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# Antecedents of the Rome Statute of the International Criminal Court Revisited

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ON JULY 17, 1998 the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court (hereafter Rome Statute or Statute).<sup>1</sup> This was the culmination of the hopes and dreams of many generations of international lawyers and others who aimed at seeing international law placed on a sounder basis than the voluntarist conceptions so characteristic of it.

One hundred and sixty States took part in the Conference, held in Rome between June 15 and July 17, 1998. Thirty-one official organizations and other entities were represented at the Conference by observers. In addition, observers from 134 non-governmental organizations participated. The Rome Statute was adopted on a non-recorded vote of 120 in favor, seven against, and 21 abstentions, the remaining States not taking part in the vote. The purpose of this article is to retrace briefly the developments that led to the Rome Statute, together with some afterthoughts.

It is a pleasure to dedicate this article to my friend of about fifty years standing, Leslie Green. The author wishes to acknowledge the assistance of Hans-Peter Gasser, Editor-in-Chief of the International Review of the Red Cross, in preparing this article.

<sup>1</sup>The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

### In the Beginning (1872–1914)

It is common knowledge that in the Middle Ages knights could be “tried” by their peers of another people or another fiefdom for violation of the accepted canons of knightly behavior or for allowing particularly vicious acts to be performed by soldiers under their authority. A well-known example of this is the so-called Breisach trial of 1447.<sup>2</sup> These, however, were hardly war crimes trials as we understand them today. Rather they were knightly courts of honor deciding on violations, direct or indirect, of knightly codes.

Another attempt at quasi-criminal international proceedings encountered during the mid-nineteenth century should be noted. As part of its campaign against the slave trade, Great Britain concluded a series of bilateral agreements. These allowed duly commissioned ships of the Royal Navy to visit and search on the high seas flag vessels of the other State, and bring vessels suspected of engaging in illegal slave trade operations into port. Here they would be brought before a mixed commission for adjudication. The mixed commission would decide, without appeal, whether or not a vessel brought before it was a slave ship trading illicitly and legally captured, and would accordingly either condemn it as lawful prize and liberate the slaves it carried, or acquit it and restore both the vessels and the slaves to their owners. These mixed commissions had no jurisdiction over the owners, masters or crews of the condemned vessels. Individuals were to be handed over to their own authorities for trial and punishment in their own courts and according to their own laws. Mixed commissions of this kind sat to the east along the coast from the Cape of Good Hope to the Cape Verde Islands, and in the west from Rio de Janeiro to New York, with the court at Freetown, Sierra Leone, being the most important. It is estimated that over 600 slave vessels were condemned by these commissions and that some 80,000 slaves were liberated by them. They functioned between 1819 and 1871.<sup>3</sup>

Credit for the first attempt in modern times to develop a system of an international criminal tribunal goes to Gustave Moynier of Switzerland. Moynier, together with Henry Dunant, was one of the founders of the International Red Cross, through the Geneva Red Cross Conference of 1863,<sup>4</sup> followed by the first Geneva Conference of 1864. That Conference adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864.<sup>5</sup> Dismayed at the failure of the belligerents in the Franco-Prussian War of 1870–1871 to observe faithfully the provisions of the Geneva Convention in its first real test, Moynier conceived the idea of an established standing international machinery to make it possible to try

individuals who allegedly violated the provisions of the Convention.<sup>6</sup> He was able to persuade his colleagues of what became known as the International Committee of the Red Cross to circulate his proposal to the national committees, for consideration at a future Red Cross Conference.<sup>7</sup>

The gist of Moynier's proposal was that as soon as war had been declared, the President of the Swiss Confederation was to choose by lot three Powers party to the Geneva Convention, excluding belligerents. The three governments, together with those of the belligerents, were to be invited to nominate an "adjudicator" [*arbitre*]. Those five persons would constitute a tribunal. That tribunal, however, would deal only with breaches of the Convention that had been the subject of complaints addressed to it by interested governments. The tribunal was to subject the facts to an adversarial inquiry and then present its decision, for each individual case, as a verdict of guilty or not guilty. If guilt was established, the tribunal was to pronounce a penalty, in accordance with provisions of international law. The latter were to be the "subject of a treaty which is complementary" to the proposed convention on the international judicial body. The tribunal was to notify its judgments to interested governments. These, for their part, were to impose on those found guilty the penalties that had been pronounced against them. Another interesting provision was to the effect that where a complaint was accompanied by a request for damages and interest, the tribunal would be competent to rule on that claim and to fix the amount of the compensation. "The government of the offender will be responsible for implementing the decision." In this scheme, what was permanent was not the tribunal itself but the mechanism for the establishment of a tribunal in time of war.

