensive] practical experience in the prosecution [or trial]/123/ of criminal cases. They shall, furthermore, have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor [and the Deputy Prosecutors] shall be elected by secret ballot by an absolute majority of the States Parties./124/ [The Deputy Prosecutors shall be appointed by the Prosecutor./125/] Unless a shorter term is otherwise decided on at the time of their election [or appointment], they shall hold office for a term of [five] [seven] [nine] years and are [not] eligible for re-election. The Prosecutor and Deputy Prosecutors may not be over 65 years of age at the time of election [or appointment].

5. The Prosecutor and Deputy Prosecutors shall not engage in any activity which is likely to interfere with their prosecutorial functions or to affect confidence in their independence. [When serving on a full-time basis, they] [They] shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at his or her request from acting in a particular case.

7. [Neither the Prosecutor nor the Deputy Prosecutors shall participate in any matter in which their impartiality might reasonably be doubted on any ground.]/126/ They shall be excluded from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case involving the accused at the national level [, or are a national of a complainant State[, of the State on whose territory the offence is alleged to have been committed] or of a State of which the accused is a national].

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by [the Presidency] [the Appeals Chamber] [the Judges of the Court]. The accused may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this paragraph. The Prosecutor or Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

[9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.]/127/

[10. The Office of the Prosecutor shall be responsible for providing protective measures to witnesses to be called by the Prosecution. The Office of the Prosecutor shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.]/128/

Article 44

The Registry

1. Subject to article 43, the Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court.

2. [The judges] [The States Parties] by an absolute majority by secret ballot shall elect a Registrar, who [, under the authority of the President of the Court,] shall be the principal administrative officer of the Court. They may [in the same manner elect] [appoint] a Deputy Registrar if the need arises.

3. The Registrar shall hold office for a term of [five] [nine] years, is [not] eligible for re-election [once] and shall serve 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 by an absolute majority of the judges, and may be [elected] [appointed] on the basis that the Deputy Registrar is willing to serve as required. [Their term shall end in all cases when they reach 65 years of age.] The Registrar and the Deputy Registrar shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

[4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide counselling and other assistance to victims, [defence]/129/ witnesses, their family members and others at risk on account of testimony given by such witnesses and shall advise the organs of the Court on appropriate measures of protection and other matters affecting the rights and the well-being of such persons. The unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.]/130/

Article 45

Staff

1. The Registrar and the Prosecutor shall appoint such qualified staff of their respective offices, including investigators in case of the Prosecutor, as may be required.

2. In the employment of the staff, the Registrar and the Prosecutor shall ensure the highest standards of efficiency, competence and integrity and shall have regard to the criteria set forth in article 37, paragraph 8.

3. The staff regulations, which shall apply to the staff of all organs of the Court, shall be proposed by the Registrar with the agreement of the Presidency and the Prosecutor. Such regulations shall be circulated to the States Parties for comment, before they take effect. The Registrar shall take into account the comments made by States Parties./131/

[4. Any State Party, intergovernmental organization [or non-governmental organization] may offer to detail personnel to assist with the work of any of the organs of the Court and to be considered for such work. The Prosecutor may accept any such offer for the Office of the Prosecutor. In any other case, the Presidency, in consultation with the Registrar, may accept the offer.]/132/

Article 46

Solemn undertaking

Before first exercising their functions under the present Statute, judges, the Prosecutor, Deputy Prosecutors, the Registrar and the Deputy Registrar shall make a public and solemn undertaking to do so impartially and conscientiously.

Article 47/133/

Removal from office

1. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who is found to have committed serious misconduct or a serious breach of his or her duties under this Statute [or the [Rules of Procedure and Evidence] [Regulations of the Court]], or to be unable to exercise the functions required by this Statute,/134/ shall cease to hold office if a decision to this effect is made in accordance with paragraph 2.

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

(a) in the case of a judge, by an [absolute] [two-thirds] majority of the States Parties further to a recommendation adopted by a two-thirds majority of the other judges of the Court;

(b) in the case of the Prosecutor [or a Deputy Prosecutor], by an absolute majority of the States Parties;

[(c) in the case of a Deputy Prosecutor, by the Prosecutor or by an absolute majority of the States Parties;]

[(c)] [(d)] in the case of the Registrar or Deputy Registrar, by a majority vote of the [judges] [or the] [States Parties].

3. The judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability otherwise to hold office is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court], but shall not otherwise participate in the consideration of the matter.

Article 48

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in paragraph 1 shall be subject to disciplinary measures, in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court]./135/

Article 49

Privileges and immunities

1. The judges, the Prosecutor, [the Deputy Prosecutors,] [the Registrar] [and the Deputy Registrar] shall [, when engaged in the business of the Court,] enjoy diplomatic privileges and

immunities.

2. The [Deputy Prosecutors,] [the Registrar,] [the Deputy Registrar] [and] staff of the Office of the Prosecutor and the Registry shall enjoy the privileges, immunities and facilities necessary for the performance of their functions [in accordance with the Rules of Procedure and Evidence].

3. Counsel, experts, witnesses or any other person required at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court. [In particular and without prejudice to article 70, they shall, in respect of the words spoken or written and acts done by them in the discharge of their functions, be immune from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer discharging their functions.]/136/

4. The privileges and immunities of:

(a) [a judge] [the members of the Presidency] and the Prosecutor may be waived by an absolute majority of the judges;

[(b) the other judges may be waived by the Presidency;]

(c) the Registrar may be waived by the Presidency;

(d) the Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor; and

(e) the Deputy Registrar and staff of the Registry may be waived by the Registrar./137/

Article 50

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties [in the Rules of Procedure and Evidence]. These salaries and allowances may not be decreased during their terms of office.

Article 51

Working languages

1. The working languages of the Court shall be English and French, pursuant to the Rules of Procedure and Evidence.

2. The Court shall, at the request of any Party, authorize a language other than English or French to be used by that Party.

Article 52

Rules of Procedure and Evidence/138/

1. [Option 1

The Rules of Procedure and Evidence, including an elaboration of the elements of offenses that must be proven, annexed at ____, shall be an integral part of this Statute.]

[Option 2:

The Rules of Procedure and Evidence shall enter into force [upon adoption by the Assembly of States Parties by [an absolute majority] [a two-thirds majority of those present and voting]] [together with this Statute]. They shall be consistent with the Statute.]

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) any State Party;

(b) the judges acting by an absolute majority;

[(c) the Prosecutor].

They shall enter into force upon adoption by the Assembly of States Parties [by a [...] majority]. Any modification shall be consistent with this Statute.

[3. In urgent cases, the judges may by [consensus] [a two-thirds majority] draw up a rule to be applied provisionally until the Assembly of States Parties adopts, amends or rejects it.]

Article 53

Regulations of the Court/139/

1. As far as provided in this Statute or the Rules of Procedure and Evidence or otherwise necessary for the routine functioning of the Court, the judges shall by [a two-thirds] [an absolute] majority adopt the Regulations of the Court. The Regulations of the Court shall be consistent with the Statute and the Rules of Procedure and Evidence. [In the event of conflict, the Statute or the Rules of Procedure and Evidence shall prevail.]

2. The Prosecutor [and the Registrar] shall be consulted in the elaboration of the Regulations and any amendments thereto. [The Regulations of the Court and any amendments thereto shall be circulated to the States Parties for comment. The judges shall take into account the comments made by States Parties.]

3. The Regulations and any amendments thereto shall take effect immediately upon adoption by the judges, unless otherwise decided by the judges, and shall remain in effect unless a majority of States Parties objects to them./140/

PART 5. INVESTIGATION AND PROSECUTION

Article 54

Investigation of alleged crimes

1. On receiving a complaint [or upon notification of a decision of the Security Council referred to in article 10, paragraph 1,] [or ex officio upon any other substantiated information], the Prosecutor shall [subject to paragraphs 2 and 3] initiate an investigation unless the Prosecutor concludes that there is no reasonable basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the [Presidency] [Pre-Trial Chamber].

N.B. The term "reasonable basis" in the opening clause is also used in the criteria listed in paragraph 2 (i). If the latter is retained, a broader term in the opening clause might be necessary in order to cover all the criteria listed under paragraph 2.

[2. Prior to initiating investigation the Prosecutor shall:

(a) [notify the States Parties of any complaint [or any decision of the Security Council referred to in article 10, paragraph 1], and those States Parties shall so inform the persons within their jurisdiction who are referred to by name in the submission; and]

(b) determine whether:

(i) the complaint provides or is likely to provide a reasonable basis [in law or on the facts] for proceeding with a prosecution under this Statute; and

(ii) the case is or would be admissible under article 15; and

[(ii) bis a prosecution under this Statute would be [in the interests of justice] [taking into account the gravity of the offences] [and the interests of victims];

(iii) [an investigation would be consistent with the terms of any relevant Security Council decision]; and

(iv) to seek a preliminary ruling from the Court regarding the Court's jurisdiction if the case could later be challenged under article 17.]

[3. The Prosecutor shall not initiate an investigation where the submission of the case to the Court is challenged under article 15 within one month of notification under article 54, paragraph 2 (a) until the final ruling of the Court.]

4. The Prosecutor may:/141/

(a) request the presence of and question suspects, victims and witnesses;

(b) collect documentary and other evidence [documents, records and articles of evidence];

(c)

Option 1

conduct on-site investigations;

Option 2

(i) Except as provided for in this paragraph, when evidence is in the territory of a State, the Prosecutor shall, as necessary, seek the cooperation of that State in order to obtain that evidence. The Prosecutor may conduct investigations on the territory of a State only:

a. [with the consent of its competent authorities] [upon notification of and where necessary with the consent of its competent authorities] [in accordance with

Part 9] [subject to the waiver by the competent authorities of the requirement of consent];

[b. When the Pre-Trial Chamber is satisfied that competent authorities to whom a request for assistance under Part 9 can be transmitted are not available [or not functioning].]

[(ii) In the case of paragraph (i) (b) above, [such investigations] [investigations of a non-compulsory nature/142/] shall be conducted with the [concurrence] [approval] of the Pre-Trial Chamber [which shall have regard to the views of [interested States]]. [Notification shall be given to the State in question, in particular for the purpose of the State obtaining an extension of the period for execution of a relevant request for judicial assistance.]

[(iii) In the case of paragraph (i) (b) above, the Prosecutor may use compulsory measures for collecting evidence (such as search and seizure and compelling the attendance of witnesses) based upon a valid warrant issued by the Pre-Trial Chamber.]

(d) take necessary measures to ensure the confidentiality of information or the protection of any person [, including victims];

[(e) The Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in so doing, respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children;]

N.B. See also article 68, paragraph 2 (Protection of the [accused], victims and witnesses [and their participation in the proceedings]).

(f) as appropriate, seek the cooperation of any State or of the United Nations, [or of any peacekeeping force that may be present in the territory where an investigation is to be undertaken];

[(g) where documents or information have been obtained by the Prosecutor upon a condition as to their confidentiality, which are, or are intended to be, used solely for the purposes of generating new evidence, agree that such documents or information will not be disclosed at any stage of the proceedings unless the provider of the information consents.]

N.B. This paragraph, as well as articles 58, paragraph 10 (d) and (f) (Commencement of prosecution), 61, paragraph 2 (Notification of the indictment), 67, paragraph 2, 68, paragraph 9 (Protection of the [accused], victims and witnesses [and their participation in the proceedings]), 71 (Confidential information), 90, paragraphs 2 and 6 (Other forms of cooperation [and judicial and legal [mutual] assistance]) all relate to confidentiality and they should be examined with a view to avoiding any duplication or contradiction.

[(h) enter into such arrangements or agreements, not otherwise inconsistent with this Statute, as may be necessary to secure the cooperation or assistance of a State or person in the

investigation.]

N.B. In the final drafting of paragraph 4, attention should be given to harmonizing the use of the words "shall" and "may".

5. The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, issue such subpoenas [, orders] and warrants as may be required for the purposes of an investigation, including a warrant under article 59, paragraph 1, for the pre-indictment arrest of a suspect.

6. If, upon investigation and having regard, inter alia, to the matters referred to in article 15, the Prosecutor concludes that [a case is inadmissible under article 15 or] there is [not a sufficient basis for a prosecution] [no prima facie case] under this Statute [or a prosecution would not be in the interests of justice] [taking into account the interests of victims] and decides not to file an indictment, the Prosecutor shall so inform the [Presidency] [Pre-Trial Chamber], as well as the complainant State [or the Security Council, in a case to which article 10, paragraph 1, applies], giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

[7. A decision referred to in paragraph 6 based on considerations of the interests of justice shall only become effective upon its having been confirmed by the [Presidency] [Pre-Trial Chamber] under paragraph 8 of this article.]

8. At the request of a complainant State [or, in a case to which article 10, paragraph 1, applies, at the request of the Security Council,] the [Presidency] [Pre-Trial Chamber] [shall] [may] review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision [but it may do so only once] [: provided that the Prosecutor, any suspect and the complainant State [or the Security Council (as the case may be)] shall be informed of such review proceedings or confirmation proceedings within the contemplation of paragraph 6 of this article which involves a decision based on considerations of the interests of justice and shall be entitled to submit his/her/their/its viewpoints with regard thereto, which viewpoints shall be considered by the [Presidency] [Pre-Trial Chamber] in coming to its decision].

[When new information is brought to his/her attention regarding the facts in respect of which he or she decided not to initiate an investigation or not to institute proceedings, the Prosecutor may reconsider his/her decision.]

[9. After a determination to initiate an investigation in accordance with article 54, paragraph 4, and prior to the commencement of a trial, a State requested by the Prosecutor to carry out investigations or a State on the territory of which the Prosecutor intends to conduct investigations may challenge the decision of the Prosecutor to initiate an investigation before the Pre-Trial Chamber on the grounds of lack of sufficient basis for a prosecution under this Statute.]

10. A person suspected of a crime under this Statute shall have the right:

(a) prior to being questioned, to be informed that the person is a suspect [, of the conduct that the person is alleged to have committed which may constitute a crime under this Statute] and of

the rights under (b) to (d) hereafter;

(b) to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) to have [at all times] [in connection with questioning] the [prompt] [competent] legal assistance of the person's choosing; [or, if the person does not have legal assistance, to have legal assistance assigned by the Court in any case where the interests of justice so require, including where the person is unable to secure counsel, and without payment if the person lacks sufficient means to pay for such assistance];

[(d) to be questioned in the presence of counsel unless the suspect has voluntarily waived his or her right to counsel;]

(e) not to be compelled to testify or to confess guilt nor to be subjected to any form of coercion, duress or threat;

(f) if questioned in a language other than [a language the person understands and speaks] [his or her own language], to have, free of any cost, the assistance of a competent interpreter and a translation of any document on which the person is to be questioned;

(g) not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

[11. Evidence obtained during questioning in violation of these rights shall under no circumstances be used in the trial unless they are favourable to the suspect.]/143/

[12. (a) The Prosecutor shall fully respect the rights of suspects under the Statute and the Rules of Procedure and Evidence.

(b) [To establish the truth the Prosecutor shall [ex officio] extend the investigation to cover all facts and evidence that are relevant to an assessment of the charge and to the legal consequences that may follow. The Prosecutor shall investigate equally incriminating and exonerating circumstances.]

(c) [If the Prosecutor concludes that there is a basis for prosecution under this Statute, he shall, in accordance with the Rules of Procedure and Evidence, investigate the case by seeking the cooperation of the States concerned or by himself, and such investigation shall be conducted in conformity with international law and fully respecting the sovereignty of the States concerned.]]/144/

[13. (a) A person suspected of committing a crime within the meaning of this Statute:

(i) shall, as soon as he is involved in an investigation or prosecuted under this Statute, be entitled to collect all of the evidence that he deems necessary for his defence;

(ii) may either collect this evidence himself or request the Pre-Trial Chamber of the Court to accomplish certain acts, seeking, where necessary, cooperation from any State Party.

The Pre-Trial Chamber may reject the request.

(b) If the suspect elects to collect the evidence himself in accordance with this paragraph, he may apply to the [Presidency] [Pre-Trial Chamber] for the following orders and subpoenas: [list

to be inserted]]

N.B.

- In view of the length of the article, consideration may be given to placing some of its elements in a separate article.

- The drafting of this article might need revision in the light of the decisions to be taken in respect of article 57 (Functions of the Pre-Trial Chamber in relation with investigation).

[Article 55

Information on national investigations or proceedings

1. [A State Party shall promptly inform the Prosecutor] [At any time, a State Party may inform the Prosecutor] [Where the Court has jurisdiction over a crime pursuant to articles 6 and 7, the Court may request a State Party to inform it] about national investigations or proceedings as soon as it considers that any such investigations or proceedings involve the commission of a crime within the jurisdiction of the Court. Such information shall, at the request of the State Party concerned, be confidential and shall include a concise statement of the circumstances of the alleged crime, the status of the investigation or proceeding concerned and, where possible, the identity and whereabouts of any suspect or accused.

The Prosecutor may subsequently request the State Party to provide additional information about the national investigations or proceedings.

2. The Prosecutor may, after examining the information received from a State Party under paragraph 1 and having regard to the matters referred to in article 15, decide to initiate an investigation pursuant to articles 12 and 54. For that purpose, he may seek a ruling from the Pre-Trial Chamber in accordance with article 17.]

[Article 56

Deferral of an investigation by the Prosecutor/145/

1. In the event that the Prosecutor, having regard to the matters referred to in article 15, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. Such information shall, at the request of the State concerned, be confidential.

2. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of whose proceedings deferral has taken place.]

[Article 57]/146/

Functions of the Pre-Trial Chamber in relation with investigation/147/

1. [Where the Prosecutor intends to take an investigative action which may] [When the Prosecutor considers an investigation to]

present a unique opportunity, which may not be available subsequently for the purposes of a trial, to take testimony or a statement from a witness, or to examine, collect or test evidence, [the Prosecutor shall] [, if the suspect/accused has not been identified or is not available] inform the Pre-Trial Chamber; and] the Pre-Trial Chamber, on the request of the Prosecutor, [or a suspect,] [or on its own initiative,] may take such measures as may be necessary to assure the efficiency and integrity of the proceedings, and in particular to protect the rights of the defence.

2. These measures may include the power:

(a) to make [orders] [recommendations] [orders and recommendations] regarding procedures to be followed;

(b) to direct that a record be made of the proceedings;

(c) to appoint an expert to assist;

(d) to authorize counsel for a suspect to assist, or where suspects have not been identified or have not designated counsel, appoint a lawyer to attend and represent the interest of the defence;

(e) to name one of its members [or an available judge of the Court]:

(i) to observe and make [orders] [recommendations] [orders and recommendations] regarding the collection and preservation of evidence or the questioning of persons;

(ii) to decide on questions of law; or

(iii) to take such other actions as may be necessary to collect or preserve evidence [favourable to the defence] [relevant to the case].

Option: [When in the course of a proceeding a unique opportunity presents itself to collect evidence, the Pre-Trial Chamber may, at the request of the Prosecutor or of the suspect, name one of its members or an available judge of the Court to take necessary measures to collect or preserve evidence, while respecting the rights of the defence.]

3. [If any [order] [recommendation] [order and recommendation] of the Pre-Trial Chamber is breached or is not complied with, the Pre-Trial Chamber may:

(a) reject the admissibility of any evidence obtained as a result or consequence of such a breach or non-compliance; or

(b) consider such breach or non-compliance in respect of whether any weight should be attached to any evidence obtained as a result or consequence of such breach or non-compliance.]

Article 58

Commencement of prosecution

1. If upon investigation [in the course of an investigation] the Prosecutor, having regard to the matters referred to in article 15, concludes that [the case is admissible, and] [a case does

exist against one or more persons named,] [there is a prima facie case] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial,] [which the accused could be called on to answer and that is desirable in the interests of justice that the case should proceed], the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged in respect of each of the persons referred to, their name and particulars, a statement of the allegations of fact against them, and the characterization of these facts within the jurisdiction of the Court and shall be accompanied by [relevant] [sufficient] evidence collected by the Prosecutor for the purposes of confirmation [of the indictment] by the [Presidency] [Pre-Trial Chamber].