This proposal did not receive a warm welcome. A longish note by Moynier's friend and colleague, the Belgian jurist G. Rolin-Jaequemyns, gives the text of replies received from several eminent internationalists of that epoch. These included F. Lieber of the United States of America,<sup>8</sup> A. Morin of France, F. de Holtzendorff of Germany, John Westlake of Great Britain, and the *Asamblea española de la Asociación internacional para el secorso de los heridos en campaña* of Madrid—apparently the only national society to reply to the circular.<sup>9</sup>

Moynier's proposal attacked several of the central problems that the idea of a permanent international criminal court raises. Among these are the selection of the judges, the law to be applied, jurisdiction both *ratione personae* and *ratione materiae* and its scope *ratione temporis*, the enforcement of the decision, and the relation between the criminal responsibility of an individual even though the agent of the State and the international responsibility of the State

itself (an aspect now regulated by Article 3 of the Hague Convention No. IV of 1907 with respect to the laws and customs of war on land).<sup>10</sup> The proposal bears traces showing that it could have been inspired by a combination of factors. These include the general attack on international law as “law” without regular enforcement machinery through standing courts; the influence of the *Alabama* arbitration taking place in Moynier’s hometown and the seat of the Red Cross, Geneva; dismay in Red Cross circles at the relative weakness of the Geneva Convention brought out during the Franco-Prussian war; and perhaps to some extent the experience of the Central Commission of the Rhine that was exercising some civil and criminal jurisdiction, even if of limited and localized scope.

However, the proposal was ahead of its time. No international experience had been acquired of any permanent international judicial instance of universal competence. The absence of an agreed international code on the law of war and on the conduct of warfare, and setting forth what acts, when committed by an individual, could be considered criminal, detracted from the feasibility of any kind of international criminal tribunal at that period. Furthermore, the concept of extradition formalized in national legislation and in international treaties was relatively undeveloped and there was—and still is—well-marked reticence on the part of many influential States to allow the extradition of their nationals, save perhaps in the most exceptional circumstances. The existence of factors such as these was not propitious for the fundamental innovation in international law and practice that the creation of an international judicial instance exercising jurisdiction over an individual acting as agent of the State would entail, even on so limited a scale as Moynier envisaged.

In this connection, it is interesting to observe that after the failure of Moynier’s initiative in 1872, the International Committee of the Red Cross did not return to the idea of establishing an international criminal court to try individuals accused of violations of the Geneva Conventions. Instead, it focused its attention more on securing national legislation criminalizing individuals for such violations. The issue of an international penal jurisdiction does not seem to have been raised in the Geneva Red Cross Conferences of 1929, 1949, and 1974–1977. The most that occurred was in connection with the 1949 conference, where the International Committee suggested including in all the Conventions to be adopted at that Conference a provision regarding grave breaches. According to that suggestion, grave breaches were to be punished as crimes against the law of nations by the tribunals of any of the parties to the Convention “or by any international jurisdiction.” This proposal, however, was not pursued.<sup>11</sup>

Nevertheless, Moynier's initiative was not without practical consequences. His reference to international law that was to be made was followed by a rapid spurt in the development of the *jus in bello*, the law governing the conduct of warfare. That was prompted, of course, by a combination of many diverse attributes. These included, alongside the intellectual and humanitarian activism, rapid technological advances in that period, both generally and in the weapons of war. This development ran on two-parallel and interactive lines. One was a series of intergovernmental treaty-making conferences—at Brussels (1874), The Hague (1899, 1907) and London (1908–1909). The second was activity *de lege ferenda* on a grand scale by the Institute of International Law (of which Moynier was one of the founders), leading to a series of resolutions on different aspects. The most important was the Oxford Manual on the laws of war on land of 1880 and a parallel manual on the laws of naval war governing the relations between belligerents, also adopted at Oxford (1913).<sup>12</sup> Many prominent international lawyers and diplomats were active on both those tracks. At the same time, individual scholars were beginning to look into the question.<sup>13</sup>