[2. The [Presidency] [Pre-Trial Chamber] shall examine the indictment, any amendment and any supporting material and determine whether:

(a) [a prima facie case exists] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial] [there is strong evidence against the accused] with respect to a crime within the jurisdiction of the Court; and

(b) having regard, inter alia, to the matters referred to in article 15, the case should on the information available be heard by the Court [if the Court has not yet ruled on this issue];

[(c) it is desirable in the interests of justice that the case should proceed;]

If so, it shall [by majority/consensus] confirm the indictment and establish a trial chamber in accordance with article 40 [, and inform the Presidency].]

[3. Any State concerned may challenge the decision of the Prosecutor to file an indictment before the Pre-Trial Chamber on grounds of inconsistency with this Statute.]

[4. After the filing of an indictment, the Pre-Trial Chamber shall [in any case] [if the accused is in custody or has been judicially released by the Court pending trial] notify the indictment to the accused, [set a deadline prior to the confirmation hearing, until which the Prosecutor and the defence may add new evidence [for purposes of such confirmation hearing]], and set a date for the review of the indictment. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his/her counsel, subject to the provisions of paragraph 8. In the hearing, the accused shall be allowed to object to the indictment and criticize the material on which it is based.

Following the hearing, the Pre-Trial Chamber may:

(a) confirm the indictment in its entirety;

(b) confirm only part of the indictment [and amend it], by giving a different qualification to the facts;

[(c) order further investigation];

(d) refuse to confirm the indictment.

When it confirms the indictment in its entirety or in part,

the Pre-Trial Chamber shall commit the accused to the Trial Chamber for trial on the indictment as confirmed. Confirmation of indictment shall uphold the warrants issued earlier, except if the Court decides otherwise.]

5. If, after any adjournment that may be necessary to allow additional material to be produced, the [Presidency] [Pre-Trial Chamber] decides not to confirm the indictment, it shall so inform the complainant State [or, in a case to which article 10, paragraph 1, applies, the Security Council].

[If it does not confirm the indictment, all the warrants issued prior to the decision of non-confirmation shall cease immediately to have effect.]

[6. The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing a new indictment based on the acts underlying that count if supported by additional evidence.]

[7.

Option 1

The [Presidency] [Pre-Trial Chamber] may [, on its own or] at the request of the Prosecutor amend the indictment [, in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence] [after hearing the accused, provided that the Trial Chamber is satisfied that the accused is not prejudiced in his rights to defend himself].]

Option 2

Prior to the confirmation of the indictment by the Pre-Trial Chamber, the Prosecutor may amend or withdraw the indictment. [The accused shall be informed of the withdrawal as well as of any amendment. In the event of withdrawal, the Pre-Trial Chamber may, under the provisions provided for in article 54, ask the Prosecutor to reconsider his/her decision.]

After the confirmation of the indictment, the Prosecutor may amend the indictment only with the permission of the Pre-Trial Chamber, and after notice to the accused. If the Prosecutor is seeking to add additional charges or to substitute more serious charges for those in the confirmed indictment, the new or amended charges must be confirmed by the Pre-Trial Chamber in accordance with the procedures for confirmation of the indictment set out in paragraph [...].

After the commencement of the trial, the Prosecutor may withdraw the indictment or certain charges within the indictment only with the permission of the Trial Chamber].

[In case of withdrawal of the indictment after the confirmation thereof, new prosecution may be instituted for the same offence only based upon a newly discovered material evidence which was not available to the Prosecutor at the time of the withdrawal in the interest of the defence.]

N.B. Consideration may be given to limiting paragraph 7 to the main principles regarding amendment and withdrawal of the indictment while addressing the details in the Rules of Procedure and Evidence.

[8./148/ When one or more of the accused has fled or cannot be

found, and when all reasonable steps have been taken to inform the accused, the Pre-Trial Chamber may still hold a hearing in order to examine whether it shall confirm the indictment. In that case, the accused cannot be represented by counsel.

When it confirms the indictment, in its entirety or in part, against an accused who has fled or cannot be found, the Pre-Trial Chamber shall issue a warrant to search for, arrest and transfer the accused, which is tantamount to committing him to the Trial Chamber for trial.]

[9. Anyone who has [personally] suffered [direct] injury caused by a crime submitted to the Court, [the legal representatives of victims, victims' relatives, successors and assigns,] may inform the [Prosecutor] [and the] [Pre-Trial Chamber] in writing of the acts having caused injury to him/her/them and the nature and amount of the losses which he/she/they has/have sustained.

When it confirms the indictment, in its entirety or in part, the Pre-Trial Chamber may order provisional measures which may be necessary [in order to enable a Trial Chamber, upon a subsequent conviction,] to compensate the victim designated in the above paragraph. For that purpose, the Pre-Trial Chamber shall seek the cooperation of the interested States.

Such provisions shall also apply when the accused has fled or cannot be found.]

N.B. Paragraph 9 should be reviewed in the light of article 73 (Reparations to victims).

10. The [Presidency] [Pre-Trial Chamber] [Trial Chamber] may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b)

Option 1

requiring the disclosure to the defence [of the relevant evidence that the defence requests] within a sufficient time before the trial to enable the preparation of the defence, of [relevant] documentary or other evidence available to the Prosecutor [, whether or not the Prosecutor intends to rely on that evidence] [which the Prosecutor intends to rely upon]; [if the Prosecutor fails to comply with an order under this subparagraph, the evidence in question will be inadmissible at the trial;]

Option 2

save in respect of documents or information referred to in article 54, paragraph 4 (g), and subject to subparagraph (f) below, requiring the disclosure to the defence of documents or information which are either considered [material] [relevant] to the preparation of the defence, or are intended for use by the Prosecutor at trial or were obtained from the accused;/149/

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing [, at the request of either party or a State, or at the instance of the Court on its own volition,] for the protection of the accused, victims and witnesses and of confidential information;

(e) providing [, at the request of either party or a State, or at the instance of the Court on its own volition,] for the protection and privacy of victims and witnesses;

[(f) providing, at the request of either party or a State, or at the instance of the Court of its own volition, for the non-disclosure or protection of documents or information provided by a State the disclosure of which would [endanger] [prejudice] the national security or national defence interests of a State in accordance with criteria to be specified in rules made pursuant to this Statute.]

N.B. Subparagraphs (d), (e) and (f) of paragraph 10 could be consolidated further.

Article 59

Arrest

1. At any time after an investigation has been initiated, the [Presidency] [Pre-Trial Chamber] may at the request of the Prosecutor issue a warrant for the pre-indictment arrest of a suspect if there are reasonable grounds/150/ /151/ to believe that:

(a) the suspect has committed a crime within the jurisdiction of the Court; and

(b) taking the suspect into custody is necessary to ensure that the suspect does not:

(i) fail to appear for trial;

[(ii) [interfere with or destroy evidence;]/152/

[(iii) [intimidate] [influence] witnesses or victims;]

[(iv) engage in collusion with accomplices;] or

[(v) [continue to commit a crime within the jurisdiction of the Court.]/153/

[The Pre-Trial Chamber may also issue a warrant of judicial supervision in order to place a person under restrictions of liberty other than arrest.]/154/

[No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the rules of the Court.]/155/

2. (a) The warrant for the pre-indictment arrest shall be deemed to have lapsed and the request for the pre-indictment arrest of a suspect shall be deemed to have been withdrawn if [the indictment has not been confirmed] [a post-indictment warrant has not been served] within [30] [60] [90] days of the arrest, or in exceptional circumstances such longer time up to a total of [60] [90] days as the [Presidency] [Pre-Trial Chamber] may allow.

(b) In the case of a State Party which has notified the Court under article 88, paragraph 2, that it can surrender pre-

indictment, the warrant for the pre-indictment arrest of a suspect shall be deemed to have been withdrawn if [the indictment has not been confirmed] [a post-indictment warrant has not been served] within [30] [60] [90] days of the surrender, or in exceptional circumstances such longer time up to a total of [60] [90] days as the [Presidency] [Pre-Trial Chamber] may allow.

If the Prosecutor decides not to indict the suspect or the [Presidency] [Pre-Trial Chamber] decides not to [confirm the indictment] [not to issue a post-indictment warrant], the Prosecutor shall immediately advise the custodial State of that fact./156/

3. "Opening clause":

Option 1

[In the case where no pre-indictment warrant has been obtained,] [Prior to the confirmation hearing,] [As soon as practicable] [after the confirmation of the indictment], the Prosecutor shall seek from the [Presidency] [Pre-Trial Chamber] a [post-indictment] warrant for the arrest and transfer of the accused. The [Presidency] [Pre-Trial Chamber] shall issue such a warrant unless it is satisfied that:

Option 2

Upon confirmation of the indictment, a warrant for the arrest of the accused shall be issued by the Pre-Trial Chamber, unless, having heard the views of the Prosecutor, it is satisfied that:

(a) the accused will voluntarily appear for trial and none of the other factors in paragraph 1 (b) are present]; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. The Court/157/ shall transmit the warrant to any State where the person may be located, along with a request for the provisional arrest, or arrest and [surrender, transfer, extradition] of the person under Part 9.

5. [Pre-indictment and post-indictment warrants may also be issued when the accused is a fugitive. In this case, the post-indictment warrant issued by the Pre-Trial Chamber shall have the effect of an international warrant and shall be disseminated by all appropriate means. When the accused is apprehended, the authorities shall proceed as provided for in Part 9.]

6. [A post-indictment warrant shall remain in effect until the date of the judgement. The effects of the warrant delivered by the Pre-Trial Chamber shall not be interrupted by the actions challenging the submission of cases to the Court.]

Article 60

Pre-trial detention or release

1. [The States [Parties] [in which the person is located] [and in which the crime was committed] shall be notified of a warrant issued by the Pre-Trial Chamber.] The State that has received a pre- or post-indictment warrant and a request for the arrest of a person under article 59, paragraph 5, shall immediately [in

accordance with its laws]/158/ [[and] in accordance with the provisions of Part 9 of this Statute] take steps to arrest the suspect [on the basis of the warrant issued by the Court or by obtaining a domestic warrant for arrest based on the Court's warrant and request]./159/

[2. The Prosecutor may, with the consent of the Pre-Trial Chamber, execute a warrant for arrest by him or herself only in cases where the competent authority of the State Party concerned may not be available or may be ineffective.]/160/

3. A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall determine, in accordance with the law of that State, that the warrant applies to that person and the person has been arrested in accordance with the proper process and that the person's rights have been respected.

4. The person shall have the right to apply to [the competent judicial authority in the custodial State] [the Pre-Trial Chamber] for interim release pending [surrender] [transfer] [extradition] [in accordance with its national law]. [The custodial State shall take into account the views of the Prosecutor [and Court] on interim release.]

N.B. The term "Court", if retained in this paragraph, should be clarified.

5. After the [decision to] [surrender] [transfer] [extradite] to the Court, the person may apply to the [Presidency] [Pre-Trial Chamber] for interim release pending trial.

6. The person shall be detained unless the [Presidency] [Pre-Trial Chamber] is satisfied that the person will voluntarily appear for trial and none of the other factors in article 59, paragraph 1 (b), are present. If it decides to release the person, it may do so with or without conditions [or may issue a warrant of judicial supervision restricting the person's liberty other than by arrest]. [The [Presidency] [Pre-Trial Chamber] shall also, on its own initiative, review its ruling periodically. If satisfied that changed circumstances require that the ruling be modified, it may order any measure provided for in paragraph 5.]

N.B. Reference to "any measure provided for in paragraph 5" should be revised in the light of the current language of paragraph 5.

7. (a) The [Presidency] [Pre-Trial Chamber] may, either of its own initiative or at the request of the person concerned or the Prosecutor, modify its ruling as to detention [, judicial supervision] or conditional release in effect at that time.

[(b) The person may be detained prior to trial for a maximum of one year; however, this period may be extended up to an additional year by the [Presidency] [Pre-Trial Chamber] if the Prosecutor can demonstrate that he or she will be ready for trial within that period and can show good cause for the delay.]

(c) The person and the Prosecutor may appeal the [Presidency's] [Pre-Trial Chamber's] determination regarding release or detention to the Appeals Chamber.

8. If necessary, the [Presidency] [Pre-Trial Chamber] may issue a warrant of arrest to secure the presence of an accused who has been released.

9. A person arrested may apply to the [Presidency] [Pre-Trial Chamber] for a determination of the lawfulness under this Statute of any arrest warrant or order of detention issued by the Court. If the [Presidency] [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall order the release of the person, [and may award compensation] [in accordance with article ...]:/161/

10. [A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held, or if necessary in the host State.] [Once ordered [surrendered] [transferred] [extradited] by the custodial State, the person shall be delivered to the Court as soon as possible, and shall be held in an appropriate place of detention in the host State or other State in which the trial is to be held.]

Article 61/162/

Notification of the indictment

N.B. It might be necessary to broaden the title of this article to cover the whole of its content.

1. The [Prosecutor] [Registrar] shall ensure, where necessary with the cooperation of national authorities, that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, [in a language that the accused understands] [in his own language]:

(a) in the case of the pre-indictment arrest of a suspect, [a statement of the grounds for the arrest] [the warrant of arrest or restriction of liberty];

(b) in any other case, the confirmed indictment;

(c) a statement of the [accused's] [arrested person's] rights under [articles 54 or 67 of] this Statute and the Rules [, as applicable].

[2. An indictment shall be made public, except in the following situations:

(a) The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or in the case of joint accused, on all the accused. In exercising its discretion, the [Presidency] [Pre-Trial Chamber] shall take account of all relevant factors, including the potential for pre-arrest flight of an accused, destruction of evidence and harm to victims or witnesses if the indictment is made public;

(b)/163/ The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.]

3. In any case to which paragraph 1 (a) applies, the indictment shall be served on the accused as soon as possible after it has

been confirmed.

4. If, 60/164/ days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 59, paragraph 3, or for some reason the requirements of paragraph 1 cannot be complied with, the [Presidency] [Pre-Trial Chamber] [the Registrar] [may] [shall] on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

[5. [The accused] [Anyone suspected of committing a crime within the meaning of this Statute] shall be entitled:

(a) to be informed promptly of the nature and cause of the charge against him or her [and be questioned in a language which he understands, and, to this end, to have the free assistance of a competent interpreter, and to be provided free of charge with a translation of the documents on the basis of which he is being questioned or that show why a measure infringing upon his liberty or property has been proposed];

(b) [to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel;] [to be assisted promptly by a lawyer of his own choosing, or, if he does not have sufficient means to pay for one, by a lawyer appointed by the [Pre-Trial Chamber of the] Court;]

(c) [before being questioned, or when a measure infringing upon his liberty or property has been proposed and brought to his attention, to be fully informed of the charges against him and the rights to which he is entitled under paragraph 1 of this article.]]

Further option for articles 58 to 61/165/ /166/

Article 58

Issuance by the Pre-Trial Chamber of an arrest warrant or a summons to appear/167/

1. At any time after an investigation has been initiated, the Pre-Trial Chamber may, at the application of the Prosecutor, issue a warrant for the arrest for a person if:

(a) there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) it appears that the arrest of the person is necessary to assure the person's appearance at trial, to assure that the person does not obstruct or endanger the investigation or the court proceedings, [or to prevent the person from continuing to commit a crime within the jurisdiction of the Court].

2. The application shall specify:

(a) the name of the person or persons, and any other relevant identifying information;

(b) the specific crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) a concise statement of the facts which are alleged to constitute those crimes;

(d) a summary of the evidence and any other information which form reasonable grounds to believe the person committed those

crimes; and

(e) the reason why the Prosecutor believes the arrest of the person is necessary.

3. The Pre-Trial Chamber shall examine the application and the evidence or other information submitted by the Prosecutor and, if satisfied that there are reasonable grounds to believe that the person named committed the crimes alleged and that the arrest of the person appears necessary, shall issue a warrant for the arrest of the person. The warrant of arrest shall identify the person to be arrested and the crimes for which the person's arrest is sought, and shall contain a concise statement of the facts which are alleged to constitute those crimes. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

4. Based on the arrest warrant, the Court may request the provisional arrest, or the arrest and [surrender][extradition] of the person under Part 9.

[5. Prior to the [surrender][extradition] of the person, the Prosecutor may request that the Pre-Trial Chamber amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe the person committed the modified or additional crimes.]/168/

6. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber finds that there are reasonable grounds to believe that the person committed the crime alleged, and that a summons is sufficient to assure the person's appearance, it shall issue the summons for the person to appear on a specified date. The summons shall identify the person summoned and the crimes which the person is alleged to have committed, and shall contain a concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person. [The Pre-Trial Chamber may request the State that serves the summons to place the person under restrictions of liberty, if permitted by the law of that State.]/169/

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and [surrender][extradition] shall immediately take steps to arrest the suspect in accordance with its laws and the provisions of Part 9./170/

2. A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall determine, in accordance with the law of that State, that the warrant applies to that person, that the person has been arrested in accordance with the proper process, and that the person's rights have been respected.

3. The person arrested shall have the right to apply for interim release pending [surrender][extradition] to [the Pre-Trial Chamber][the competent judicial authority in the custodial State in accordance with its national law. The custodial State shall take into account the views of the Prosecutor and the Court regarding the interim release.]

[4. Pending a decision on [surrender][extradition], a person may apply to the Pre-Trial Chamber for a determination of the lawfulness under this Statute of any arrest warrant issued by the Court. If the Pre-Trial Chamber decides that the arrest warrant was unlawful under the Statute, it shall order the release of the person.]/171/

5. Once ordered to be [surrendered][extradited] by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the [surrender][extradition] of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. However, the person shall be detained unless the Pre-Trial Chamber is satisfied that the person, if released, will appear for trial, will not obstruct or endanger the investigation or the Court's proceedings[, or will not continue to commit crimes within the jurisdiction of the Court]. If it decides to release the person, the Pre-Trial Chamber may do so with or without conditions, including conditions restricting the person's liberty.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or accused./172/ Upon such review, it may modify its ruling as to detention, release, or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall assure that a person is not detained for an unreasonable period prior to trial due to unexcusable delay by the Prosecutor. If such delay has occurred, the Court shall consider releasing the person pursuant to conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released.

Article 61

Confirmation of the charges before trial/173/

1. Within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel[, unless -

(a) the person has waived his right to be present; or

(b) the person has fled or cannot be found and all reasonable

steps have been made to inform the person of the proposed charges and that a hearing to confirm those charges will be held, in which case the person shall not be represented by counsel].

2. A reasonable time before the hearing, the person shall be provided with a copy of the charges on which the Prosecutor intends to seek trial, and be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may make orders regarding the disclosure of information for purposes of the hearing as may be appropriate under the Statute and the Rules.

3. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any proposed charges. The accused shall be given reasonable notice before the hearing of any amendment or withdrawal of proposed charges.

4. At the hearing, the Prosecutor shall have the burden of presenting, for each charge on which he seeks trial, sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

5. At the hearing, the accused person may object to the proposed charges, criticize the evidence presented by the Prosecutor and present evidence on his or her own behalf.

6. The Pre-Trial Chamber shall determine whether, considering the presentations by both the Prosecutor and the accused, there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged./174/ Based on its determinations, the Pre-Trial Chamber may:/175/

(a) confirm those proposed charges as to which it has determined there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) refuse to confirm those proposed charges as to which it has determined there is insufficient evidence;

(c) adjourn the hearing and request the Prosecutor to consider -

(i) providing further evidence or conduct further investigation with respect to a particular charge; or

(ii) amending a proposed charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court./176/

7. After the charges are confirmed and before the trial has begun, the Prosecutor may amend the charges, but only with the permission of the Pre-Trial Chamber and after notice to the accused. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this Article to confirm those charges must be held. After commencement of the trial, the Prosecutor may withdraw the charges only with the permission of the Trial Chamber.