The law embodied in the Geneva Conventions, from 1864 up to and including the Additional Protocols of 1977, used to be termed “Geneva law,” and the succession of treaties, declarations, and other instruments governing the conduct of warfare was designated as “Hague law.” Geneva law was concerned with individuals—victims of war (military and civilian) and the perpetrators of violations of the laws and customs established for their protection, whether military or civilian personnel. Hague law dealt with the rights and duties of States in their conduct of warfare. Breach of the applicable treaties could lead to a case of State responsibility. The black-letter texts were at this stage couched in the language of rights and duties of States as the subjects of international law. They paid little attention to the actions of individuals, whether in a position of command and authority, or subordinates. They show little signs of recognition of the importance and relevance of military hierarchy. Both sets of treaties and the law that they enunciate have become heavily encrusted with rules and practices of customary international law generated by the black-letter texts. These largely place responsibility for the application of the rules of law on individuals (especially members of the armed forces) as the instrumentalities through which States act or even when an individual is acting *sua sponte* and not under orders.

In addition, the development of the concept of human rights on a universal scale embodied in the Charter of the UN and amplified in the Universal Declaration of Human Rights and other instruments has had a direct impact on this branch of the law. One consequence has been that the distinction between

Geneva law and Hague law has become increasingly artificial, especially when the law envisages individual criminal responsibility for violations. The two branches of the law are now plaited together as international humanitarian law, which nonetheless maintains the distinction between the international responsibility of the State and the criminal responsibility of an individual. It is not clear when the term “international humanitarian law” was first used. The International Court of Justice has endorsed it.<sup>14</sup> Established competence “in relevant areas of international law such as international humanitarian law” is one of the qualifications required for judges of the new Court by Article 36, paragraph 3(b) (ii), of the Rome Statute.

### **Intermezzo: The Peace Treaties and the League of Nations (1919–1939)**

A major step forward was taken in the Treaty of Versailles of 1919.<sup>15</sup> Article 227 envisaged the trial of the Kaiser Wilhelm II by a special tribunal “for a supreme offence against international morality and the sanctity of treaties.” The special tribunal was to be composed of five judges, one appointed by each of the Principal Allied and Associated Powers, and to be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It was to fix the punishment which it thought should be imposed. The Allied and Associated Powers “will address a request to the Government of the Netherlands [to which the Kaiser had fled on his abdication as Emperor of Germany] for the surrender [not “extradition”] to them of the ex-Emperor in order that he may be put on trial.” As is well known, the Dutch Government refused to “surrender” the Kaiser, and the matter of his trial was quietly dropped. The significance of this provision is its recognition—probably the first instance in modern times—that the Head of State can be criminally liable for violations of international law, not limited to international humanitarian law or what we would today call “war crimes.”<sup>16</sup> In addition, Article 228 provided that the Allied and Associated Powers could bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Article 229 provided for the trial of persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers before the military tribunals of that power. All those provisions, however, came up against the obstacle that German law did not permit the extradition of German nationals, and apparently viewed “surrender” as another word for “extradition.” Some Germans accused of war crimes were tried by German Courts. However, on the whole, in practice

those provisions of the Treaty of Versailles were not satisfactory.<sup>17</sup> Their importance is more conceptual.

Thus, the modern process had begun.

The next step was taken a year later, in 1920. The Committee of Jurists appointed under Article 14 of the Covenant of the League of Nations to prepare the statute of the Permanent Court of International Justice adopted a resolution for the establishment of a High Court of International Justice, to try crimes constituting a breach of international public order or against the universal law of nations referred to it by the League Assembly or Council. This Court would have the power to define the nature of the crime, fix the penalty, and decide the appropriate means of carrying out the sentence. The resolution came before the first session of the League Assembly (1920) which, however, did not adopt it, and the matter was accordingly dropped.<sup>18</sup>

At this point, nongovernmental organizations began to show interest in the matter. Drafts were prepared by the Inter-Parliamentary Union, the International Law Association, the International Congress of Penal Law and the International Association of Penal Law (this latter adopting a proposal by V.V. Pella, who was to play an important role after the Second World War).<sup>19</sup> At that stage there was a widespread feeling—not shared in political circles—that in one way or another appropriate competence should be conferred on the Permanent Court of International Justice, then a new and untried international institution.