8. A previously issued warrant shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

PART 6. THE TRIAL

Article 62

Place of trial

1. Unless otherwise decided in accordance with paragraph 2, the place of the trial will be the seat of the Court.

2. The [Presidency] [Assembly of the State parties] may authorize the Court to exercise its functions at a place other than its seat [where it will ensure the efficient conduct of the trial and is in the interest of justice] [or] [when trial by the members of the Court is likely to make the proceedings simpler and less costly]

3. [(a) The Presidency of the Court shall make inquiries with the State Party that appears likely to receive the Court.

[(b) After the State Party likely to receive the Court has agreed, the decision [under the preceding paragraph] to hold a session away from the Court's seat shall be taken by the Assembly of the States Parties, which shall be informed either by one of its members, the Presidency, the Prosecutor or the Assembly of the Judges of the Court.]

4. [With the express agreement of the State Party receiving the Court], the privileges, immunities and facilities provided for in shall continue to be effective when the Court holds a session pursuant to paragraph 2.

5. [The provisions of this article shall also apply to non-States Parties which, after inquiries by the Presidency, state that they agree to receive the Court and to grant the privileges, immunities and facilities provided for in .]

N.B. Some of the issues raised in the proposals may be dealt with in the Rules of Procedure and Evidence.

Article 63

Trial in presence of the accused

Comment: There appear, in essence, to be three options regarding trials in absentia which have emerged to date, in addition to the ILC draft (A/51/22, vol. II). The ILC text and the proposed options are set out below:

N.B. The ILC text as such could be deleted since it seems to have been superseded by the options that were developed as a consequence of the discussions at the Preparatory Committee.

ILC draft

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be

present;

(b) the accused is continuing to disrupt the trial; or

(c) the accused has escaped from lawful custody under this Statute or has broken bail.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4./177/ In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) recording the evidence;

(b) considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

5. If the accused is subsequently tried under this Statute:

(a) the record of evidence before the Indictment Chamber shall be admissible;

(b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

* * *

Option 1

The trial shall not be held if the accused is not present./178/

Option 2

General rule

1. As a general rule, the accused shall be present during the trial.

Exceptions

2. In exceptional circumstances, the Trial Chamber may order that the trial proceed in the absence of the accused, if the accused, having been present at the commencement of the trial thereafter:

(a) has escaped from lawful custody or has broken bail; or

[(b) is continuing to disrupt the trial.]/179/

Rights of the accused

3. The Trial Chamber shall, if it makes an order under paragraph

2, ensure that the rights of the accused under this Statute are respected, and in particular that the accused is legally represented, if necessary by a lawyer appointed by the Court./180/

Proceedings to preserve evidence/181/

Subsequent trial/182/

Option 3

1. As a general rule, the accused should be present during the trial.

2. In exceptional circumstances, the Trial Chamber may, in the interests of justice [at the request of the Prosecutor] [proprio motu or at the request of one of the parties] order that the trial proceed in the absence of the accused, if the latter, having been duly informed of the opening of the trial:

(a) Requests to be excused from appearing for reasons of serious ill-health;

(b) Disrupts the trial;

(c) Does not appear on the day of the hearing;

(d) under detention has, when summoned for the date of the trial, refused to appear without good reason, and made it particularly difficult to bring him to the Court; or

In the event that the accused is convicted following a trial held in his absence, the Trial Chamber may issue a warrant for the arrest and transfer of the accused for the purposes of executing the judgement. The decision taken under the provisions of this paragraph shall be communicated to the accused and may be appealed.

3. The Trial Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4. When the accused has not been duly informed of the opening of the trial and when all reasonable steps have been taken to inform the accused of the charges, the Trial Chamber may also, in very exceptional circumstances, [at the request of the Prosecutor] [proprio motu or at the request of one of the parties], order that the trial proceed in the absence of the accused when required in the interests of justice or the interests of the victims.

The accused may not then be represented by a lawyer of the accused's choosing, but the judge presiding over the Trial Chamber may appoint a lawyer on his own motion.

When the accused, having been judged in accordance with the above provisions, is taken prisoner or is arrested, the decisions taken in his absence by the Trial Chamber shall be null and void in all their provisions. The evidence submitted during the trial held in the absence of the accused may not be used, during the second trial, to establish the charges levelled against the accused,

except where it is impossible for the depositions to be made a second time or where the evidence cannot again be produced.

Nevertheless, the accused may agree to the decision if the sentence pronounced in his absence is less than or equal to 10 years of imprisonment.

Option 4

1. The accused shall have the right to be present at the trial, unless the Trial Chamber, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.

2./183/ The Trial Chamber shall, if it makes an order under (paragraph 2), ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

Article 64

Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

(a) have the indictment read;

(b) ensure that articles 58, paragraph 10 (b), and 61 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

(c) satisfy itself that the other rights of the accused under this Statute and the Rules have been respected;

(d) allow the accused to enter a plea of not guilty or to make an admission of guilt before the Trial Chamber [and should the accused fail to do so, enter a plea of not guilty on his or her behalf].

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[3. The President of the Trial Chamber shall control and direct the hearing, and decide upon the manner by which evidence shall be produced by the parties. In all circumstances, the President shall have the duty to remain impartial.]

N.B. It was suggested that the beginning of the paragraph should refer to the person presiding over the Trial Chamber.

4. The Trial Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

5. The trial shall be held in public, unless the Trial Chamber determines that certain proceedings be in closed session in

accordance with article 68, or for the purpose of protecting confidential or sensitive information which is to be given in evidence. The deliberations of the Court shall remain confidential.

6. The Trial Chamber shall, subject to this Statute and the Rules of Procedure and Evidence, have, inter alia, the power on the application of a party or of its own motion to:

(a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;

(b) exercise the same powers as the Pre-Trial Chamber regarding measures that restrict the liberty of a person;

(c) terminate or modify any warrants issued by the Pre-Trial Chamber;

(d) rule on any preliminary motions.

N.B. See the last paragraph of article 17, paragraph 5 (Challenges to the jurisdiction of the Court or the admissibility of a case) for any possible inconsistency with paragraph 6 (d) and article 81.

(b) require the attendance and testimony of witnesses, and the production of documents and other evidentiary materials by obtaining, if necessary, the assistance of States as provided in this Statute;

[(b) bis order the production of further evidence to that already collected prior to the trial or presented during the trial by the parties;]

(c) rule on the admissibility or relevance of evidence;

(d) protect confidential information; and

(e) maintain order in the course of a hearing.

The provisions of article 58, paragraph 10 (f), will apply mutatis mutandis for the purposes of orders sought under subparagraph (d) above.

7. [The Trial Chamber may refer pre-trial issues under this article to the Pre-Trial Chamber for resolution.]

8. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt under article 64, paragraph 1 (d), the Trial Chamber shall determine whether:

(a) the accused understands the nature and consequences of the admission of guilt and whether the admission is voluntarily made after sufficient consultation with defence counsel; and

(b) the admission of guilt is [firmly] supported by the facts of the case that are contained in:

(i) the indictment and in any supplementary materials presented by the Prosecutor, and which the accused admits; and

(ii) any other evidence, including the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall consider the admission of guilt, together with any additional evidence presented and admitted, as an admission of all the essential facts that are required to prove the crime to which the admission of guilt relates, and [may] [shall] convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall order that the trial be continued under the ordinary trial procedures provided by this Statute, and shall consider the admission of guilt not to have been made [and shall [may] remit the case to another Trial Chamber].

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is otherwise required in the interests of justice, in particular the interests of the victims, the Trial Chamber may request that the Prosecutor present additional evidence, including the testimony of witnesses, or may order that the trial be continued under the ordinary trial procedures provided by this Statute and, in the latter situation, shall consider the admission of guilt not to have been made [and shall [may] remit the case to another Trial Chamber].

5. Discussions between the Prosecutor and the defence regarding modification of the charges in the indictment, acceptance of the admission of guilt by the accused, or the penalty to be imposed shall not be legally binding on the Chamber./184/

Article 66

Presumption of innocence

Everyone shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt./185/

Article 67

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled [, in addition to any rights afforded to a suspect under this Statute,] to a public hearing, having regard to [article 64 and] article 68, and to a fair hearing by an independent and impartial tribunal, and to the following minimum guarantees in full equality:/186/

(a) to be informed promptly and in detail, [in a language that the accused understands] [in his own language], of the nature, cause and content of the charge;

(b) to have adequate time and facilities for the preparation of the defence, and to communicate freely with counsel of the

accused's choosing, in confidence;/187/

(c) to be tried without [undue] [unreasonable] delay and to enjoy a speedy trial;

(d) subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, including where the person is unable to secure counsel, and without payment if the accused lacks sufficient means to pay for such assistance;

(e) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution; [In addition the accused shall also be entitled to present any other evidence;]

(f) if any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

[[(h) to make an unsworn statement in his or her defence, if desired] [to declare in his or her defence, but [need] [shall] not take an oath to speak the truth]];

[(i) to request the Pre-Trial Chamber or, after the commencement of the trial, the Trial Chamber to seek the cooperation of a State Party pursuant to Part 9 [7] of this Statute to collect evidence for him/her;]

[(j) no reverse onus or duty of rebuttal shall be imposed on the accused.]

N.B. See also article 68, paragraph 2 (Protection of the [accused], victims and witnesses [and their participation in the proceedings]) for any possible inconsistency with subparagraph 1.

2. [Exculpatory evidence] [Evidence which shows or tends to show the innocence] [or mitigate the guilt] of the accused or may affect the credibility of prosecution evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be [made available] [disclosed] to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide. [The provisions of article 58, paragraph 10 (f), will apply mutatis mutandis for the purposes of a decision made under this subparagraph.]

[3. The right of all persons to be secure in their homes and to secure their papers and effects against entries, searches and seizures shall not be impaired by the Court except upon warrant issued by the [Court] [Pre-Trial Chamber], on the request of the Prosecutor, in accordance with Part 9 or the Rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in

accordance with such procedures as are established by the Rules of the Court.]

[4. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, without due process of law.]/188/

Article 68

Protection of the [accused], victims and witnesses [and their participation in the proceedings]

1. The Court shall take the necessary measures available to it to protect the accused, victims and witnesses. Notwithstanding the principle of public hearings, the Court may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means. [In camera hearings are mandatory when they are requested by an accused who was a minor at the time of the commission of the acts or by a victim of sexual violence.]

2. [The Prosecutor shall, in ensuring the effective investigation and prosecution of crimes, respect and take appropriate measures to protect the privacy, physical and psychological well-being, dignity and security of victims and witnesses, having regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, whether the crime involves sexual or gender violence. These measures will be consistent with the rights of the accused.]

N.B. See also article 54, paragraph 4 (e) (Investigation of alleged crimes).

3. The Court shall take such measures as are necessary to ensure the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, at all stages of the process, including, but not limited to, victims and witnesses of sexual and gender violence. However, these measures [may not] [shall not] be [inconsistent with] [prejudicial to] the rights of the accused.

4. [The Court [shall] [may] permit the views and concerns of the victim to be presented and considered at appropriate stages of the proceedings where their personal interests are affected in a manner which is consistent with the rights of the accused and a fair and impartial trial.]

[5. The Victims and Witnesses Unit, established under article 44 of this Statute, shall provide counselling and other assistance to victims and witnesses and advise the Prosecutor and the Court on appropriate measures of protection and other matters affecting their rights. These measures may extend to family members and others at risk on account of testimony given by such witnesses.]

N.B. See article 44, paragraph 4.

[6. Notwithstanding paragraph 1 of article 58, if disclosure of any evidence and/or any of the particulars referred to in that paragraph will probably lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for purposes of these proceedings, withhold such particulars and submit a summary of such evidence. Such a summary shall, for purposes of any later trial proceedings before the Court, be deemed to form part of the particulars of the indictment.]

[7. The rules of procedure shall include provisions giving effect

to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.]

[8. Legal representatives of victims of crimes have the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation.]

N.B. This paragraph should be reviewed in the light of the text on article 73 (Reparations to victims).

9. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of sensitive information.

Article 69

Evidence

1. Before testifying, each witness shall, in accordance with [or as excepted by] the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness./189/

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence./190/ These measures shall not be [prejudicial to] [inconsistent with] the rights of the accused.

3. The Court has the authority to call all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence in accordance with the Rules of Procedure and Evidence./191/

5. The Court shall not require proof of facts of common knowledge but may take judicial notice of them./192/

6. Evidence obtained by means of a violation of this Statute/193/ or internationally recognized human rights [or other relevant rules of international law], and which either casts substantial doubt on its reliability or the admission of which is antithetical to and would seriously damage the integrity of the proceedings, shall not be admissible.

7. [With regard to defences open to the accused under the general principles of criminal law in the present Statute, the onus of proof shall be on the accused, subject to a preponderance of probability as applicable in civil cases.]/194/

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on [, but may have regard to,] the application of the State's national law.

Article 70

Offenses or acts against the integrity of the Court

1. The Court shall have jurisdiction over the following offenses and acts against its integrity when committed intentionally, as defined below:

(a) giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) presenting evidence that the party knows is false or forged;

Option 1

[(c) obstructing or disrupting the conduct of the Court's proceedings by disorderly or offensive conduct;]

[(d) disobeying an order made by or under the authority of the Court in connection with the conduct of its proceedings;]

Option 2

[The Court may, by [fine] or other sanction, punish misbehaviour of persons committed during its proceedings, to the extent provided for in the Rules.]

(e) corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(f) impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(g) retaliating against an official of the Court on account of duties performed by that or another official.

2. The offenses referred to in the present article shall be tried before a Chamber other than the Chamber in which the alleged offenses were committed in accordance with the Rules of Procedure and Evidence.

3. The Court may, in the event of conviction, impose a term of imprisonment not exceeding [X months/years] [or a fine, or both].

N.B. It is not contemplated that all the provisions of the Statute and Rules, whether substantive or procedural, regarding the Court's exercise of jurisdiction over article 5 crimes would apply equally to these offenses. Further work to clarify this issue will be essential. Moreover, similar thought must be given to States parties' obligation to surrender persons charged with these offenses, especially when the State Party is pursuing prosecution itself.

[Article 71

Sensitive national security information

N.B. This title is suggested.

Option 1

1. Any person requested to give information or evidence to the

Court may refuse to do so on the ground that they are of a confidential nature and that their disclosure would seriously prejudice the national defence or security interest of the State party concerned.

2. The Court may ask the State party concerned whether it confirms that the disclosure of these information or evidence would seriously prejudice its national defence or security interest.

If the State so confirms, the provision of article 90 (2) (c) and article [...] apply.

Option 2

1. This article applies in any case [falling within the scope of articles [54, paragraph 4 (g),] 58, paragraph 10 (d) and (f), 67, paragraph 2; 68, paragraph 9; 71 and 90, paragraph 2] where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests.

2. If, in the opinion of a State, disclosure of documents or information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor or the Defence (as the case may be), to seek to resolve the matter by cooperative means. In appropriate circumstances, this may include the possibility of seeking a determination of the Court as to:

(a) Whether the request might be modified or clarified;

(b) The relevance of the information or documents sought;

(c) Whether there might be agreement on the conditions under which disclosure might be given by providing summaries or redactions, by the use of in camera and/or ex parte proceedings or by means of other protective measures permissible under this Statute or the Rules.

3. Without prejudice to article 54, paragraph 4 (g), the Pre-Trial Chamber or the Trial Chamber shall not make a determination that disclosure should be made except in accordance with the provisions set out below.

4. The Court may hold a hearing for the purposes of hearing the State's representations on non-disclosure. If so, notice to the State will be given in accordance with the Rules./195/ The Pre-Trial Chamber or Trial Chamber shall, if so requested by the State, hold in camera and ex parte hearings, and may make other special arrangements, including, as appropriate:

- Designating a single judge to examine documents or hear submissions;

- Allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;

- Allowing the State to provide its own interpreters for the hearing and its own translations of sensitive documents; and

- Ordering that no transcripts be made of such proceedings, and that documents not required by the Pre-Trial Chamber

or Trial Chamber be returned directly to the State without being deposited or filed in the registry of the Court.

5. The Pre-Trial Chamber or Trial Chamber shall not make a determination to which this article applies unless:

(a) It is clear from the State's actions that it is not acting in good faith towards the Court; and, in determining the State's bona fides, the Pre-Trial Chamber or Trial Chamber shall have regard to the following factors:

(i) Whether efforts have been made to secure the State's assistance through cooperative means and without recourse to measures of compulsion;

(ii) Whether the State has expressly refused to cooperate;

(iii) Whether there is clear evidence that the State does not intend to cooperate either because there has been excessive delay in complying with a request for assistance or because there are other circumstances clearly indicating an absence of good faith on its part;

(b) The information or evidence is relevant to an issue before the Court and is necessary for the efficient and fair conduct of the proceedings; and

(c) Having regard to the State's claim that its national security interests would be prejudiced by disclosure, the Pre-Trial Chamber or the Trial Chamber is satisfied that the claim is manifestly without foundation.

6. Where a State makes a claim falling within paragraph 2 (c) above, it shall submit a reasoned case, orally or in writing, in support of its claim that its national security interests would be so prejudiced.

Option 3

1. Article 90, paragraph 2, option 2, subparagraphs (c) and (d), which now permits a State Party to deny assistance where "execution of the request would seriously prejudice its national security, ordre public or other essential interests" or where "the request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence]", would be deleted and replaced by a narrower formulation for subparagraph (c), to read as follows:

Article 90, paragraph 2 (c)

"A State Party may deny a request for assistance, in whole or in part, only if:

"...

"(c) having complied with the provisions of article [see new article below], it determines that there are no conditions under which it can comply with the request, including request for information or evidence arising under article 64, without seriously prejudicing its national security interests."

2. A new article, perhaps following current article 90, would set out procedures to be followed before a State party could deny assistance on national security grounds:

"Article [ ]

"1. If a State Party receives a request for information or evidence from the Prosecutor or the Court, the disclosure of which would, in the opinion of the State, seriously prejudice its national security interests, the State shall without delay notify the Prosecutor or the Court of its concerns and request consultations to determine whether there are means whereby its concerns may be addressed, which may include, among other things, the following:

"(a) modification or clarification of the request;

"(b) a determination by the Pre-Trial or Trial Chamber regarding the relevance of the information or evidence sought;

"(c) obtaining the information or evidence from a different source or in a different form; or

"(d) agreement on conditions under which the assistance could be provided, including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera and/or ex parte proceedings, or other protective measures permissible under the Statute and the Rules.

"2. For purposes of hearing the State's concerns regarding disclosure or facilitating consultations to address those concerns, the Pre-Trial Chamber or Trial Chamber shall, if so requested by the State, hold in camera and/or ex parte hearings, and make other special arrangements, as appropriate.

"3. If, following such consultations, the Prosecutor or Court reaffirms the request for the information or evidence and the State determines there are no means or conditions under which it could provide that information or evidence without serious prejudice to its national security interests, it shall so notify the Prosecutor or the Court of its determination and the specific reasons therefor, unless a specific description of the reasons would itself necessarily result in such a serious prejudice to the State's national security interests.

"4. If a State has complied with the provisions of paragraphs 1 and 3, it may then deny the request for assistance under article 90, paragraph 2 (c).

"5. If the Court is of the view that information or evidence sought from a State is important to the resolution of a critical issue in the case and that the State has manifestly acted in bad faith in denying a request for that information or evidence under article 90, paragraph 2 (c), the Court shall communicate its views to the Assembly of States Parties, and, in an appropriate case, to the Security Council, for such further action as may be necessary and appropriate."]

Article 72

Quorum and judgement

1. A quorum consists of [at least four] [all] members of the Trial Chamber. The judgement shall be given only by judges who have been present at each stage of the trial before the Trial Chamber and throughout its deliberations.

[All of the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations, provided,

however, that the trial or deliberation may proceed with four judges, if one, for a good cause, is unable to attend.]

2. The Trial Chamber's judgement shall be based on its evaluation of the evidence and the entire proceedings. The judgement shall not exceed the facts and circumstances described in the indictment or its amendment, if any./196/ The Court may base its judgement only on evidence submitted and discussed before it at the trial.

3. Option 1

The judges shall attempt to achieve unanimity in their judgement, failing which it shall be taken by a majority of the judges.