On the diplomatic front, the Special International Conference on Repression of Terrorism was in session from 1 to 16 November 1937. It adopted a Convention for the Prevention and Punishment of Terrorism and a Convention for the Creation of an International Criminal Court, neither of which, however, entered into force.<sup>20</sup> That Court's jurisdiction was limited to the offenses set out in the Convention for the Prevention and Punishment of Terrorism. The judges were to be nominated by States parties, and chosen by the Permanent Court of International Justice. The Convention was quite detailed, with 56 articles in all (including the final clauses). Considering the general deterioration of the international situation by 1937, it is quite remarkable that this Conference, attended by 31 States—including the Soviet Union, but not Germany, Italy or Japan—could reach agreement on such complex texts, something that really was to elude the United Nations until 1998.

### Restart in the United Nations (1945–1967)

The Declaration on the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, signed at Berlin on June 5, 1945, was the

next major advance.<sup>21</sup> Article 11 of that instrument required the German authorities to apprehend and surrender to the Allies all persons from time to time named or designated by rank, office or employment by the Allies as having been suspected of having committed, ordered or abetted war crimes or analogous offenses. This was followed by the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, signed at London on August 8, 1945.<sup>22</sup> The precedent of the Treaty of Versailles was not being followed, and the prohibition of German law on the extradition or surrender of German nationals leading to their trial in a foreign court was made inoperative. The unconditional surrender of Germany made this possible.

It is unnecessary here to go over the story of the London Agreement and the Charter of the International Military Tribunal for the Far East, Tokyo, January 19, 1946,<sup>23</sup> and of the Nürnberg and Tokyo Tribunals. They set in motion powerful trends for the establishment of a permanent international criminal tribunal to avoid the creation of *ad hoc* tribunals in the future. The first major move in that direction accompanied the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948.<sup>24</sup> Article VI of that Convention provides:

Persons charged with genocide or any of the other acts enumerated in article III [conspiracy, incitement, attempt or complicity regarding genocide] shall be tried by a competent tribunal in the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.<sup>25</sup>

When the General Assembly adopted that Convention and opened it for signature, it also adopted Resolution 230 (II) B. Here it invited the newly formed International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by other international agreements. It requested the International Law Commission to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice. That resolution must be regarded as the starting point of the process that led to the Rome Statute of 1998. Its point of departure was the work accomplished during the period of the League of Nations and the 1945 activities of the victorious Allies, but future developments were unrestricted.<sup>26</sup>

At its first session in 1949, the International Law Commission held a preliminary discussion. It rejected proposals to postpone the matter to the following



session and decided to appoint a rapporteur to report to that next session. At its 33rd meeting it appointed two rapporteurs, R.J. Alfaro (Panama) and Judge A.E.F. Sandström (Sweden), to prepare working papers on the topic.<sup>27</sup> The two working papers were duly presented. Each examined the two aspects mentioned specifically in the General Assembly's resolution, namely the general question, and the particular aspect of the employing of the International Court of Justice for this purpose.

Alfaro<sup>28</sup> dealt mainly with the evolution of the idea of an international criminal jurisdiction, without adding much to the Secretariat's Historical Survey. He was unhesitatingly of the opinion that instituting an international criminal jurisdiction was both desirable and feasible "for the prevention and punishment of international crimes."

If the rule of law is to govern the community of States and protect it against the violations of the International public order, it can only be satisfactorily established by the promulgation of an international penal code and by the permanent functioning of an international criminal jurisdiction (para. 136).

Regarding the International Court of Justice, he pointed out that an amendment to Article 34 of the Statute would be required to establish a chamber of the Court with power to try States and individuals. With that proviso, he would answer the question in the affirmative (para. 134).

Sandström<sup>29</sup> concentrated more on the possibility of establishing an international criminal judicial organ, carefully weighing the pros and cons. His conclusions were negative:

39. In my opinion the cons outweigh by far the pros. A permanent judicial criminal organ established in the actual organization of the international community would be impaired by very serious defects and would do more harm than good. The time cannot as yet be considered ripe for the establishment of such an organ.

40. If such a judicial organ is to be established, it is submitted that, in view of the defects with which it would be impaired, it would be preferable to provide for the possibility of establishing a Criminal Chamber of the International Court of Justice in case of need. The defects would then be less noticeable, and such a possibility could perhaps in a given case meet the criticism voiced against the Nürnberg trial.

The Commission dealt with the matter at its 41st to 44th meetings during its second session (1950). After votes, the Commission decided that the

establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon it by international convention was desirable. It went on to decide that the establishment of such an international judicial organ was possible. Finally, it reported that it had paid attention to the possibility of establishing a criminal chamber of the International Court of Justice and that, though it was possible to do so by amendment of the Court's Statute, the Commission did not recommend it.<sup>30</sup>

The General Assembly discussed this at its fifth session in 1950. The Cold War was dominating all activities in the United Nations then, not a promising moment for dispassionate consideration of so delicate a matter as the establishment of an international criminal court. In Resolution 489 (V), December 12, 1950, the General Assembly showed that a final decision regarding the setting up of an international penal tribunal could not be taken except on the basis of concrete proposals. It accordingly established a Committee composed of 17 Member States "to prepare one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court."<sup>31</sup>

The Committee was in session from August 1 to 31, 1951.<sup>32</sup> It produced a draft statute for an international criminal court in 55 articles (excluding the preamble and the final clauses). It also adopted a *voxu* in which, referring to the Genocide Convention, it expressed the wish that along with the instrument establishing the International Criminal Court, a provision should be drawn up conferring jurisdiction on that Court in respect of the crime of genocide. The report is important. It set out the first general outline of the structure of the proposed tribunal. The draft statute was divided into several chapters, on general principles (Articles 1–3), the organization of the Court (Articles 4–24), the competence of the Court (Articles 25–32), the committing authority and prosecuting authority, not an organ of the court, the Committee drawing the attention of the General Assembly to the need to establish special investigatory and prosecuting machinery (Articles 33–34), procedure (Articles 35–53), clemency (Article 54) and final provisions (Article 55). That has remained the basic structure for the international criminal court. Among the deficiencies of the draft was Article 2, on the law to be applied, except that the Rome Statute has included the prosecution among the organs of the new Court, a curious abandonment of any idea of the separation of powers. It was partly similar to Moynier's 1872 suggestion, and partly reflected the ICRC's change of direction, aiming at incorporating the relevant provisions in national criminal law: "The Court shall apply international law, including international criminal law, and where appropriate, national law." There were other deficiencies. The draft was subjected to a series of critical written observations by several

governments, including some that had been represented on the Committee, and even more serious criticism in the Sixth Committee's debate that year.<sup>33</sup>

The General Assembly then adopted Resolution 687 (VII), December 5, 1952.<sup>34</sup> Here it decided to appoint another committee of 17 Member States to be designated by the President of the General Assembly (Lester Pearson of Canada). Its mandate was more complicated. The new Committee was, in the light of the comments and suggestions of governments, (i) to explore the implications and consequences of establishing an international criminal court and of the various methods by which this might be done; (ii) to study the relationship between such a court and the United Nations and its organs; and (iii) to reexamine the draft statute. This resolution brought out the more general complexities of the subject, something that before had not been clear.

The 1953 Committee was in session between July 27 and August 20, 1953. In its report, it in effect followed what the earlier Committee had reported, suggesting only some minor changes in the Statute as previously drafted. On the central issue of the law to be applied, Article 2 merely repeated unchanged Article 2 of the earlier draft.<sup>35</sup> In Resolution 898 (IX), December 4, 1954, the General Assembly did not really accept this. It noted the connection between the question of defining aggression, the draft Code of Offenses against the Peace and Security of Mankind, and the question of an international criminal jurisdiction. It decided to postpone consideration of the international criminal court until the General Assembly had taken up again the questions of the definition of aggression and the draft Code of Offenses. This well brings out that at that time the question of the applicable law continued to be the central issue of interest on the political level. Simultaneously, in Resolution 895 (IX) of the same date, the General Assembly established a new special committee to submit in 1956 a detailed report with a draft definition of aggression. At the same time the International Law Commission submitted a report on the draft Code of Offenses Against the Peace and Security of Mankind.<sup>36</sup> In Resolution 897 (IX), also of December 4, 1954, the General Assembly, referring to its decision regarding the definition of aggression, decided to postpone further consideration of the Code until the Committee on the definition of aggression had submitted its report. The three items in that way became bound together, a triad. The decision to postpone these items *sine die* was a direct consequence of the Cold War.