Option 2

All judges must concur in a decision as to conviction and at least three judges must concur as to the sentence to be imposed.

4. If the required majority for a decision as to conviction or the sentence to be imposed cannot be reached, the opinion which is more favourable to the accused shall prevail./197/

5. The deliberations of the Trial Chamber shall remain secret.

6. The judgement shall be in writing and shall contain a full and reasoned statement of the findings on the evidence and conclusions. [It shall be the sole judgement issued.] [It may contain dissenting opinions [, one dissent covering all dissenting opinions].] The judgement or a summary thereof shall be delivered in open court.

[Article 73

Reparations to victims

1. The Court [shall] [may] establish principles relating to reparations to, or in respect of,/198/ victims, including restitution, compensation and [compensation for the purposes of] rehabilitation. The Court may, upon request, [or upon its own motion if the interests of justice so require,] determine, in its judgement, the scope and extent of any damage, loss and injury to, or in respect of, victims.

2. In accordance with the principles established by the Court:

(a) The Court may make an order directly against a convicted person for an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation./199/ [An award by way of compensation may comprise:

(i) an exemplary element;

(ii) a compensatory element;

(iii) both]

[Where appropriate, the Court may order that the award for reparations be made into the trust fund provided for in article 79];

(b) [The Court may also [make an order] [recommend] that an appropriate form of reparations to, or in respect of, victims,

including restitution, compensation and rehabilitation, be made by a State]:

[- if the convicted person is unable to do so himself/herself; [and

- if the convicted person was, in committing the offence, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority]];

(c) [In any case other than those referred to in subparagraph (b), the Court may also recommend that States grant an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation].

3. In exercising its power under the present article, the Court may determine whether, in order to give effect to any order it may make, it is necessary to request protective measures under article 90, paragraph 1./200/

4. Before making a decision under the present article, the Court shall take account of and may invite any written or oral representations from or on behalf of the convicted person, victims [, other interested persons] or interested States.

5. Victims or their successors or assigns may seek enforcement of an order [or judgement] under the present article by competent national authorities. In this regard, they may ask the Court to seek enforcement of the orders [or judgement] under [Part 9 and] Part 10 of the Statute. [To that end, States Parties shall take the necessary measures to assist them].

6. Nothing in the present article shall be interpreted as prejudicing the rights of victims [not covered by the judgement of the Court] under national or international law.

7. [Victims or any person acting on their behalf, the convicted person [or any interested State] [or other interested persons] may appeal against judgement under this article, in accordance [with [Part 8 of the Statute and] the Rules].

8. [Rules necessary to give effect to the provisions of the present article shall be made in accordance with article 52].]

N.B. The following provision has been considered by the Preparatory Committee and it was deemed that it would be appropriate for the Rules: "The judgement of the Court under this article will be transmitted by the Registrar to the competent authorities of the State or States with which the convicted person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the convicted person's assets and property or with which the victim has such connection".

Article 74

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to sentence.

2. Except where article 65 applies, the Trial Chamber may on its own motion, and shall at the request of the Prosecutor or the accused, made before the completion of the trial, hold a further hearing to hear any additional evidence or submissions relevant to sentence, in accordance with the Rules.

3. Where paragraph 2 applies, any representations under article 73 shall be heard during the hearing referred to in paragraph 2.

4. The sentence shall be pronounced in public [and in the presence of the accused]./201/

PART 7. PENALTIES

Article 75

Applicable penalties

The Court may impose on a person convicted under this Statute [one or more of the following penalties] [the following penalty]:

(a)/202/ [a term of life imprisonment or imprisonment for a specified number of years;]

[a maximum term of imprisonment of [30] years;]

[a definite term of imprisonment between [20] and [40] years [, unless this is reduced according to the provisions of this Statute]/203/;]

[The Court may attach to the sentence of imprisonment a minimum period during which the convicted person may not be granted any [release under relevant provisions of Part 10 of the Statute].]

[In the case of a convicted person under the age of 18 years at the time of the commission of the crime, a specified term of imprisonment of no more than 20 years];

[When imposing a penalty on a person under the age of 18 years [at the time of the commission of the crime], the Court shall determine the appropriate measures to ensure the rehabilitation of the offender]/204/

N.B. The two preceding paragraphs should be harmonized with article 26 (Age of responsibility).

[(b) A fine [in addition to a sentence of imprisonment on conviction of a crime under article 5]];/205/

[(c)

(i) [[disqualification from seeking public office for the person's term of imprisonment and any further period of time that may be imposed] [in the modality and to the extent that the penalty could be imposed in accordance with the laws of the State in which such a penalty is to be enforced];]/206/

(ii) a forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct, without prejudice to the rights of bona fide third parties. [When the whole or part of the [instrumentalities of crime or] proceeds, property, assets mentioned in ... cannot be forfeited, a sum of money equivalent thereto may be collected.];/207/]

[(d) Appropriate forms of reparation]

[[without prejudice to the obligation on every State to provide reparation in respect of conduct engaging the responsibility of the State]/208/ [or reparation through any other international arrangement], appropriate forms of reparation [, [including] [such as] restitution, compensation and rehabilitation]]./209/

N.B. If retained, subparagraph (d) should be examined in the context of the discussions on article 73 (Reparations to victims).

[(e) (Death penalty)]

Option 1

[death penalty, as an option, in case of aggravating circumstances and when the Trial Chamber finds it necessary in the light of the gravity of the crime, the number of victims and the severity of the damage.]

Option 2

No provision on death penalty.

[Article 76/210/ /211/

Penalties applicable to legal persons

A legal person shall incur one or more of the following penalties:

(i) fines;

[(ii) dissolution;]

[(iii) prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]

[(iv) closure, for such a period as determined by the Court, of the premises used in the commission of the crime;]

[(v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;/212/] [and]

[(vi) appropriate forms of reparation.]/213/

N.B. Subparagraph (vi) should be examined in the context of reparation to victims.

Article 77

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person./214/

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise

spent in detention in connection with conduct underlying the crime.

3. When a person had been convicted of more than one crime, the Court shall:

Option 1

[pronounce a single sentence of imprisonment [not exceeding the maximum sentence prescribed for the gravest crime] [, increased by half]]

Option 2

[indicate whether multiple sentences of imprisonment shall be served consecutively or concurrently.]

[Article 78/215/

Applicable national legal standards

Option 1

In determining the length of a term of imprisonment or the amount of a fine to be imposed, [or property to be forfeited,] the Court [may have regard to the penalties provided for by law of] [shall impose the highest penalty provided for by the law of either]:

(a) [the State of which the convicted person is a national];

(b) [the State where the crime was committed;] [or]

(c) [the State which had custody of and jurisdiction over the accused.]

[In cases where national law does not regulate a specific crime, the Court will apply penalties ascribed to analogous crimes in the same national law.]

Option 2

No provision on national legal standards.]/216/

[Article 79/217/

Fines [and assets] collected by the Court

Fines [and assets] collected by the Court may be transferred, by order of the Court, to one or more of the following:

[(a) [as a matter of priority,] a trust fund [established by the Secretary-General of the United Nations] or [administered by the Court] for the benefit of victims of the crime [and their families];]

[(b) a State the nationals of which were the victims of the crime;]

[(c) the Registrar, to defray the costs of the trial.]]

N.B. This article should be examined in the context of reparations to victims.

PART 8. APPEAL AND REVIEW

Article 80

Appeal against judgement or sentence

1. A [decision] [conviction] under article 72 may be appealed, in accordance with the Rules of Procedure and Evidence, as provided for below:

(a) The Prosecutor may make such an appeal on the following grounds:

(i) procedural error,

(ii) error of fact, or

(iii) error of law;

(b) The convicted person or the Prosecutor on that person's behalf may make such an appeal on the following grounds:

(i) procedural error,

(ii) error of fact,

(iii) error of law, or

(iv) any other ground that affects the fairness or reliability of the proceedings or decision.

[(c) The Prosecutor shall not be entitled to appeal against the conviction but he or she shall be entitled to draw the attention of the Appeals Chamber to a point of law, which in his or her opinion requires interpretation or clarification.]

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of [significant] disproportion between the crime and the sentence;

(b) If on an appeal against sentence, the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 80, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 82.

The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under article 80, paragraph 2 (a).

[3.

Option 1

The Prosecutor or the convicted person may, in accordance with the Rules of Procedure and Evidence, appeal [to the Appeals Chamber] against a decision rendered in absentia under article 63.

Option 2

The Prosecutor or the convicted person may not appeal against

a decision rendered in absentia under article 63 except that an appeal against judgement given on the merits in the absence of the accused shall be allowed if the accused accepts the judgement or was represented during the trial before the Trial Chamber by Defence Counsel appointed by the accused.]

4. (1) Unless the Trail Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

When his time in custody exceeds the sentence of imprisonment imposed, he shall be released, but if the Prosecutor is also appealing, his release may be subject to the conditions under (2) below.

(2) In case of an acquittal, the accused shall be released immediately, subject to the following:

(a) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(b) A decision by the Trial Chamber under (a) above may be appealed in accordance with the Rules of Procedure and Evidence.

5. Subject to the provisions of paragraph 4 (1), execution of the judgement shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 81

Appeal against interlocutory decisions/218/

1. Either party may appeal any of the following interlocutory decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) An order granting or denying release of the defendant on bail;

[(c) An order that confirms or denies, wholly or in part, the indictment;]

[(d) An order of exclusion of evidence;]

[(e) When the majority of members of a Trial Chamber shall be of the opinion that the order involves a controlling issue as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate conclusion of the trial and a majority of the judges of the Appeals Chamber, at their discretion, agree to hear the appeal.]

2. An interlocutory appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders upon request in accordance with the rules.

Article 82

Proceedings on appeal/219/

1. For the purposes of proceedings under articles 80 and 82, the Appeals Chamber also has all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision, judgement or sentence, or that the decision, judgement or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision, judgement or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine and to report back accordingly, or may itself call evidence to determine the issue. When the decision has been appealed only by the accused, it cannot be amended to his or her detriment.

[Those defences shall be admissible only if already raised in the Trial Chamber or if resulting from the proceedings in that Chamber.]

3. If in an appeal against sentence the Chamber finds that the sentence is [significantly] disproportionate to the crime, it may be vary the sentence in accordance with Part 7./220/

4. The decision of the Chamber shall be taken by a majority of the judges and shall be delivered in open court. [[Six] [Four] judges constitute a quorum.] [The judges shall attempt to achieve unanimity in their judgement, failing which it shall be taken by a majority of the judges.]

The judgement shall state the reasons on which it is based. [If the judgement does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.]

5. The Appeals Chamber may deliver its judgement in the absence of the accused.

Article 83

Revision of conviction or sentence

Option 1 (two-step process)

1. The convicted person or, after death, the person's spouse, [successors or assigns] [children, relatives or any persons having express instructions] [, the State of the person's nationality], or the Prosecutor on the person's behalf, may apply to the [Presidency] [Appeals Chamber] to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that

(i) was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) is sufficiently important that had it been proven at trial it likely would have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken

into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in a conviction or in its confirmation has committed in that case a serious breach of his or her duties;

[(d) The conduct upon which the conviction was based no longer constitutes a crime under the Statute or the sentence being served exceeds the maximum penalty currently provided in the Statute;]

[(e) The Court[, or where applicable, the court of a State Party,] rendered a decision that necessarily also invalidates the judgement in this case.]

[2. The Prosecutor may apply for revision of a final judgement of acquittal on the grounds that, within five years after pronouncement of the final judgement, new evidence of the kind referred to in paragraph 1 (a) or 1 (b) is discovered [or the acquitted person has confessed guilt with respect to the crime concerned].]

3. The [Presidency] [Appeals Chamber] shall reject the application if it considers it to be unfounded. If it determines that there is a [significant possibility] [probability] that the application is meritorious, it:

[may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) [Refer the matter to the Appeals Chamber]/221/ [retain jurisdiction over the matter]/222/

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.]

[OR

[shall annul the conviction and refer the accused to a Chamber at the same level as, but having composition different from, that of the Chamber that handed down the annulled decision.]

[4. The decision of the Presidency or of a Trial Chamber disposing of the application may be appealed by either party to the Appeals Chamber.]

Option 2 (one-step process)

1. The convicted person or, after death, the person's spouse, [successors or assigns] [children, relatives or any persons having express instructions] [, the State of the person's nationality], or the Prosecutor on the person's behalf, may apply to [the original or, if unavailable or if relief is sought on the basis of paragraph 1 (c), another] [a] Trial Chamber to revise the final judgement of conviction or sentence on the grounds that:

1 (a)-(e) [same as in option 1]

2. [same as in option 1]

3. The Chamber shall hear the parties in the manner set forth in the Rules of Procedure and Evidence. It shall reject the application if it considers it to be unfounded. If it agrees with the application, it may, as appropriate:

(a) Enter a corrected judgement;

(b) Order a new trial; or

(c) Refer the matter to the Appeals Chamber.

[4. The decision of the Trial Chamber disposing of the application may be appealed by either party to the Appeals Chamber.]

[Article 84

Compensation to a suspect/accused/convicted person

1. Anyone who has been subject to arrest or detention in violation of the Statute, [the Rules] or internationally recognized human rights law shall have a right to compensation from the Court, in accordance with the Rules.

2. When a person has, by a final decision, been convicted of a criminal offence, and when subsequently his or her conviction has been reversed, or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated in accordance with the Rules, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

[3. The Court may also award compensation to a person who was held in detention, based on the prejudice caused to him by such detention, when the proceedings against him have concluded with a decision to release him because of insufficient charges against him or because of a final decision of acquittal.]]

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE/223/

N.B. Consideration should be given to interchanging parts 9 and 10.

Article 85

General obligation to cooperate

States Parties shall, in accordance with the provisions of this [Part] [Statute], fully cooperate with the Court/224/ in its investigation and prosecution of crimes under this Statute. States Parties shall so cooperate without [undue] delay.

Article 86/225/

[Requests for cooperation: general provisions]

1. Authorities competent to make and receive requests/Channels for communication of requests

(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted

through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, accession or approval. Such designation and subsequent changes shall be done in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of paragraph 1 (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Language of requests/226/

Requests for cooperation [and supporting documents] shall be [either] in [an official language of the requested State [unless otherwise agreed]] [or in] [one of the working languages reflected in article 51, in accordance with the choice made by that State upon ratification, accession or approval].

[The legal effect of such request shall not be diminished if any supporting document is not in such working language provided that a brief summary of any such document in that working language is also submitted.]

3. Confidentiality of requests from the Court

The requested State shall keep confidential a request and any supporting documents, except to the extent that the disclosure is necessary for execution of the request.

4. Cooperation by non-States Parties/227/

[(a) The Court may [call on] [invite] any State not party to this Statute to provide assistance under this part on the basis of [comity,] an ad hoc arrangement, an agreement with such State [or any other appropriate basis].]

[(b) Where a State not party to this Statute [which has entered into an ad hoc arrangement or an agreement with the Court],/228/ fails to cooperate with requests under paragraph (a), thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the General Assembly of States Parties]/229/ [or] [the United Nations General Assembly] [or, where the Security Council referred the matter to the Court,] [to the Security Council] [so that necessary measures may be taken to enable the Court to exercise its jurisdiction]./230/]

5. Cooperation of intergovernmental organizations

The Court may ask any intergovernmental organizations to provide information or documents. The Court may also ask for other forms of cooperation and assistance as may be agreed upon with such organizations and in accordance with their respective competencies and/or mandates.

6./231/ States Parties' failure to cooperate [comply]

Where a State Party fails to comply with a request by the Court contrary to the provisions of the Statute, thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the Assembly of States Parties]/232/ [or] [the General Assembly of the United Nations] [or, where the Security Council referred the matter to the Court] [to the Security Council] [so that necessary measures may be taken to enable the Court to

exercise its jurisdiction]./233/

N.B. In view of the length of the article, the headings of the paragraphs are retained pending a decision on the text of the article. Consideration may be given to dividing the article into three as follows:

- paragraphs 1 to 3;
- paragraphs 4 and 5;
- paragraph 6.

Article 87

[Surrender] [Transfer] [Extradition] of persons/234/ to the Court

1. The Court may transmit a request for the arrest and [surrender] [transfer] [extradition] of a person, along with the supporting material outlined in article 88, to any State on the territory of which that person may be found, and shall request the cooperation of that State in the arrest and [surrender] [transfer] [extradition] of such person. States Parties shall, in accordance with the provisions of this Part [and the procedure under their national law], comply with requests for arrest and [surrender] [transfer] [extradition] without [undue] delay.

[2. The national law of a requested State shall govern the [conditions] [procedure] for granting or denying a request for [surrender] [transfer] [extradition] [except as otherwise provided in this Part].]

3.

[Option 1: No grounds for refusal.]

[Option 2: A State Party may deny a request for [surrender] [transfer] [extradition] only if:/235/

(a) with respect to a crime under [article 5 (b) through (e)] [article 5 (e)], it has not accepted the jurisdiction of the Court;

[(b) the person is a national of the requested State;]/236/

(c) the person has been investigated or has been proceeded against, convicted or acquitted in the requested State or another State for the offence for which his [surrender] [transfer] [extradition] is sought [, except that a request may not be denied if the Court has determined that the case is admissible under article 15];

[(d) the information submitted in support of the request does not meet the minimum evidentiary requirements of the requested State, as set forth in article 88, paragraph 1 (c);]

(e) compliance with the request would put it in breach of an existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another State.]/237/

N.B. The options in this subparagraph are not clear.

[4. If a request for [surrender] [transfer] [extradition] is denied, the requested State Party shall promptly inform the Court

of the reasons for such denial.]

5. Application to the Court to set aside [surrender] [transfer] [extradition]

A State Party [having received a request under paragraph 1 may, in accordance with the Rules of Procedure and Evidence/238/] [may, in [...] days of receiving a request under paragraph 1], file a written application with the Court to [set aside] [withdraw] the request on specified grounds [including those mentioned in articles 15 and 18]. Pending a decision of the Court on the application, the State concerned may delay complying with the request but shall take appropriate measures [as may be available] to ensure the compliance with the request after a decision of the Court to reject the application.

6. Parallel requests from the Court and State(s)

Option 1

(a) A State Party [which has accepted the jurisdiction of the Court] [, if it is a party to the treaty covered by [article 5, paragraph (e),] with respect to the crime,] shall [, as far as possible,] give priority to a request from the Court under paragraph 1 over requests for extradition from other States [Parties].

(b) If the requested State also receives a request from a non-State Party to which it is bound by an extradition agreement for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's [surrender] [transfer] [extradition], the requested State shall determine whether to [surrender] [transfer] [extradite] the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

(i) the respective dates of the requests;

(ii) if the offences are different, the nature and gravity of the offences;

(iii) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and

(iv) the possibility of subsequent [surrender] [transfer] [extradition] or extradition between the Court and the State requesting extradition.

Option 2

(a) If the requested State also receives a request from a [State] [State Party] [to which it is bound by an extradition agreement] for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's [surrender] [transfer] [extradition], the appropriate authority of the requested State shall determine whether to [surrender] [transfer] [extradite] the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

(i) whether the extradition request was made pursuant to a

treaty;

(ii) the respective dates of the requests;

(iii) if the offences are different, the nature and gravity of the offences;

(iv) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and

(v) the possibility of subsequent [surrender] [transfer] or extradition between the Court and the State requesting extradition.

(b) The requested State may not, however, deny a request for the [surrender] [transfer] [extradition] made under this article in deference to another State's request for extradition of the same person for the same offence if the State requesting extradition is a State Party and the Court has ruled the case before it is admissible, and its decision took into consideration the proceedings in that State which gave rise to its extradition request.

Option 3

(a) Subject to paragraph (b), a State Party [shall] [may] accord priority to a request by a State over a request by the Court for the extradition, transfer or surrender of a person to the requesting State under the provisions of any existing bilateral or multilateral agreement.

(b) A State Party shall however accord priority to requests from the Court over a request by a State where the Court has [positively] determined pursuant to article 15 that the requesting State is unwilling or unable genuinely to carry out the investigation or prosecution of the case for which extradition, transfer or surrender is sought.

[7. Proceeding in requested State

Where the law of the requested State so requires, the person whose [surrender] [transfer] [extradition] is sought shall be entitled to challenge the request for arrest and [surrender] [transfer] [extradition] in the court of the requested State on [only] the following grounds:

[(a) lack of jurisdiction of the Court;]
[(b) non bis in idem; or]

[(c) the evidence submitted in support of the request does not meet the evidentiary requirements of the requested State as set forth in article 88, paragraph 1 (b) (v) and (c) (ii).]]

8. Delayed or temporary [surrender] [transfer] [extradition]

If the person sought is being proceeded against or is serving a sentence in the requested State for an offence different from that for which [surrender] [transfer] [extradition] to the Court is sought, the requested State, after making its decision to grant the request, may:

(a) temporarily [surrender] [transfer] [extradite] the person

to the Court and in that case, the Court shall return the person to that State after the completion of the trial or as otherwise agreed; or

(b) [with the consent of the [Court] [Pre-Trial Chamber] which shall rule after having heard the Prosecutor] postpone the [surrender] [transfer] [extradition] of the person until the completion or abandonment of the prosecution [or completion of service of the sentence]./239/

[9. Extradite or prosecute obligation/240/

(a) In the case of a crime to which article 5, paragraph (e), applies, the requested State [, if it is a party to the treaty in question but has not accepted the Court's jurisdiction with respect to that crime,] shall, where it decides not to [surrender] [transfer] [extradite] the accused to the Court, promptly take all necessary steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case [through proceedings in accordance with national laws] to its competent authorities for the purpose of prosecution.

[(b) In any other case, the requested State Party shall [consider whether it can], in accordance with its legal procedures, take steps to arrest and [surrender] [transfer] [extradite] the accused to the Court, or [whether it should take steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case to its competent authorities for the purpose of prosecution.]

[(c) The [surrender] [transfer] [extradition] of an accused to the Court will constitute, as between States Parties which accept the jurisdiction of the Court with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or that the case be referred to the competent authorities of the requested State for the purpose of prosecution.]]

[10. Provision of evidence irrespective of [surrender] [transfer] [extradition]

[To the extent permitted under the law of the requested State and] without prejudice to the rights of third parties, all items found in the requested State [that have been acquired as a result of the alleged crime or] that may be required as evidence shall, upon request, be transmitted to the Court [if the [surrender] [transfer] [extradition] is granted on conditions to be determined by the Court] [even if the [surrender] [transfer] [extradition] of the person cannot be carried out]. [Any rights which third parties may have acquired in the said items shall be preserved where these rights exist. The property shall be returned without charge to the requested State as soon as possible after the trial.]]

N.B.

- It would be more appropriate to deal with the issues raised in this paragraph in the context of article 90 (Other forms of cooperation [and judicial and legal [mutual] assistance]).

- Consideration may be given to dealing with some of the details in this paragraph in the Rules of Procedure and Evidence.

11. Transit of [surrendered] [transferred] [extradited] person/241/

(a) A State Party shall authorize transportation under its national procedural law through its territory of a person being [surrendered] [transferred] [extradited] to the Court by another State. A request by the Court for transit shall be transmitted in accordance with article 86. The request for transit shall contain a description of the person being transported, a brief statement of the facts of the case and the legal characterization and the warrant for arrest and [transfer] [surrender] [extradition]. A person in transit shall be detained in custody during the period of transit.

[(b) No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit.]

(c) If an unscheduled landing occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

12. Costs

The costs associated with the [surrender] [transfer] [extradition] of a person shall be borne by the [Court] [requested State] [Court or the requested State depending upon where the cost concerned arises].

N.B. In view of the length of the article, the headings of the paragraphs are retained. Consideration may be given to dividing the article into shorter articles, without prejudice to their retention, as follows:

- paragraphs 1 and 2;
- paragraphs 3 and 4;
- paragraph 5;
- paragraph 6;
- paragraph 7;
- paragraph 8;
- paragraph 9;
- paragraph 10;
- paragraph 11;
- paragraph 12.

Article 88

Contents of request for [surrender] [transfer] [extradition]/242/

1. A request for arrest and [surrender] [transfer] [extradition] shall be made in writing. In urgent cases a request may be made by any medium capable of delivering a written record,/243/ provided

that a request shall be confirmed [if necessary] through the channel provided for in article 86. The request shall contain or be supported by:

(a) information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(b) in the case of a request for pre-indictment arrest and [surrender] [transfer] [extradition]:

(i) a copy of warrant for arrest;/244/

(ii) a statement of the reasons to believe the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to seek an indictment within [90] days;

(iii) a brief summary of the [essential] facts of the case;

(iv) a statement as to why pre-indictment arrest is urgent and necessary;/245/

(v) [such documents, statements, or other types of information regarding the commission of the offence and the person's role therein, which may be required by the laws of the requested State;] [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties with other States;]

(c) in the case of a request for post-indictment arrest and [surrender] [transfer] [extradition]:

(i) a copy of the warrant of arrest and indictment;

[(ii) such documents, statements, or other types of information regarding the commission of the offence and the accused's role therein which may be required by the laws of the requested State; [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties or other arrangements with other States];]

(d) in the case of a request for the arrest and [surrender] [transfer] [extradition] of a person already convicted:/246/

(i) a copy of any warrant of arrest for that person;

(ii) a copy of the judgement of conviction;

(iii) information to demonstrate that the person sought is the one referred to in the judgement of conviction;

(iv) [if the person sought has been sentenced,] a copy of the sentence imposed and a statement of any time already served and that remaining.

2. A State Party shall notify the Court at the time of ratification, accession or approval whether it can [surrender] [transfer] [extradite] on the basis of a pre-indictment warrant and the information specified in paragraph 1 (b) or it can only [surrender] [transfer] [extradite] following [confirmation of indictment] [issuance of a post-indictment warrant] on the basis of the information in paragraph 1 (c).

[3. Where the requested State Party considers the information provided insufficient to allow it to comply with the request, it shall seek, without delay, additional information and may fix a reasonable time limit for the receipt thereof. [Any proceedings in the requested State may be continued, and the person sought may be detained, for such period as may be necessary to enable the Court to provide the additional information requested.] If the additional information is not provided within the reasonable time limit fixed by the requested State, the person may be released.]

[4. The Court may in accordance with article 68 withhold from the requested State specific information about any victims, potential witnesses and their families if it considers that it is necessary to ensure their safety or physical or psychological well-being. Any information that is made available under this article shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses and their families.]/247/

N.B. This provision is similar to the text in articles 89, paragraph 3, (Provisional arrest) and 90, paragraph 8 (b) (Other forms of cooperation [and judicial and legal [mutual] assistance]). Consideration may be given to combining them in a single article.

Article 89

Provisional arrest/248/

1. In case of urgency, the Court may request the provisional arrest of the person sought pending presentation of the request for [surrender] [transfer] [extradition] and supporting documents under article 88.

2. The request for provisional arrest shall [be made by any medium capable of delivering a written record and shall] contain:

(i) a description of the person sought and information regarding the probable location of such person;

(ii) a brief statement of the essential facts of the case, including, if possible, the time and location of the offence;

(iii) a statement of the existence of a warrant of arrest or a judgement of conviction against the person sought, and, if applicable, a description of the specific offence or offences with which the person has been charged or for which he has been convicted; and

(iv) a statement that a request for [surrender] [transfer] [extradition] of the person sought will follow.

3. The Court may withhold from the requested State specific information about any victims, potential witnesses and their families or close associates if it considers that it is necessary to ensure their safety or well-being. Any information that is provided under this article to the requested State shall be provided in a manner that protects the safety or well-being of any victims, potential witnesses and their families or close associates.

N.B. See the N.B. in article 88, paragraph 4 (Contents

of request for [surrender] [transfer] [extradition]).

4. A person who is provisionally arrested may be discharged from custody upon the expiration of [ ]/249/ days from the date of provisional arrest if the requested State has not received the request for [surrender] [transfer] [extradition] and the supporting documents specified under article 88. However, the person may consent to [surrender] [transfer] [extradition] before the expiration of this period if the legislation of the requested State allows, in which case that State shall proceed to [surrender] [transfer] [extradite] the person to the Court as soon as possible./250/

5. The fact that the person sought has been discharged from custody pursuant to paragraph 4 shall not prejudice the subsequent rearrest and [surrender] [transfer] [extradition] of that person if the request for [surrender] [transfer] [extradition] and supporting documents are delivered at a later date.

Article 90

Other forms of cooperation [and judicial and legal [mutual] assistance]/251/

1. States Parties shall, in accordance with the provisions of this Part [and their national [procedural] law], comply with requests for assistance by the Court for:

(a) the identification and whereabouts of persons or the location of items;

(b) the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions or reports necessary to the Court;

(c) the questioning of any suspect or accused;

(d) the service of documents, including judicial documents;

(e) facilitating the appearance of persons before the Court;

[(f) the temporary transfer of persons in custody, with their consent [which cannot be withdrawn], in order to provide testimony [or other assistance] to the Court;]

[(g) the conduct of on-site investigations and inspections/252/ [with the consent of the requested State];]

[(h) the conduct of proceedings of the Court in its territory with the consent of the requested State;]/253/

(i) the execution of searches and seizures;

(j) the provision of records and documents, including official records and documents;

(k) the protection of victims and witnesses and the integrity of evidence;

(l) the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture without prejudice to the rights of bona fide third parties;/254/ and

(m) any other types of assistance [not prohibited by the law of the requested State].

[2. Grounds for refusal

Option 1

A State Party shall not deny a request for assistance from the Court.

Option 2

A State Party may deny a request for assistance, in whole or in part, only if:/255/

(a) with respect to a crime [under [article 5, paragraphs (b) through (e)] [article 5, paragraph (e)], it has not accepted the jurisdiction of the Court;

(b) the authorities of the requested State would be prohibited by its national laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence in that State;

(c) execution of the request would seriously prejudice its national security, ordre public or other essential interests;

(d) the request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence];

(e) execution of the request would interfere with an ongoing investigation or prosecution in the requested State or in another State [or with a completed investigation or prosecution that might have led to an acquittal or conviction, except that a request may not be denied if the investigation or prosecution relates to the same matter which is the subject of the request and the Court has determined that the case is admissible under article 15];

(f) compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State Party].]

[3. Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them.]

4. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

[5. If a requested State does not produce a document or disclose evidence under paragraph 2 (d) on the ground that it relates to its national defence, the Trial Chamber shall only make such inferences that relate to the guilt or innocence of the accused.]

N.B. See article 71.

6. Confidentiality/256/

(a) The Court shall ensure the confidentiality of documents and information except as required for the investigation and

proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 of the Statute and related Rules of Procedure and Evidence.

7. Assistance by the Court

(a) The Court [may] [shall], upon request, cooperate with and provide assistance [within its competence] to a State Party conducting an investigation into or trial in respect of acts which constitute a crime under this Statute [or which constitute a serious crime under the national law of the requesting State].

(b)/257/

(i) The assistance provided under subparagraph (a) shall include, among others:

(1) the transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

(2) the questioning of any person detained by the Court;

(ii) In the case of assistance under subparagraph (b) (i) (1):

(1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;/258/

(2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68/259/ [and shall require the consent of that witness or expert];

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a non-State party.

8. Form and contents of the request

(a) Requests for [judicial and legal] [mutual] assistance shall:

(i) be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that it shall be confirmed [, if necessary,] through the channel provided for in article 86; and

(ii) contain the following, as applicable:

(1) a brief statement of the purpose of the request and the assistance sought, including the legal basis and grounds for the request;

(2) as much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(3) a brief description of the essential facts underlying the request;

(4) the reasons for and details of any procedure or requirement to be followed;

[(5) such information as may be required under the law of the requested State in order to execute the request;]

(6) any other information relevant to the assistance being sought.

(b) The Court may withhold, in accordance with article 68, from the requested State [or a State making a request under paragraph 6] specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available under this article to the requested State shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses and their families.

N.B. See the N.B. in article 88, paragraph 4 (Contents of request for [surrender] [transfer] [extradition]).

N.B. Consideration may be given to dividing this article into shorter articles, without prejudice to their retention, as follows:

- paragraph 1;
- paragraphs 2 to 5;
- paragraph 6;
- paragraph 7;
- paragraph 8.

Article 91

Execution of requests under article 90

1. Requests for assistance shall be executed in accordance with the law of the requested State [and, unless prohibited by such law, in the manner specified in the request, including following any procedures outlined therein or permitting persons specified in the request to be present at and assist in the execution process/260/ [by its competent authorities]].

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently./261/

3. Replies from States Parties, including any accompanying documents, [may be in the language of the requested State] [shall be in accordance with paragraph 2 of article 86. The Court may also request the transmission of documents in their original language].

[4. The [Prosecutor] [Court] may [, if requested,] assist the authorities of the requested State with the execution of the request for judicial assistance [and may, with the consent of the requested State, carry out certain inquiries on its territory].]/262/

[5. [For the purposes of paragraph 4,] the requested State shall, upon request, inform the Court of the time and place of execution of the request for assistance.]/263/

6. (a) The ordinary costs for execution of requests in the territory of the requested State shall be borne by the requested State except for the following which should be borne by the Court:

(i) Costs associated with the travel and security of witnesses and experts or the transfer of persons in custody;

(ii) Costs of translation, interpretation and transcription;

(iii) The travel and subsistence costs of the Prosecutor, members of his office or any other member of the Court; and

(iv) The costs of any expert opinion or report requested by the Court.

(b) Where the execution of a request will result in extraordinary costs, [there shall be consultations to determine how those costs will be met] [those costs shall be met by the Court].

(c) The provisions in this paragraph shall apply with appropriate modifications to requests made to the Court for assistance./264/

N.B.

- Consideration may be given to whether this provision should constitute a separate article where all the provisions dealing with costs would be combined. See also article 87, paragraph 12 ([Surrender] [Transfer] [Extradition] of persons to the Court).

- Consideration may also be given to dealing with some of the details relating to the costs in the Rules of Procedure and Evidence.

[7. (a) Witnesses or experts may not be compelled to testify at the seat of the Court.

[(b) If they do not wish to travel to the seat of the Court, their evidence shall be taken in the country in which they reside or in such other place as they may agree upon with the Court [in accordance with national requirements [and in compliance with international law standards]/265/].

(c) In order to guarantee the safety of witnesses and experts, any means of communication may be used to take their evidence while preserving their anonymity./266/]/267/

[(d) No witness or expert who appears before the Court may be prosecuted, detained or submitted to any restriction of personal freedom by the Court in respect of any acts [or omissions] that preceded the departure of that person from the requested State.]

8. Provisions allowing a person heard or examined by the Court under article [...] to invoke restrictions designed to prevent disclosure of confidential information connected with national defence or security also apply to the execution of requests for assistance under this article.

[Article 92

Rule of speciality

1. Limit on other proceedings against [surrendered] [transferred] [extradited] person

A person [surrendered] [transferred] [extradited] to the Court under this Statute shall not be:

(a) proceeded against, punished or detained for any criminal act other than that for which the person has been [surrendered] [transferred] [extradited];

(b) [surrendered] [transferred] [extradited] to another State in respect of any criminal act/268/

[except when he or she commits the criminal act after [extradition] [surrender] [transfer]].

2. Limit on other uses of evidence

Evidence provided by a State Party under this Statute shall [, if that State Party so requests,] not be used as evidence for any purpose other than that for which it was provided [unless this is necessary to preserve a right of the accused under article 67, paragraph 2].

3. Waiver of rule by the requested State

The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes to be specified in the request. In the case of paragraph 1, this request shall be accompanied by an additional warrant of arrest and by a legal record of any statement made by the accused with respect to the offence.]/269/

N.B. The headings of the paragraphs are retained pending a decision on the text of the article.

PART 10. ENFORCEMENT/270/

Article 93

General obligation regarding recognition [and enforcement] of judgements

States Parties [shall] [undertake to recognize] [[and to] enforce directly on their territory] [give effect to] the judgements of the Court [, in accordance with the provisions of this part].

[The judgements of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to

compensation for damage caused to victims and the restitution of property acquired by the person convicted and other forms of reparation ordered by the Court, such as restitution, compensation and rehabilitation.]/271/

N.B. This article should also be considered in the context of the discussions on article 73 (Reparations to victims).

Article 94

Role of States in enforcement [and supervision] of sentences of imprisonment

/272/1.

Option 1

A sentence of imprisonment shall be served in a State designated by the [Court] [Presidency].

Option 2

(a) A sentence of imprisonment shall be served in a State designated by the [Court] [Presidency] from a list of States which have indicated to the Court their willingness to accept sentenced persons. The State so designated shall promptly inform the [Court] [Presidency] whether it accepts the request.

(b)/273/ A State may make its consent conditional. [When a State makes its consent conditional, on the applicability of its domestic laws relating to pardon, conditional release and commutation of sentence, and on its administration of the sentence, the consent of the Court is not required to subsequent actions by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment].

2.

(a) The [Court's] [Presidency's] designation of a State under paragraph 1 shall be governed by principles of [equitable distribution] [burden sharing] to be elaborated [in the Rules.] [However, no such designation shall be made with respect to the State where or against which the crime was committed or the State of which the convicted person or the victim is a national [, unless the [Court] [Presidency] explicitly decides otherwise for reasons of social rehabilitation].]

(b) In making a designation under paragraph 1, the [Court] [Presidency] shall allow the person sentenced to provide views on any concerns as to personal security or rehabilitation. However, the consent of the person is not required for the [Court] [Presidency] to designate a particular State for enforcement of the sentence.

[(c) In making a designation under paragraph 1, the [Court] [Presidency] shall take into account reasonable compliance with international standards governing treatment of prisoners.]

3.

If no State is designated under paragraph 1, the sentence of

imprisonment shall be served in the prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement as referred to in article 3, paragraph 2.

Article 95

Enforcement of the sentence

1. [Subject to conditions it may have specified in paragraph (b) of option 2 of article 94,]/274/ the sentence of imprisonment shall be binding on the States Parties, which may in no case modify it.
2. The Court alone shall have the right to decide any application for review of the judgement or sentence. The State of enforcement shall not impede the sentenced person from making any such application.

Article 96

Supervision and administration of sentence

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the [Court] [Presidency] [, and consistent with internationally recognized standards governing treatment of prisoners.]

2.

Option 1

The conditions of detention shall be governed by the law of the State of enforcement and consistent with internationally recognized standards governing treatment of prisoners. [However, the [Court] [Presidency] may, on its own motion or at the request of the sentenced person, modify the conditions of detention of the sentenced person. The State of enforcement shall enforce the modified conditions of detention. The [Court] [Presidency] may also on its own motion, or at the request of the sentenced person or the State of enforcement, decide that the sentenced person be transferred to another State for the continued serving of the sentence [provided that State agrees].

Option 2

The conditions of detention shall be governed by the law of the State of enforcement, consistent with internationally recognized minimum standards, but in any case not more or less favourable than those available to prisoners convicted of similar offenses in the State of enforcement.

3. Communications between persons sentenced and the Court shall be unimpeded [and confidential].

Article 97

Transfer of the person upon completion of sentence

1. Unless the State of enforcement agrees to permit the prisoner to remain in its territory following completion of sentence, the prisoner shall be released into the custody of the State of the person's nationality or another State that has agreed to receive the person.

gopher://gopher.igc.apc.org:70/00/orgs/icc/undocs/rome/statute.txt

2. The costs involved in transporting the prisoner to another State under article 94 shall be borne by the Court, unless the State of enforcement or the receiving State agree otherwise.

3. [Unless prohibited by the provisions of article 92] [with the consent of the Court as provided in article 98],/275/ the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the prisoner to the State which has requested the extradition or surrender of the prisoner for purposes of trial or enforcement of a sentence.