The Special Committee on the Definition of Aggression submitted its report in 1956.<sup>37</sup> Meanwhile, the early crisis of the United Nations on the admission of new members had been resolved and the beginnings of the decolonization process were taking place. Those two processes produced profound changes in the composition and institutional character of the United Nations, especially

the General Assembly. In Resolution 1181 (XII), November 29, 1957, the General Assembly noted that 22 additional States had recently joined the United Nations. It requested the Secretary-General to take the view of the new Member States and to place the question of defining aggression on the provisional agenda of the General Assembly not earlier than its 14th session (1959), after another special committee had advised him that it considered the time appropriate. That resolution was adopted on a roll-call vote, something rare on draft resolutions coming from the Sixth Committee, of 42:24:15 with one State absent. The negative votes were cast by the Soviet Bloc together with some Latin American, Arab, and other States, and the abstentions were similarly scattered. That vote shows the impact of the Cold War and the changing composition of the General Assembly on what was nothing more than a procedural decision, in effect deferring consideration of the matter for another two years at least. However, no recommendation to renew discussion of the definition of aggression was ever made.

Meanwhile, as the Cold War continued, the decolonization process produced an enormous increase in the membership of the United Nations, completely changing all voting patterns in the General Assembly and in diplomatic conferences and enhancing the role of "consensus" in decision making as opposed to a majority vote. On top of that, the Six Days War (1967) led to a major international crisis. That was to generate a new phase in the development of each of these three interlocked items. To widespread surprise, the Soviet Union took the initiative. Before the exercise was completed, the Soviet Union, and with it the Soviet Bloc in the United Nations, had also collapsed, leading to further profound changes in the composition and character of the United Nations overall, and the General Assembly in particular.

This first United Nations phase had brought out two aspects in particular: (i) the close connection that exists between the establishment of an International Criminal Court and the law to be applied, quite apart from any question arising out of the Genocide Convention; and (ii) the question of the relationship to exist between the criminal court and the United Nations, and in particular the Security Council. It also showed that on the political level the question of the law to be applied contained at least two separate elements, namely the definition of aggression and the code of offenses against the peace and security of mankind, that item itself being more directly the offshoot of the Nürnberg Judgment. Further developments regarding the court would therefore depend on the progress in those two other matters.

The Definition of Aggression, the Code of Crimes  
and the Geneva Red Cross Conference (1967–1991)

On September 22, 1967, the USSR requested the inclusion in the agenda of the 22nd session of the General Assembly of a tendentiously worded additional item entitled: "Need to expedite the drafting of a definition of aggression in the light of the present international situation." The item was taken on the agenda after a bitter procedural debate. In an unusual procedure it was allocated to plenary meetings for a general debate, and then, in light of that debate and the results achieved, to the Sixth Committee. The General Assembly decided in Resolution 2330 (XXII), December 18, 1967, to establish a Special Committee on the Question of Defining Aggression to consider all aspects of the question and to report back to the General Assembly. Retracing the subsequent developments is not necessary here. It is sufficient to say that in Resolution 3314 (XXIX), December 14, 1974, the General Assembly, without a vote, adopted a definition of aggression.<sup>38</sup> That definition does not, however, deal with "the crime of aggression" as a matter of the criminal responsibility of an individual. Article 5 of the Rome Statute includes "the crime of aggression" among the crimes over which the new International Criminal Court will have jurisdiction. As it is, it does not explain what that means for individual criminal responsibility. In Resolution F annexed to its Final Act, the Conference requested the Preparatory Commission established by that resolution *inter alia* to prepare proposals for a provision on aggression for submission to the Assembly of States Parties at a Review Conference.<sup>39</sup> Although the Nürnberg and Tokyo Tribunals had little difficulty in dealing with charges of crimes against peace by the planning, preparation, initiation, and waging of wars of aggression against the accused before them—all senior officers of the State—the problem today is complicated because of the existence of the Security Council with primary responsibility for the maintenance of international peace and security. The issue to be faced is whether the International Criminal Court can have jurisdiction over a case of aggression regardless of whether the Security Council has formally determined that an act of aggression has taken place (Charter, Article 39).

In 1968 the Special Committee on the Definition of Aggression drew the General Assembly's attention to the question of the Draft Code of Offenses against the Peace and Security of Mankind, but no action was taken then. When the General Assembly adopted the definition of aggression, it again took note of observations by the Secretary-General regarding the Draft Code and the international criminal court, without adopting then any operative

decision.<sup>40</sup> In 1977 the International Law Commission raised the question of renewing consideration of the Draft Code. In Resolution 33/97, December 16, 1978, the General Assembly requested the Secretary-General to ascertain views of Member States and relevant intergovernmental organizations, a request that was reiterated in Resolution 35/97, December 4, 1980. In Resolution 36/106, December 10, 1981, the General Assembly invited the International Law Commission to resume its work on that topic. The International Law Commission recommenced its work in 1982. In 1996 it adopted what is now named the Draft Code of Crimes against the Peace and Security of Mankind, and submitted it to the General Assembly.<sup>41</sup>