[Article 98

Limitation of prosecution/punishment for other offences/276/

1. A sentenced person in the custody of the State of enforcement shall not be subjected to prosecution or punishment [or extradition to a third State] for any conduct committed prior to delivery to the State of detention, unless such prosecution or punishment [or extradition] has been approved by the [Court] [Presidency] [at the request of the State of detention].

2. The [Court] [Presidency] shall rule on the matter after having heard the prisoner.

3. Paragraph 1 of this article shall cease to apply if the sentenced person remains more than 30 days on the territory of the State of enforcement after having served the full sentence imposed by the Court.]

[Article 99

Enforcement of fines and forfeiture measures

1. States Parties shall [, in accordance with their national law,] enforce fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]]/277/ as fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]] rendered by their national authorities.

[For the purpose of enforcement of fines, the [Court] [Presidency] may order the forced sale of any property of the person sentenced which is on the territory of a State Party. For the same purposes, the [Court] [Presidency] may order the forfeiture of proceeds, property and assets and instrumentalities of crimes belonging to the person sentenced.]/278/ /279/

[Decisions by the Presidency are implemented by States Parties in conformity with their domestic laws.

[The provisions of this article shall apply to legal persons.]]

2. Property, including the proceeds of the sale thereof, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be handed over to the [Court] [Presidency] [which will dispose of that property in accordance with the provisions of article 79 [paragraph 5 of article 54].]

Article 100/280/

Pardon,/281/ parole and commutation of sentences [early release]

Option 1

1. The prisoner may apply to the [Court] [Presidency] for a [decision on] [ruling regarding the appropriateness of] [pardon,] parole or commutation of sentence, if under a generally applicable law of the State of enforcement, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for [pardon,] parole or commutation of sentence.

Option 2

1. (a) The State of enforcement shall not release the prisoner before the expiry of the sentence as pronounced by the Court.

(b) The [Court] [Presidency] alone shall have the right to decide any application for [commutation of the sentence] [commutation of the sentence or parole] [commutation of the sentence, parole or [pardon]]. [If appropriate in the circumstances, parole may be granted after the prisoner has served:

(i) not less than 20 years in case of life imprisonment;

(ii) not less than two thirds of the term in case of imprisonment for a definite term.

Parole may be revoked when the parolee is convicted of having committed an offence while on parole, or has violated any condition of his parole.]

2. Procedures regarding an application for commutation of sentence [or parole [or pardon]] and the [Court's] [Presidency's] decision on such an application shall be governed by the Rules of Procedure and Evidence.

N.B. Consideration should be given to whether this article should be placed in Part 7.

[Article 101

Escape

In the event of an escape, the sentenced person shall, as soon as he has been arrested pursuant to a request of the Court under article 88, paragraph 1 (d), be delivered to the State in which he was serving his sentence or to another place determined by the Court.]

PART 11. ASSEMBLY OF STATES PARTIES

Article 102

Assembly of States Parties

1. There is hereby established an Assembly of States Parties to this Statute. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. The signatories of the [Statute] [Final Act] may be [observers] [members] in the Assembly./282/

2. The Assembly shall:

[(a) consider and adopt recommendations of the preparatory commission;]

(b) provide management oversight to the Presidency, Prosecutor and Registrar regarding the administration of the Court;

(c) consider the reports and activities of the Bureau and take appropriate action in regard thereto;

(d) consider and approve the budget for the Court [in consultation with the Registrar] [and rule on any financial issue];

(e) determine whether to alter, as appropriate, the number of judges [or members of the Office of the Prosecutor or the Registry], serving on a full- or part-time basis, for such period as it shall determine;

[(f) consider, upon recommendation [of the Court] [of the Bureau], any question relating to non-cooperation by States Parties [and non-States Parties] and take [necessary] [appropriate] measures, including referring the matter to [the Security Council] [the United Nations General Assembly] as provided in article 86.]/283/

(g) perform any other function or take any other action as specified in this Statute or the Rules of Procedure and Evidence [including consideration of requests for a review of these instruments] [including consideration of applications relating to pardon submitted to it.]/284/

3. (a) The Assembly shall have a Bureau consisting of a President, a Vice-President and [18]/285/ members elected by the Assembly for three-year terms./286/ The President of the Court, the Prosecutor and the Registrar or their representatives may, as appropriate, participate as [observers] [members] in meetings of the Bureau./287/

(b) The Bureau shall [have a representative character] [be elected on the basis of ensuring its representative character], taking into account, in particular, equitable geographical distribution and bearing in mind the adequate representation of the principal legal systems of the world [as far as possible].

The Bureau shall meet as often as necessary, but at least once a year, and shall assist the Assembly in the discharge of its responsibilities.

(c) The Assembly may also establish other subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation in order to enhance the efficiency and economy of [non-judicial administration] [operations] of the Court.

4. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations [or in any other place as it may decide] once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in the Statute, special sessions shall be convened [by the Bureau on its own initiative or] at the request of one third of the States Parties.

5. Each State Party shall have one vote. Every effort shall be

made to reach decisions on matters of substance by consensus in the Assembly and in the Bureau. If consensus cannot be reached, decisions on matters of substance must be approved by [a two-thirds majority of those present and voting, representing the absolute majority of States Parties] [a two-thirds majority of those present and voting] [an absolute majority of States Parties] except as otherwise provided in the Statute.

6. [A State Party that is in arrears in the payment of its financial contributions to the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding [two full] [three] [five] years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party]./288/

7. The Assembly shall adopt its own Rules of Procedure.

PART 12. FINANCING OF THE COURT

Article 103

Payment of expenses of the Court

Expenses of the Court as assessed by the States Parties shall be paid from the funds of the Court, in accordance with the Statute and the Financial Regulations and Rules adopted by the States Parties.

Article 104

Funds of the Court

Option 1

The funds of the Court shall comprise assessed contributions made by States Parties.

Option 2

The expenses of the Court shall be borne by the United Nations, subject to the approval of the General Assembly of the United Nations./289/

Option 3

1. The funds of the Court shall include:

(a) Assessed contributions of States Parties;

(b) Funds provided by the United Nations./290/

2. However, during the initial phase,/291/ the expenses of the Court shall be borne by the United Nations, subject to the approval of the General Assembly of the United Nations.

Article 105

Voluntary contributions

Without prejudice to article 104, the Court may utilize voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the States Parties.

Article 106

Assessment of contributions

The contributions of States [Parties] shall be assessed in accordance with an agreed scale of assessment [based upon [the scale used for the regular budget of the United Nations] [a multi-unit class system along the lines of that used in the International Telecommunication Union or the Universal Postal Union]].

Article 107

Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 108

Settlement of disputes

Option 1

[Except as otherwise provided in the Statute] [,a] [A]ny dispute concerning the interpretation or application of this Statute shall be settled by the decision of the Court.

Option 2

Without prejudice to the competence of the Court concerning disputes relating to its judicial activities as is established in accordance with this Statute, any dispute between two or more States Parties relating to interpretation or application of this Statute which is not resolved through negotiations [within a reasonable time] [within ... months] shall be referred to the Assembly of States Parties which shall make recommendations on further means of settlement of the dispute./292/

Option 3

Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

Option 4

No article on dispute settlement.

Article 109

Reservations

Option 1

No reservations may be made to this Statute.

Option 2

Paragraphs 1 and 2

Option A

1. No reservations other than those made in accordance with paragraph 2 of the present article shall be permitted.

2. Any State may at the time of signature, ratification, acceptance, approval or accession make reservations in respect of the following ...

Option B

1. No reservations to this Statute shall be permitted unless expressly provided for in specific articles of the Statute.

2. No paragraph 2.

3. A State which has made reservations may at any time by notification in writing to the Secretary-General withdraw all or part of its reservations.

4.

Option A

In the event of a dispute or legal question arising in connection with the admissibility of reservations made by a State under paragraph 2, the Court shall be competent to decide the admissibility of such reservations.

Option B

No paragraph 4.

Option 3

1. At the time of signature, ratification, acceptance, approval or accession, any State may make reservations to articles of this Statute except [those in Parts ...] [articles ...].

2. A State which has made reservations may at any time by notification in writing to the Secretary-General of the United Nations withdraw all or part of its reservation.

Option 4

No article on reservations.

Article 110

Amendments

1. After the expiry of [...] years from the entry into force of this Statute, any State Party may propose amendments thereto. The

text of any proposed amendment shall be submitted to [the Secretary-General of the United Nations,] who shall promptly circulate it to all States Parties.

2. A proposed amendment to this Statute shall be considered at the next [meeting of the Assembly of States Parties] [Review Conference], provided that no consideration shall take place until three months after its circulation pursuant to paragraph 1.

3.

Option 1

The adoption of an amendment at a meeting of the Assembly of States Parties shall be by consensus.

Option 2

The adoption of an amendment at a meeting of the Assembly of States Parties shall require a [2/3] [3/4] majority of [all the States Parties] [those present and voting].

4. [The Secretary-General of the United Nations] shall circulate any amendment adopted at a meeting of the Assembly of States Parties to all States Parties.

5. An amendment adopted at a meeting of the Assembly of States Parties shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by [2/3] [3/4] of [all the States Parties]./293/

6. Any State Party that has not ratified or accepted the amendment may withdraw from the Statute with immediate effect, notwithstanding paragraph 1 of article 115, by giving notice no later than one year after the entry into force of such amendment.

Article 111/294/

Review of the Statute

Option 1

1. After the expiry of [...] years from the entry into force of this Statute, the meeting of the Assembly of States Parties may decide, by a two-thirds majority of [States Parties] [those present and voting], to convene a special meeting of the Assembly of States Parties to review the Statute. [Such a meeting shall not be held more frequently than [...] years from the previous such meeting.]

2. The provisions of paragraphs 3 to 6 of article 110 shall apply to any amendment to the Statute proposed at such a meeting of the Assembly of States Parties.

Option 2

1. [Five] years after the entry into force of this Statute the Depositary shall convene a meeting of the Assembly of States Parties to review the list of crimes within the jurisdiction of the Court contained in article 5, in order to consider additions to the list. Any amendment to that effect shall be subject to paragraphs 3 and 4 of article 110 and shall enter into force with

regard to those States Parties which have deposited their instrument of acceptance on the [thirteenth] day following the deposit of the [tenth] instrument of acceptance. For each State whose instrument of acceptance is deposited after the entry into force of the amendment, the amendment shall enter into force on the [thirtieth] day after the deposit by such State of its instrument of acceptance. If an amendment has not entered into force for a State, the Court shall not exercise its jurisdiction with respect to a crime covered by the amendment when committed on the territory of that State or by its nationals. Subsequently, at the request of a State Party, the Depositary shall, upon approval by a majority of States Parties, convene a meeting of the Assembly of States Parties in order to consider additions to the list of crimes within the jurisdiction of the Court.

2. Without prejudice to paragraph 1, the meeting of the Assembly of State Parties may at any time after the entry into force of this Statute decide, by a two-thirds majority of [Sates Parties] [those present and voting], to convene a special meeting of the Assembly of States Parties to review the Statute. Any amendment to the Statute proposed at such a meeting of the Assembly of States Parties shall be subject to paragraphs 3 to 6 of article 110.

Article 112

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States [without any kind of discrimination] in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on [17 July 1998]. Thereafter, it will remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until [17 October 1998]. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

[Article 113

Early activation of principles and rules of the Statute

Pending the entry into force of the Statute, States that have signed the Statute shall, in accordance with applicable principles of international law, refrain from acts that would defeat the object and purpose of the Statute. To this end, in ensuring the international prosecution and suppression of crimes of international concern, States should pay due regard to the relevant principles and provisions contained in the Statute, including in the performance of their responsibilities in competent organs of the United Nations, with a view to accelerating the achievement of the shared goal of establishing the Court.]

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Article 114

Entry into force

1. This Statute shall enter into force [following the completion of the Rules of Procedure and Evidence] on the [60th] day following the date of the deposit of the [...] instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations [provided that such instruments have been deposited by no fewer than [one] [two] [four] members from each geographical group as established by the General Assembly of the United Nations].

2. For each State ratifying, accepting, approving or acceding to the Statute after the deposit of the [...] instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the [60th] day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 115

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged by reason of its withdrawal from the financial obligations which accrued while it was a Party to this Statute. Nor shall the withdrawal affect the duty of that State to cooperate with the Court in connection with criminal investigations and proceedings commenced under this Statute prior to its termination for that State; nor shall it prejudice in any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal becomes effective.

[A State shall not be discharged by reason of its withdrawal from the obligations arising from the Statute while it was a Party to this Statute. Nor shall the withdrawal prejudice in any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal becomes effective.]

Article 116

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

PART TWO

DRAFT FINAL ACT OF THE UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

1. The General Assembly, in its resolution 51/207 of 17 December 1996, decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalizing and adopting a convention on the establishment of an international criminal court.

2. The General Assembly, in its resolution 52/160 of 15 December 1997, accepted with deep appreciation the generous offer of the Government of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July 1998.

3. Previously, the General Assembly, in its resolution 44/39 of 4 December 1989, had requested the International Law Commission to address the question of establishing an international criminal court; in resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an international criminal court; and in resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993, requested the Commission to elaborate the draft statute for such a court as a matter of priority.

4. The International Law Commission considered the question of establishing an international criminal court from its forty-second session, in 1990, to its forty-sixth session, in 1994. At that session, the Commission completed a draft statute for an international criminal court, which was submitted to the General Assembly.

5. The General Assembly, in its resolution 49/53 of 9 December 1994, decided to establish an ad hoc committee to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.

6. The Ad Hoc Committee on the Establishment of an International Criminal Court met from 3 to 13 April and from 14 to 25 August 1995, during which time the Committee reviewed the issues arising out of the draft statute prepared by the International Law Commission and considered arrangements for the convening of an international conference.

7. The General Assembly, in its resolution 50/46 of 11 December 1995, decided to establish a preparatory committee to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

8. The Preparatory Committee on the Establishment of an

International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time the Committee discussed further the issues arising out of the draft statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court.

9. By its resolution 51/207 of 17 December 1996, the General Assembly decided that the Preparatory Committee would meet in 1997 and 1998 in order to complete the drafting of the text for submission to the Conference.

10. The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time the Committee continued to prepare a widely acceptable consolidated text of a convention for an international criminal court.

11. In its resolution 52/160 of 15 December 1997, the General Assembly requested the Preparatory Committee to continue its work in accordance with General Assembly resolution 51/207 and, at the end of its sessions, to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate.

12. The Preparatory Committee met from 16 March to 3 April 1998, during which time the Committee completed the preparation of the draft Convention on the Establishment of an International Criminal Court, which was transmitted to the Conference.

13. The Conference met at the headquarters of the Food and Agriculture Organization of the United Nations in Rome from 15 June to 17 July 1998.

14. The General Assembly, in its resolution 52/160, requested the Secretary-General to invite all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency to participate in the Conference. The delegations of ... States participated in the Conference, as follows: ...

15. In the same resolution, the General Assembly requested the Secretary-General to invite representatives of organizations and other entities that had received a standing invitation from the Assembly pursuant to its relevant resolutions to participate as observers in its sessions and work on the understanding that such representatives would participate in that capacity, and to invite, as observers to the Conference, representatives of interested regional intergovernmental organizations and other interested international bodies, including the International Tribunals for the Former Yugoslavia and for Rwanda. The following organizations were represented at the Conference by an observer: ...

16. Pursuant to the same resolution, the Secretary-General invited non-governmental organizations accredited by the Preparatory Committee with due regard to the provisions of section VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Preparatory Committee and in accordance with the resolution as well as the rules of procedure to be adopted by the Conference. The following non-governmental organizations were represented at the Conference by an observer: ...

17. The Conference elected ... as President.

18. The Conference elected as Vice-Presidents the representatives

of the following States: ...

19. The following committees were set up by the Conference:

General Committee

Chairman:. ...

Members: ...

Committee of the Whole

Chairman: ...

Vice-Chairmen: ...

Rapporteur: ...

Drafting Committee

Chairman: ...

Members: ...

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 the Conference.

Credentials Committee

Chairman: ...

Members: The representatives of ...

20. The Secretary-General was represented by Mr. Hans Corell, Under-Secretary-General, the Legal Counsel. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Executive Secretary. The Secretariat was further composed as follows: ...

21. The Conference had before it a draft Convention on the Establishment of an International Criminal Court transmitted by the Preparatory Committee in accordance with its mandate ...

22. The Conference assigned to the Committee of the Whole the consideration of the draft Convention on the Establishment of an International Criminal Court adopted by the Preparatory Committee. The Conference entrusted the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or by the Committee of the Whole and reporting to the Conference or to the Committee of the Whole as appropriate.

23. On the basis of the deliberations recorded in the records of the Conference (A/CONF. ...) and of the Committee of the Whole (A/CONF. ...) and the reports of the Committee of the Whole and the Drafting Committee (A/CONF. ...), the Conference drew up the following [Convention]:

[Rome Convention on the Establishment of an International Criminal Court]

24. The foregoing Convention, which is subject to ratification,

was adopted by the Conference on ... July 1998 and opened for signature on [17 July 1998], in accordance with its provisions, until [17 October 1998] at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

25. After 17 October 1998, the closing date for signature at the Ministry of Foreign Affairs of Italy, the Convention will be deposited with the Secretary-General of the United Nations.

26. The Conference also adopted the following resolutions, which are annexed to the present Final Act:

Tribute to the International Law Commission

Tribute to the President of the Conference, to the Chairman of the Committee of the Whole and to the Chairman of the Drafting Committee

Tribute to the People and the Government of Italy

[Resolution on the Establishment of the Preparatory Commission for the International Criminal Court]

...

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Rome this seventeenth day of July, one thousand nine hundred and ninety-eight, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Ministry of Foreign Affairs of Italy.

ANNEX

Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

...

The United Nations Conference on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Having decided to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions,

Having decided that a preparatory commission should be established for the fulfilment of these purposes,

Decides as follows:

1. There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission [as early as possible at a date to be decided by [the General Assembly of the United Nations] [the Secretary-General]] [upon signature of or accession to the Statute by ... States]./295/

2. The Commission shall consist of representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference.

3. The Commission shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work. These elections shall take place at the first meeting of the Commission.

4. The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

(a) Rules of Procedure and Evidence [including elements of offences]/296/ on a priority basis;

(b) a relationship agreement between the Court and the United Nations;

(c) basic principles governing a headquarters agreement to be negotiated between the Court and the host country;

[(d) staff regulations;]/297/

(e) financial regulations and rules;

[(f) an agreement on the privileges and immunities of the Court;]

(g) a budget for the first financial year;

(h) the rules of procedure of the Assembly of States Parties.

5. The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties. [It shall convene the first meeting of the Assembly of States Parties.]

6. The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties.

7. The Commission shall meet at the Headquarters of the United Nations. The Secretary-General of the United Nations is requested to provide to the Commission such secretariat services as it may require, subject to the approval of the General Assembly of the United Nations.

8. The Secretary-General of the United Nations shall bring this resolution to the attention of the General Assembly for any necessary action.

ENDNOTES

/1/In this connection, there was a proposal contained in document A/AC.249/1998/DP.6.
/2/Delegations have expressed their opposition to the wording of the third paragraph of the preamble and have asked that this paragraph be made consistent with article 1 of the Statute so as to read as follows:

"Emphasizing further that such a court shall be complementary to national criminal jurisdictions;"
/3/The reference to "intent to destroy, in whole or in part ... a group, as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.
/4/The Prèparatory Committee took note of the suggestion to examine the possibility of addressing "social and political" groups in the context of crimes against humanity.

N.B. The need for this footnote should be reviewed in the light of the discussions that have taken place in respect of crimes against humanity.
/5/The reference to "mental harm" is understood to mean more than the minor or temporary impairment of mental faculties.
/6/The Working Group will return to the question of the placement of article III of the Genocide Convention once the Working Group on general principles of criminal law has considered this issue in the context of its work.

N.B. See also article 23 (Individual criminal responsibility).
/7/This square bracket closes at the end of paragraph 2.
/8/The proposal reflects the view held by a large number of delegations that the crime of aggression should be included in the Statute.