In Resolution 44/39, December 4, 1989, dealing with trafficking in narcotics across national frontiers, the General Assembly invited the International Law Commission, when considering the Draft Code, to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes that may be covered under such a code, including persons engaged in illicit trafficking in narcotic drugs across national frontiers. This showed that political thinking was beginning to envisage a wider role for the proposed international criminal jurisdiction than for the Genocide or Apartheid Conventions or to enforce the law applicable in times of armed conflict. In 1992 the Commission included a detailed survey of the question in its examination of the Draft Code.<sup>42</sup>

One other major event of this period, formally outside the United Nations, was the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. That Conference, in session from 1974 to 1977, was, as is traditional for the Geneva Conventions, convened and organized by the Swiss Government to examine and adopt texts based on preparatory work undertaken by the International Committee of the Red Cross. That Conference completed its work with the adoption of two instruments, formally entitled Protocols Additional to the Geneva Conventions of 12 August, 1949. One related to the Protection of Victims of International Armed Conflicts (Protocol I) and the second to the Protection of Victims of Non-international Armed Conflicts (Protocol II). Those two instruments are important additions to and updates of the 1949 Geneva Conventions. They include very carefully drafted and reasonably comprehensive listings of what those instruments classify as breaches or grave breaches, although some of them are controversial and not universally accepted. Together with the Geneva Conventions of 1949 on the protection of war victims, they completed the process of establishing the rules of international humanitarian

law as a self-standing branch of the law, not dependent on the existence of a formal state of war. In that way they bring the Geneva law into line with the fundamental rule of Article 2, paragraph 4, of the UN Charter, prohibiting the use of force against the territorial integrity or political independence of any State or in any manner inconsistent with the Purposes of the United Nations. It is to be noted that the detailing of war crimes in Article 8 of the Rome Statute does not always follow exactly the language of the Geneva Conventions and the Additional Protocols as regards breaches and grave breaches. This is a possible cause of difficulty for the new court. The Rome Conference may have exceeded its formal mandate when it made those changes.<sup>43</sup>

### To Rome (1992–1998)

In Resolution 47/33, November 25, 1992, the General Assembly requested the Secretary-General to seek written comments of States on that section of the report of the International Law Commission in which the Commission, as requested, addressed the issue of the proposed criminal court. At the same time, in a marked change from its attitude in the 1950s, it invited the Commission to continue its work on the question by undertaking to prepare a draft statute for the proposed court as a matter of priority. Accordingly, in 1993 the Commission reconvened the Working Group, which prepared what it termed a preliminary version of the draft statute for an international criminal tribunal and commentaries thereto.<sup>44</sup> In Resolution 48/31, December 4, 1993, the General Assembly requested the Commission to continue its work as a matter of priority, and if possible to submit a draft statute in 1994. This the Commission did. It reestablished a new Working Group and went on to draw up a complete Statute in 60 articles with commentaries, together with an Annex and three Appendices. The Commission recommended to the General Assembly to convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.<sup>45</sup>

In that condition the question reverted to the political organs for the final decisions to be taken. The discussion in the General Assembly soon showed that the International Law Commission's draft was not widely accepted and could not, as it stood, form the basic text for an international plenipotentiary conference. Accordingly, the first step of the General Assembly was to establish an *Ad hoc* Committee open to all States members of the United Nations or of specialized agencies. In Resolution 49/53, December 9, 1994, the General Assembly set out the function of this new Committee requiring it to review the

major substantive and administrative issues arising out of the draft prepared by the International Law Commission. The report of that *Ad hoc* Committee came before the next session of the General Assembly.<sup>46</sup> In Resolution 50/46, December 11, 1995, the General Assembly decided to establish a Preparatory Committee to continue preparing a widely acceptable consolidated text of a convention on an international criminal court as a next step towards consideration by a conference of plenipotentiaries. It also decided to include the item in the provisional agenda of the 52nd session in order to study the report of the Preparatory Committee "and, in the light of that report, to decide on the convening of a conference of plenipotentiaries to finalize and adopt a convention on the establishment of an international criminal court, including on the timing and duration of the Conference." Composition of the Committee was slightly adjusted and included States members of the International Atomic Energy Agency, a technical modification. Some 90 States took part in the work of the Preparatory Committee at one stage or another. Comprising approximately one-half of the total membership of the organized international community, the Preparatory Committee was broadly representative of all trends that had to be taken into consideration.