The Preparatory Committee considered this crime without prejudice to a final decision on its inclusion in the Statute.
/9/Paragraph 2 of the text reflects the view held by some delegations that the definition should include an enumeration of the acts constituting aggression.
/10/Views were expressed that certain provisions should be placed within square brackets. The relative placement of the various options does not indicate in any way the measure of support for such options. Some options commanded very limited support.
/11/It has been accepted that it will be necessary to insert a provision, probably in the general principles section, which sets out the elements of knowledge and intent which must be found to have existed for an accused to be convicted of a war crime. For example: "in order to conclude that an accused had the knowledge and criminal intention required to be convicted of a crime, the Court must first determine that, taking account of the relevant circumstances of, and information available to, the accused at the time, the accused had the requisite knowledge and intent to commit the crime."

N.B. With respect to this footnote see, however, articles 29 (Mens rea (mental elements)) and 30 (Mistake of fact or of law), which deal with similar issues.
/12/Ibid.
/13/Ibid.
/14/This option seeks to incorporate the essential principles contained under accepted international law while using language suitable for individual criminal responsibility as opposed to

State responsibility.

The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase of the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.
/15/The view was expressed that the substance and placement of this proposal should be considered.
/16/It was suggested that this subparagraph does not include freedom of speech and that it includes the unilateral blockade of populations.
/17/This also includes, for example, social, economic and mental or physical disability grounds.
/18/It was suggested that some more time was needed to reflect upon the inclusion of this subparagraph.
/19/It was suggested that the inclusion of this paragraph should be subject to further clarification. It was also suggested that the list of acts should include institutionalized discrimination.
/20/The Preparatory Committee considered the following three crimes (crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs and psychotropic substances) without prejudice to a final decision on their inclusion in the Statute. The Preparatory Committee also discussed these three crimes only in a general manner and did not have time to examine them as thoroughly as the other crimes.
/21/This square bracket ends at the end of the article.
/22/This square bracket ends at the end of article 7.
/23/Options are not put in square brackets because they are alternatives supported by only some delegations. Some other delegations suggested the deletion of one or more of the options or have suggested other changes within the options.
/24/This paragraph is relevant only to option 2 of the opening clause to paragraph 1.
/25/Ibid.
/26/This square bracket ends at the end of article 8.
/27/The issues raised in this article deserve further reflection as to its place in the Statute.
/28/The square bracket ends at the end of paragraph 5 of this article.
/29/Options 1 and 2 are not mutually exclusive and could be combined in such a way that option 1 may be used in respect of some crimes and option 2 in respect of other crimes.
/30/This paragraph may also apply to option 1.
/31/Ibid.
/32/This square bracket ends at the end of option 2 of paragraph 7.
/33/This square bracket ends at the end of paragraph 3 of option 2.
/34/This article was moved here from Part 5.
/35/This provision is without any prejudice to the position of delegations with regard to "treaty crimes".
/36/Further discussion on the content of a complaint may be necessary in the context of matters dealing with procedures.
/37/This article was moved here from Part 5.
/38/The procedure to be followed by the Prosecutor in relation to this article may be discussed further.
/39/It was mentioned that although the approach taken in this option merited consideration, strong reservations were expressed with regard to the references to the Security Council; the view was

also expressed that the Court should not exercise jurisdiction unless States Parties gave their express consent.
/40/The present text of article 15 is without prejudice to the question whether complementarity-related admissibility requirements of this article may be waived by the State or States concerned.
/41/Suggestions were made that the principle of complementarity should be further clarified either in this article or elsewhere in the Statute.
/42/The proposal on extradition or international cooperation is not included in the text, subject to the determination of whether the relevant State would be able to present arguments in the procedure on admissibility.

N.B. In the context of this footnote, see also article 17, paragraph 2 (Challenges to the jurisdiction of the Court or the admissibility of a case).
/43/If the Security Council can refer situations to the Court or the Prosecutor can initiate investigations, then the appropriate wording may be considered.
/44/It was noted that article 15 should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties. A number of delegations expressed the view that article 18, as currently worded, did not adequately address these situations for purposes of complementarity. It was agreed that these questions should be revisited in light of further revisions to article 18 to determine whether the reference to article 18 was sufficient or whether additional language was needed in article 15 to address these situations.
/45/Some delegations preferred the inclusion of the following subparagraph: "the accused is not liable under article 92 (Rule of speciality) to be prosecuted before or punished by the Court".

N.B. In the light of the text of article 92 (Rule of speciality), consideration should be given as to whether this footnote is still necessary.
/46/Some delegations believed that this subparagraph should be included elsewhere in the Statute or deleted.
/47/The term "proceedings" covers both investigations and prosecutions.
/48/Article 17, paragraph 5, should be revised to require a vote by two thirds of the judges of the Appeals Chamber to decide that a case is admissible.
/49/In the light of the wording to be adopted for article 17, several draft provisions of the Statute may have to be re-examined including article 54, paragraph 6, and article 58, paragraph 2 (b).
/50/The term "suspect" includes a person who is the subject to an investigation. Another option is to limit the right to challenge to a suspect arrested on the basis of a pre-indictment arrest warrant.
/51/The final wording of this subparagraph will depend on the content of article 15.
/52/The final wording (States, Security Council, Prosecutor) will depend on the content of article 6.
/53/This provision would apply to the option where only States parties can challenge the jurisdiction of the Court or the admissibility of a case.
/54/It was suggested that if several States have jurisdiction over a case and one of those States has already challenged the jurisdiction of the Court, the remaining States should not bring additional challenges except on different grounds.
/55/The final wording of this subparagraph will depend on the content

of article 15.
/56/The question arises as to what consequences, if any, should flow from the failure of a State to make a timely challenge.
/57/The question concerning the suspension of the trial proceeding in case of appeal should be addressed in the Rules of Procedure and Evidence.
/58/The phrase "Except as provided in this Statute" should be reviewed in the light of the final text of article 83.
/59/It was noted that further consideration might be necessary on whether this paragraph should apply to conduct constituting a crime or a similar notion.
/60/Further consideration might be necessary in the light of the final text of article 15.
/61/It was noted that further consideration might be necessary on whether there should be additional exceptions to the principle of ne bis in idem, such as failure to take account of the grave nature of the crime, at either the trial or the sentencing stage.
/62/The principle in article 77 that the Court may deduct time previously served in connection with conduct underlying the crime should be reviewed, as it was pointed out that the Court should, in principle, be obliged to deduct any such time.
/63/It was noted that further consideration of this article, in particular its content and placement, is needed.
/64/There was broad support for option 1. Some delegations, however, favoured the approach taken in option 2.
/65/It was generally agreed that consistency with internationally recognized human rights would require that interpretation by the Court be consistent with the principle of nullum crimen sine lege. A view was also expressed that this should be explicitly stated in this article or be made clearer in article 21. For example, article 21, paragraph 2, could be reformulated as follows:

"The provisions of article 5 shall be strictly construed and shall not be extended by analogy to, or be interpreted to proscribe, conduct not clearly criminal under it."

/66/ This provision raises issues relating to non-retroactivity, amendment of the Statute and penalties. Accordingly, further consideration of this issue is required.
/67/ This proposal deals mainly with the limits of civil liability and should be further discussed in connection with penalties, forfeiture and compensation to victims of crimes.
/68/ There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.
/69/ It was pointed out that the commentary to the ILC Draft Code of Crimes (A/51/10, p. 24, para. (12)) implicitly also includes aiding, abetting or assisting ex post facto. This presumption was questioned in the context of the ICC. If aiding, etc., ex post facto were deemed necessary to be criminalized, an explicit provision would be needed.
/70/ In addition to the two types of conduct described in paragraph (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization".
/71/ The inclusion of this subparagraph gave rise to divergent views.

/72/ Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.
/73/ A view was expressed that it would be preferable that issues connected with attempt be taken up in a separate article rather than in the framework of individual responsibility. In that view, the article on individual responsibility should only refer to the way in which the person takes part in the commission of a crime, regardless of whether it deals with a completed crime or an attempted crime.
/74/ Further discussion of paragraph 2 would be required in connection with international judicial cooperation.
/75/ Most delegations were in favour of extending the principle of command responsibility to any superior.
/76/ One delegation held the view that this principle should be dealt with in connection with the definitions of the crimes.
/77/ The alternatives highlight the question whether command responsibility is a form of criminal responsibility in addition to others or whether it is a principle that commanders are not immune for the acts of their subordinates.
/78/ Different views exist among States as to a specific age of responsibility.

It was observed that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights) prohibit the punishment of minors.

The question arising from the draft proposals was whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption.

It was observed that a consistent approach (in terms of either an evaluation by the Court or proof by the Prosecutor) should be taken in paragraphs 1 and 2 of proposal 1 in respect of both of the age groups mentioned.

A question was raised as to what would be the criteria of the evaluation process, and should this be left for the Court to develop in supplementary rules or by jurisprudence?

It was observed that, in its article 1, the Convention on the Rights of the Child defines as a child every human being younger than eighteen years of age and that, in its article 37, it lays down a series of limitations as regards the applicable penalties, ruling out the death penalty and life imprisonment without parole.
/79/ Some delegations questioned whether the source of this obligation is wider than the Statute.
/80/ Some delegations had concerns about including this clause which referred to the creation of a risk. Other delegations thought that, in the context of the offences of the Statute, breach of an obligation under the Statute to avoid the result of a crime was sufficient.
/81/ Some delegations thought that a provision on causation was not necessary.
/82/ These brackets reflect the view expressed that, although much progress has been made on the definition of omission, the question whether omission should be inserted in the Statute depends upon the final drafting of this article.
/83/ Further discussion is needed on this paragraph.
/84/ A view was expressed to the effect that there was no reason for rejecting the concept of commission of an offence also through negligence, in which case the offender shall be liable only when so prescribed by the Statute.

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/85/ There were widely divergent views on this article.
/86/ Some delegations were of the view that mistake of fact was not necessary because it was covered by mens rea.
/87/ Some delegations felt that paragraph 2 of option 2 still left some ambiguity, and an alternative approach could read as follows:

"Mistake of law as to whether a particular type of conduct is a crime.under this Statute, or whether a crime is within the jurisdiction of the Court, is not a ground for excluding criminal responsibility. However, a [reasonable] mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such crime."
/88/ The link between the opening clause of paragraph 1 and paragraph 2 may need to be further considered.
/89/ There are two approaches to the question of voluntary intoxication: If it is decided that voluntary intoxication should in no case be an acceptable ground for excluding criminal responsibility, the text within brackets "[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]" would have to be deleted. In that case, however, provision should be made for mitigation of punishment with regard to persons who were not able to form a specific intent, where required, towards the crime committed due to their intoxication. If this text were to be retained, the ground for excluding criminal responsibility would apply in all cases of voluntary intoxication except for those in which the person became intoxicated in order to commit the crime in an intoxicated condition (actio libera in causa). This would probably lead to a great number of war crimes and crimes against humanity going unpunished.
/90/ Dots inserted so as not to repeat "[[unlawful] [and] [unjustified]]" in all three alternatives.
/91/ Ibid.
/92/ Ibid.
/93/ This should be considered together with article 30.
/94/ A proposal was made to replace the rest of the first sentence by "is under the circumstances not reasonably more excessive than the threat or perceived threat".
/95/ A proposal was made to replace "provided that the person's action [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided" with "employing means which are not disproportionate to the risk faced".
/96/ This should be considered together with article 30.
/97/ It was suggested that a mere reference to the law of necessity would suffice in place of the first part of the sentence.
/98/ This applies more to a military situation.
/99/ The issue of the extent to which the facts underlying these grounds, for excluding criminal responsibility, if not sufficient to exclude criminal responsibility, should instead be considered in mitigation of punishment will be dealt with in Part 7.
/100/ The link between the opening clause of paragraph 1 and paragraph 2 may need to be reconsidered.
/101/ An unlawful or manifestly unlawful order must be understood as an order in conflict with the rules of international law applicable in armed conflict.
/102/ This subparagraph should be considered together with article 31, paragraph 2.
/103/ For the question of mitigating circumstances, see Part 7.
/104/ It was questioned whether such grounds as military necessity could be dealt with in connection with the definition of war crimes.
/105/ This article needs to be further considered together with article 31, paragraph 2, and article 20.
/106/The view was expressed that reference should be made here to the

"President" rather than the "Presidency".
/107/Delegations agreed that this reference to "the Court" means the whole Court, as set out in article 35.
/108/The number is dependent on the total number of judges.
/109/The relationship between this provision and the provisions on amendments to the Statute needs to be borne in mind.
/110/The article dealing with the convening of regular and extraordinary meetings of the Assembly of States Parties.
/111/Consideration could be given to the quorum required for extraordinary meetings of the Assembly of States Parties in the appropriate article dealing with the convening of such meetings.
/112/This provision is conditional upon the acceptance of the words "or decrease" in paragraph 2 (a).
/113/Matters relating to the mode by which votes would be cast and the compilation and announcement of results could be dealt with by the Rules of Procedure and Evidence.
/114/This provision is linked to option 2 in paragraph 4.
/115/These options reflect the different entities which may elect the judges.
/116/The need for staggering in the event of a change of number of judges can be addressed in the Rules of Procedure and Evidence.
/117/Detailed administrative arrangements on, e.g., consultation with the Prosecutor for specific matters of mutual concern, could be dealt with in the Rules.
/118/Consideration needs to be given to whether the members of the Presidency of the Court should be members of the Appeals Chamber.
/119/Mechanisms that could be adopted for this purpose could include the assignment of judges to specific Chambers by lot, the rotation of judges, judges assigned to specific Chambers for a fixed term or fixed teams of judges with a team assigned to be the Trial Chamber and another team assigned to be the Pre-Trial Chamber for a given case.
/120/These options are linked to the earlier provision on the number of judges for the Chamber.
/121/This paragraph needs to be harmonized with paragraph 1 of article 72 and other provisions, if any, dealing with alternate judges for judicial proceedings other than trial proceedings.
/122/Some delegations expressed the view that questions of disqualification should be decided by an absolute majority of the members of the Chamber concerned.
/123/Most delegations thought that both prosecutorial and judicial experience in criminal trials should be regarded as practical experience in that sense, but as some delegations felt that prosecutorial experience should be of paramount importance, the reference to "trial experience" was kept in square brackets.
/124/There ought to be a procedure for the Assembly to have a list of candidates rather than to have nominations put to the election directly, but it was felt that this was a matter for the rules of the Assembly.
/125/If this option is kept, there should be some system of involvement for the States parties, either by way of drawing up a list for the candidates or by having a possibility to object to an appointment by a certain number of States parties.
/126/Views were expressed that the reasons for doubts should be set out specifically.
/127/Many delegations preferred this to be in the Rules of Procedure and Evidence.
/128/Such staff could be available in the Victims and Witnesses Unit under article 44, paragraph 4, but some delegations felt that there was a need for such staff in the Office of the Prosecutor, too. Some delegations felt that at least the first sentence was already covered in article 68.
/129/Some delegations were of the view that there should be a separate unit for prosecution witnesses in the Office of the Prosecutor, as reflected in the bracketed language in article 43,

paragraph 9; others were of the view that there should be only one unit located in the Registry.
/130/The relationship with paragraph 5 of article 68 was considered. Views were expressed that parts of paragraph 4 should appear in article 68.
/131/Some delegations wanted an approval procedure for the States parties to be set out in the Statute, whereas other delegations felt that circulation should be just for information.
/132/Some delegations felt that this was already covered under the part dealing with cooperation or that it should be addressed in that part.
/133/Several delegations expressed the view that a separate article is required in the Statute to deal with the general issue of expiry of terms of office. It was suggested that such an article should be drafted along the following lines:

"The term of office of a judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar ends upon the expiry of their term of office, death, resignation or removal from office in accordance with article 47."

/134/A number of delegations expressed the view that a separate procedure for removal of office in the case of an inability to exercise the functions required (through, for example, long-term illness or disability) should be set out in the Regulations of the Court.
/135/Several delegations expressed the view that this provision relating to disciplinary measures should be contained in the Rules.
/136/Some delegations felt that the principle set out in the first sentence was sufficient for the Statute and that any elaboration of that principle could be left for the Rules of Procedure and Evidence or the Host Country Agreement. Views were also expressed that this paragraph should be placed in article 68.
/137/A view was expressed that the President should be given the power to waive the privileges and immunities of the staff of the Registry and that the Prosecutor's privileges and immunities should be waived by the Deputy Prosecutors.
/138/References to the Rules in the Statute will have to be revisited and adjusted to the language used in this article (see also footnote 34 below).
/139/It was suggested that these provisions might be called "Rules of the Court" so as to enable a reference to the "Rules" in the Statute to refer to either of the sets of provisions, as appropriate.
/140/Some delegations wanted to see the procedure for objections to be clarified in the Rules of Procedure and Evidence.
/141/ It was proposed that the following text be included as the first line of article 54, paragraph 4:

"When evidence is in the territory of a State Party whose competent authority is functioning properly, the Prosecutor shall request, as necessary, the Pre-Trial Chamber to seek the cooperation of a State Party pursuant to Part 9 of this Statute."

/142/ This set of square brackets will apply if paragraph (iii) is accepted.
/143/ This paragraph will be discussed in connection with article 69.
/144/ This paragraph will be discussed in connection with article 43.
/145/ A view was expressed that article 56 could be examined in the context of article 54.
/146/ Article 57 was tabled by some 15 interested delegations at the August 1997 meeting of the Preparatory Committee. It was written de novo and did not derive from any particular delegation's proposal.

The proposal contemplates that, in exceptional circumstances in which a unique opportunity appears to exist for the taking or collection of evidence, the Pre-Trial Chamber may be involved in order to assure a fair trial/protect the interests of the defence.

Some delegations believed that the authority of the Pre-Trial Chamber set out in the proposal should be exercised only to collect and preserve evidence for the defence. In relation to the Prosecutor's investigation, the Pre-Trial Chamber should only intervene for the purpose of checking on the lawfulness of the Prosecutor's conduct.

The alternative options reflect differing views as to the balance to be struck between the need to ensure the Prosecutor's independence and the desirability of conferring a limited role on the Pre-Trial Chamber.

If this proposal is adopted, it seems likely that other proposals in relation to article 54 could be deleted or may need revision. Consideration would need to be given to article 54, paragraphs 1, 4 (a), (b), (c), (f) and (h), 5, 6, 7, 8, 9 and 13.
/147/ The powers contemplated by this draft provision include the power for the Pre-Trial Chamber to seek judicial assistance from a State.
/148/ The Preparatory Committee decided to defer the consideration of paragraph 8 of article 58 for such time as article 63 is considered.
/149/ [Quaere: definition of "relevant" for the Rules of Procedure and Evidence?]
/150/ The term "reasonable grounds" was understood to embody objective criteria.
/151/ Some delegations preferred other terms such as "serious reasons".
/152/ Some delegations suggested that subparagraphs (ii), (iii) and (iv) could be merged under a more general formulation such as "obstructing or endangering the investigation or the court proceedings".
/153/ Some delegations favoured addressing situations in which the accused may be harmed or at risk. Other delegations stated that the accused could be adequately protected under article 68.
/154/ It was suggested that this provision could be deleted because it is addressed in article 60, paragraph 6.
/155/ It was suggested that this provision could be moved to article 54, paragraph 10.
/156/ It was suggested that the questions of release and re-arrest could be addressed in another provision of this Statute.
/157/ The term "Court" is understood to include its constituent organs, including the Prosecutor, as defined in article 35.
/158/ Under article 59, paragraph 5, a warrant for pre-indictment arrest is forwarded to the State in which the individual sought may be located, along with a request for provisional arrest or transfer/surrender under Part 9. If Part 9 specifies the extent to which national laws apply to requests for provisional arrest or transfer/surrender, it will be unnecessary to treat this issue here as well.
/159/ The issue of whether a State can decline to arrest and detain a person, pending resolution of a challenge under article 17, could be dealt with in that article.
/160/ This provision raises a host of issues, including under what conditions the Prosecutor should be able to exercise such authority, whether the Prosecutor would have adequate resources to do so, and whether such issues should be addressed elsewhere in the Statute.
/161/ This paragraph should be reviewed in the light of the text of article 84.

/162/ The wording of this article might be modified in the light of the decisions to be taken as regards the question of hearing of the confirmation of an indictment.
/163/ The contents of this subparagraph could become the subject matter of the provision being negotiated on questions of confidentiality, disclosure and protection of information.
/164/ The matter concerning a specific deadline may be more appropriate for the rules of procedure.
/165/The proposal represents a simplified and somewhat restructured text for articles 58 through 61. This simplified version of these articles has been achieved as a result of adoption of the framework outlined in A/AC.249/1998/WG.4/DP.36 and the withdrawal or abbreviation by many delegations of their proposals currently contained in A/AC.249/1998/L.13. This reflects a decision by many of the authors to move away from national positions towards a single, straightforward procedural approach, acceptable to delegations representing different national legal systems.

The proposal does not attempt to resolve issues such as the trigger mechanism or powers of the Prosecutor. Similarly, it does not attempt to incorporate at this time procedures relating to challenges to admissibility or jurisdiction.

The purpose of the proposed text, if delegations agree, is to provide a basis for a more focused and efficient discussion in Rome of the procedural stages addressed in the above articles 58 through 61.
/166/A view was expressed that the proposal for articles 58 to 61 under this option omits procedures of substantive nature which have been included in the text of the same articles above.
/167/Provisions in the option for article 59 presented on page 87 ("[No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the rules of the Court.]") should be moved to article 54.
/168/Such a provision may be necessary, particularly if a strict rule of specialty were adopted.
/169/The question whether the Pre-Trial Chamber shall have the possibility to request the State that serves the summons to place the person under restrictions of liberty, despite the fact that it found that a summons is sufficient to assure the person's appearance, will have to be examined.
/170/It is contemplated that, in unusual circumstances, for example of grave illness, the State might, if permitted by its law, place the person under judicial supervision rather than arrest the person and take him into custody.
/171/Serious questions were raised about on what grounds such a challenge would be based and whether this provision was needed at all in light of the procedures for judicial review of the arrest warrant and judicial confirmation of the charges for trial.
/172/A view was expressed that there should be a specific time limit in the Statute within which the Pre-Trial Chamber must review a detention decision.
/173/Paragraph 9 of the option for article 58 presented on page 85 referred to the power of the Pre-Trial Chamber to order provisional measures to preserve the Court's ability to order compensation to victims. It is suggested that this concept be moved to article 57, paragraph 2, and be among the general powers of the Pre-Trial Chamber and not only exercisable at the time of confirmation.
/174/A decision needs to be made whether any hearing on admissibility will be held separately, or whether admissibility issues raised by the accused should also be considered at this hearing.
/175/The question remains whether the decisions of the Pre-Trial Chamber on confirmation of the charges should be unanimous or by

majority vote.
/176/Amending the charge may have implications under a rule of speciality provision.
/177/ The questions addressed in paragraphs 4 and 5 may be better dealt with in the context of the pre-trial proceedings.
/178/ Option 1 prohibits trial in absentia without any exception; like option 2, it would deal with procedures needed to preserve evidence for trial as a matter separate from trial in absentia.
/179/ Some proponents of option 2 do not agree that this should necessarily be a basis for a trial in absentia.
/180/ This provision follows paragraph 3 of the ILC draft, except that it omits subparagraph (a), regarding steps to inform the accused of the charges. This is unnecessary under this option since a trial in absentia is permitted only if the accused was present at the commencement of the trial, a stage at which the indictment is to be read out.
/181/ There is no separate proposal to preserve evidence for trial. This could be dealt with as part of pre-trial proceedings, and would not necessarily be confined to situations where the accused is absent.
/182/ Under this option, there would be no second trial following a trial in absentia.
/183/ This is paragraph 3 of the ILC text, which requires consequential adjustments to be harmonized with the text of this Option.
/184/ Concerns were expressed about this paragraph and it was suggested that its formulation should continue to be examined.
/185/ Reservations were expressed regarding the phrases "in accordance with law" and "beyond a reasonable doubt".
/186/ A proposal was made that the wording of subparagraphs (a) to (g) of paragraph 3 of article 14 of the International Covenant on Civil and Political Rights should be used as such.
/187/ The question of privileged communications could be addressed in the context of article 69.
/188/ The rights addressed in paragraphs 3 and 4, which are of a general nature, should perhaps be located in another part of the Statute. In addition, paragraph 4 could be reformulated.
/189/ Many delegations were of the view that it would be more appropriate to deal with the subject matter of this paragraph in the Rules of Procedure and Evidence.
/190/ A proposal was made that the Rules of Procedure and Evidence could permit the use of video or audio technology when the witness is not able to attend the Court due to illness, injury, age or other justifiable reason.
/191/ A proposal was made, supported by a number of delegations, to add the following paragraph to the Statute: "The Court may decide not to admit evidence where its probative value is substantially outweighed by its prejudice to a fair trial of an accused or to a fair evaluation of the testimony of a witness, including any prejudice caused by discriminatory beliefs or bias." Other delegations supported a proposal that the Statute or Rules of Procedure and Evidence also make reference to the exclusion of evidence of prior sexual conduct of a witness, evidence protected by the lawyer-client privilege, as well as other grounds of exclusion. It was finally proposed that these matters should be addressed in the Rules of Procedure and Evidence, as opposed to in the Statute. Many delegations also felt that the Rules should provide sufficient flexibility to enable the Court to rule on the relevance and admissibility of evidence where no other rule provides guidance on the standards to be applied.
/192/ It was questioned whether this provision was strictly necessary.
/193/ The question as to whether a violation of the Rules of Procedure and Evidence should also be considered in the context of the application of article 69, paragraph 5, or whether such

violation should be addressed by a separate provision in the Statute or Rules of Procedure and Evidence, needs to be determined in the context of the consideration of articles 20 and 52.
/194/ Such a provision might better be discussed in the context of articles 66, 67 or 31.
/195/ The provisions on notice to States might read as follows:

"(a) Subject to subparagraph (b) below, a determination will not be made unless [x days'] notice of the matter has been given to the State concerned and that State has been given an opportunity to make representations to the Court;

(b) If, having regard to all the circumstances, the Pre-Trial Chamber or the Trial Chamber decides that there are substantial reasons for not giving the State notice of the matter, a determination to which this article applies shall not take effect until [x] days after it has been served on that State and the State has been given the opportunity to make representations to the Court."
/196/ It was suggested that this sentence could be included in the Rules of Procedure and Evidence.
/197/ This paragraph would only be necessary if majority decisions are allowed and a quorum could consist of an even number of judges.
/198/ Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victim's families and successors (in French, "ayant-droit"). For the purposes of defining "victims" and "reparations", reference may be made to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17).
/199/ It was suggested that since, under the present article, the national courts could render a decision with respect to reparations in conflict with an order of the Court, there should, in the interests of legal certainty, be safeguards to prevent any such conflict.
/200/ As regards the reference to article 90 and to Part 10 of the Statute in general, the view was expressed that it would be necessary to clarify whether the property and assets referred to in that article includes both crime and non-crime related property and assets.
/201/ The bracketed portion of the text requires further consideration in the light of the decision to be taken concerning trials in absentia.
/202/ To meet the concerns of several delegations regarding the severity of a life sentence or a long sentence of imprisonment, it was suggested that Part 10, article 100, should provide a mandatory mechanism by which the prisoner's sentence would be re-examined by the Court after a certain period of time, in order to determine whether he or she should be released. In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.
/203/ The view was expressed that if such a provision providing for minimum sentencing is included, there should be a reference to factors that may reduce the minimum sentence. In such a case, the list of relevant factors should be exhaustive. It was suggested that among those factors could be the following: (i) diminished mental capacity that falls short of exclusion of criminal responsibility; (ii) the age of the convicted person; (iii) as appropriate, duress; and (iv) the subsequent conduct of the convicted person.
/204/ The following proposals were made which should be treated

either under age of responsibility or the jurisdiction of the Court:

"[The Court shall have no jurisdiction over those who were under the age of 18 years at the time they are alleged to have committed a crime which would otherwise come within the jurisdiction of the Court] [; however, under exceptional circumstances, the Court may exercise jurisdiction and impose a penalty on a person aged 16 to 18 years, provided it has determined that the person was capable of understanding the unlawfulness of his or her conduct at the time the crime was committed]."

/205/ Some delegations held the view that such a provision would give rise to difficult issues of enforcement.

/206/ The terms in this provision should be brought into line with similar terms used elsewhere in this Statute once those provisions are finalized.

/207/ It was suggested that forfeiture not be included as a penalty, but instead be included as a mechanism which the Court would request States to use with regard to execution of an order for reparations. According to this view, a provision on forfeiture could be considered as a separate paragraph of this article or elsewhere in the Statute.

/208/It was suggested that there was no need for such a clause relating to State responsibility, since it was already dealt with in the context of rules on individual criminal responsibility.

/209/A number of delegations suggested that the Statute should address the issue of reparations to victims and their families. Opinions were divided as to whether this issue should be dealt with in the context of penalties. It was suggested that it could usefully be dealt with within the framework of the Working Group on Procedural Matters. It was also noted that the issue of reparations had a bearing on rules of enforcement in Part 10. A number of delegations expressed the view that there mights be merit in dealing with these issues in a unified way focusing on all the issues related to compensation.

/210/Inclusion of a provision on such penalties would depend on the outcome of considerations in the context of individual criminal responsibility for legal persons.

/211/It was suggested that such provisions may give rise to issues of enforcement in the context of Part 10.

/212/See footnote 6 concerning forfeiture for natural persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications.

/213/See footnote 6 concerning reparation in the context of natural persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications.

/214/It may be impossible to foresee all of the relevant aggravating and mitigating circumstances at this stage. Many delegations felt that factors should be elaborated and developed in the Rules of Procedure and Evidence, while several other delegations expressed the view that a final decision on this approach would depend upon the mechanism agreed for adopting the Rules. Among the factors suggested by various delegations as having relevance were: the impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person's conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime.

/215/It was suggested that this issue should be dealt with only in

the context of article 20 on applicable national laws. Another suggestion was to move this issue to article 77, paragraph 1: Moreover, the view was held that this kind of provision should be avoided altogether.
/216/Consideration could be given to inserting an express provision to this effect.
/217/It was suggested that there may be options other than (a) and (b) as to the manner in which fines or assets collected by the Court could be distributed to victims.
/218/Further consideration should be given to the question of what decisions could be appealed under this article.
/219/In Part 10 the question of what constitutes a final decision or judgement will be discussed.
/220/To be revised in conjunction with article 81.
/221/This bracketed text would be used if the Presidency makes the initial review of the application for revision.
/222/This bracketed text would be used if the Appeals Chamber makes the initial review of the application for revision.
/223/Articles 86, 88, 89 and 90 contain virtually identical provisions, some of which should be harmonized.
/224/"Court" throughout this Part is understood to include its constituent organs, including the Prosecutor, as defined in article 35. Such a provision could be inserted elsewhere in the Statute.

N.B. See N.B. on article 35 (Organs of the Court).

/225/It was suggested that the provisions of article 88, paragraph 4, and article 90, paragraph 8, concerning the protection of witnesses and victims should be combined in a single paragraph in article 86, which would read:

"The Court may withhold, in accordance with article 68, from the requested State [or a State making a request to the Court under article 90, paragraph 7], specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available to a State under this part shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses or their families."

It was also suggested that the content of such a provision should be considered further.
/226/The language to be used by States in their replies to the Court is dealt with under article 91.
/227/It was suggested that the issue of non-States Parties should be addressed in a separate article 85.
/228/It was suggested that a reference to paragraph (a) would cover this concern.
/229/It was suggested that the referral be made to a standing committee of the General Assembly of States Parties. This issue needs to be further addressed in Part 4.
/230/The question of "necessary measures" has to be further examined.
/231/It was suggested that this paragraph should be inserted in article 85.
/232/It was suggested that the referral be made to a standing committee of the Council of States Parties. This issue needs to be further addressed in the organization of the Court.
/233/The question of "necessary measures" has to be further examined.
/234/The term "persons" is understood to include "suspects", "accused" and "convicted persons". [The term "suspect" means a person who is the subject of a pre-indictment arrest warrant.]
/235/There is no agreement on the list of grounds contained in this option.

/236/It was suggested that even if a person is a national of the requested State, this does not prevent that State from [transferring] [surrendering] [extraditing] the person to the Court if the latter guarantees that the national in question shall be returned to the requested State to serve the sentence pronounced by the Court (cf. article 94, paragraph 1).
/237/It was suggested that the following ground for refusal should be included: when the imposition or the execution of punishment for the offence for which surrender is requested would be barred by reasons prescribed under the law of the requested State if the requested State were to have jurisdiction over the offence.
/238/Questions dealing with the consequences of lapse of time will be addressed in the Rules of Procedure and Evidence.
/239/If it is agreed that consent of the Court will be required for postponement, then the last set of brackets can be removed.
/240/The text of paragraph 9 (a) and (b) applies if there is a consent règime. If the Court has jurisdiction over core crimes and there is no consent regime, these provisions could be deleted.
/241/It has been suggested that this or other provisions could form the basis for a separate article. In addition, some felt that a number of details set forth in this text would be more appropriately regulated in the Rules of Procedure and Evidence.
/242/Portions of this article might also be provided for in the Rules of Procedure and Evidence rather than in the Statute.
/243/Issues relating to the security of this type of transmission will have to be discussed.
/244/The question of authentication of a warrant of arrest will be dealt with in the Rules of Procedure and Evidence.
/245/Article 59 covers pre-indictment arrest, while this paragraph also addresses the form of a request for pre-indictment arrest. The text of these two provisions must be examined together to ensure that there are no inconsistencies or duplications.
/246/It was suggested that this paragraph is an enforcement-of-sentence issue to be treated in Part 10.
/247/This paragraph could also be included under article 86.
/248/ILC article 52 (1) (a) addresses provisional arrest, as well as search and seizure and other measures pertaining to mutual assistance. In order to present all proposals in a clear fashion, the present document treats provisional arrest in this article and the other matters in article 90.
/249/Some delegations have proposed a 30-day period, some a 40-day period and some a 60-day time period.
/250/It was suggested that the simplified surrender procedure should be the object of a separate paragraph, since it applies to both the provisional arrest stage and after a full surrender request has been submitted.

This paragraph could also be included in article 86.
/251/This issue has to be revisited after the title of Part 9 is confirmed.
/252/This issue is also addressed in article 54, paragraph 4 (c).
/253/The relationship between subparagraphs (g) and (h) and article 91, paragraph 4, needs to be examined.
/254/The issue of whether the Court is to be vested with such powers is linked with article 75 in Part 7 on Penalties.
/255/The list of possible grounds for refusal is not an agreed list.
/256/Views have also been expressed that subparagraphs (b) and (c) should be addressed in the Rules of Procedure and Evidence.
/257/Views have been expressed that this subparagraph should be addressed in the Rules of Procedure and Evidence.
/258/The relationship with article 92 needs to be considered.
/259/This relates to the provisions on the protection of victims and witnesses.
/260/There is a link between this provision and the empowerment provisions of paragraph 4.

/261/Views have been expressed that this should be addressed in the Rules of Procedure and Evidence.
/262/Views have been expressed that paragraph 1 is an alternative to this paragraph.
/263/Views have been expressed that this should be addressed in the Rules.
/264/Similar provisions may have to be inserted elsewhere to address the situation where the Court renders assistance to States or States Parties.
/265/The exact formulation will depend on the formulation adopted for article 69.
/266/The protection of witnesses is also addressed in articles 54 and 68.
/267/Views have been expressed on the relationship between subparagraphs (b) and (c) and article 63 on trial in the presence of the accused.
/268/The issue of transfer, etc., from the State of enforcement of a sentence of imprisonment to a third State is addressed in article 97.
/269/These square brackets reflect the view that there should be no rule of speciality in the Statute.
/270/One delegation was of the view that this part deals with issues also relevant to judicial assistance and that there might be grounds for non-recognition or non-enforcement of judgements.
/271/There was a question whether this sort of provision should be in article 72, Part 7 or in Part 10.
/272/The issue arises as to whether provision should be made concerning whether non-States Parties should accept sentenced persons for imprisonment.
/273/If retained, this provision will need to conform with provisions of article 100.
/274/The text in square brackets will be retained in the event option 2 of article 94 is adopted.
/275/There is a question as to whether the permissibility of re-extradition of the prisoner should be addressed in article 92 (Rule of speciality) or in article 98.
/276/Consideration should be given to the relationship of this article to the rule of speciality, as found in article 92. This article is also related to article 87, paragraph 8, regarding temporary or delayed surrender.
/277/References to fines, forfeiture, restitution or compensation, or similar terms, will depend on the range of sanctions and compensatory measures ultimately provided for in Part 7 [article 76].

N.B. This footnote should be reviewed in the context of the discussions on article 73 (Reparations to victims)
/278/There is a question whether this provision concerns enforcement of sentences, or rather the powers of the Court to order particular measures relating to enforcement of fines or confiscation. If it is meant to refer to States enforcing specific orders relating to fines or confiscation, then paragraph 1 might be amended to make clear that that enforcement by States Parties would include "giving effect to orders of the Court relating to enforcement of fines or forfeitures, such as the seizure of particular property or the forced sale of property of the convicted person to satisfy a fine".
/279/There was a suggestion that this paragraph should be placed first.
/280/In the discussion on penalties in the Preparatory Committee, it was suggested that, to meet concerns of several delegations regarding the severity of a life sentence or a long sentence of imprisonment, article 100 should provide a mandatory mechanism by which the prisoner's sentence would be re-examined by the Court after a certain period of time, in order to determine whether he

or she should be released. In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.
/281/A concern was expressed that pardon might involve political considerations which would not be appropriate for determination by the Court, so that the authority to decide on an application for pardon might better be vested in the Assembly of States Parties.
/282/Delegations expressed the view that this could be dealt with in the Rules of Procedure of the Assembly.
/283/It will be necessary to ensure consistency between this provision and the content of article 86.
/284/The final wording will depend on the outcome of the discussions on article 100. Mention was also made in this context of a possible role of the Assembly in dispute resolution.
/285/It was suggested that the possibility of having a procedure for increasing the number of members of the Bureau could be considered. It was also suggested that there should be more than one Vice-President.
/286/It was suggested that the elections should be staggered. This could be dealt with in the Rules of Procedure of the Assembly.
/287/Delegations expressed the view that this could be dealt with in the Rules of Procedure of the Assembly.
/288/This is subject to the finalization of the provisions on financing of the Court.
/289/This would require a decision of the General Assembly.
/290/The view was expressed that, in the case of a referral by the Security Council, the relevant expenses of the Court should be borne by the United Nations.
/291/The duration of the "initial phase" has to be determined.
/292/The view was expressed that the same procedure may be used for resolving disputes relating to the admissibility of reservations.

It was also observed a cross reference in this article should be made to article 102 (Assembly of States Parties).

/293/It was observed that consideration should also be given to requiring a qualified majority for amendments relating to institutional matters and to acceptance by all States Parties for matters of substance.
/294/Some delegations proposed that articles 110 and 111 be merged.
/295/With regard to these alternatives, a proposal was also made that the Rules of Procedure and Evidence of the Court, including an elaboration of the elements of the offences that must be proved, shall be prepared and adopted by a conference of participating States immediately following the conclusion of the present Statute. Such rules shall be consistent with the provisions of the Statute. The Statute shall be open for signature once the Rules of Procedure and Evidence have been finally adopted.
/296/The view was expressed that the Preparatory Commission may decide to make use of the expertise and experience of the International Tribunals for the Former Yugoslavia and for Rwanda, particularly in drafting the Rules of Procedure and Evidence. To this end, representatives of the Tribunals may be invited to participate as observers in the work of the Commission.
/297/This subparagraph should be in conformity with article 45 of the Statute.

A/CONF.183/2/Add.1
English
Page 1

A/CONF.183/2/
Add.1
English