That Preparatory Committee was in session throughout 1996 and 1997. It reported to the 51st session of the General Assembly. In Resolution 51/207, December 17, 1996, the General Assembly noted that major substantive and administrative issues remained to be resolved. These included, apart from the definition of different crimes, such issues as the relationship between the international court and national jurisdictions (the problem of complementarity), the so-called trigger mechanism, and the relationship of the court to the United Nations, to mention but a few. At the same time it noted that despite this, the Preparatory Committee considered that it was realistic to regard the holding of a diplomatic conference of plenipotentiaries in 1998 as feasible. The General Assembly accordingly decided that the Preparatory Committee should continue its work, that the diplomatic conference should be held in 1998, and postponed to the next session decisions on "the necessary arrangements made for the diplomatic conference . . . to be held in 1998, unless the General Assembly decides otherwise in view of relevant circumstances."<sup>47</sup> In Resolution 52/160, December 15, 1997, the General Assembly again authorized the Preparatory Committee to continue its work early in 1998 and to transmit the text of its final report directly to the Conference.<sup>48</sup> It also decided to hold the Conference in Rome between June 15 and July 17, 1998, and adopted relevant ancillary decisions.



Three other major events occurred in this period of the prehistory of the establishment of the International Criminal Court. On February 22, 1993, the Security Council adopted Resolution 808 (1993). In that resolution it decided that an international tribunal should be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. It requested the Secretary-General to submit for consideration by the Council, at the earliest possible date, and if possible no later than 60 days after the adoption of the resolution, a report on all the aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision, taking into account suggestions put forward by Member States.

On May 3, the Secretary-General submitted his report.<sup>49</sup> It is a lengthy document, and it draws on the 1953 Report on International Criminal Jurisdiction (see note 35 above) as one of the sources consulted. On May 23 the Security Council adopted Resolution 827 (1993). In that resolution, acting under Chapter VII of the Charter, it approved the Secretary-General's report and decided to establish an international tribunal "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report." The Tribunal (ICTY) was formed in November 1993 and is still in operation.

This was followed in 1994 by the adoption of Resolution 955 (1994) on November 8, 1994. Here, again acting under Chapter VII of the Charter, the Security Council adopted the Statute for the International Tribunal for Rwanda (ICTR). The Government of Rwanda asked for this tribunal to be established for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States between January 1, 1994 and December 31, 1994. Subject to that major difference over jurisdiction, the Statute of the ICTR follows closely the Statute of the ICTY, and a single Appeals Chamber acts for both tribunals. Unfortunately, little is known about the activities of ICTR. Nevertheless, it is the first international tribunal to have convicted and sentenced persons accused of the crime of genocide.<sup>50</sup>

The third major event was the completion in 1996 by the International Law Commission of the Draft Code of Crimes against the Peace and Security of

Mankind.<sup>51</sup> The General Assembly, in Resolution 51/160, December 15, 1996, drew the attention of States participating in the preparatory committee on the establishment of the International Criminal Court to the relevance of the Code to their work. However, although the Preparatory Committee had the draft Code before it, it made no relevant recommendation and there is no reference to the Code as such in the Rome Statute.<sup>52</sup>

That is the background against which the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court worked.

### Some Afterthoughts

This historical recital of the complicated events leading up to the Rome Conference goes a long way in explaining the difficulties encountered by that Conference, its unfinished business, and the defects, both of form (lack of concordance in the language versions and many presumed typographical errors in the “authentic” text) and of substance.

In the 1950s, the General Assembly, correctly, requested the International Law Commission for its opinion on the feasibility and advisability of establishing a permanent international criminal court. Equally correctly, it entrusted the work of preparing the statute of such a court to *ad hoc* intersessional committees composed of the representatives of States. The work of those *ad hoc* committees formed the basis for the report of the Secretary-General leading to the establishment by the Security Council of the Yugoslav Tribunal, and indirectly also to that of the Rwanda Tribunal. Preparing the constituent instrument of an international organization is neither progressive development of the law nor its progressive codification. It is a highly political act, requiring, of course, both political and legal inputs. In the case of an international criminal court, at least three branches of law are relevant—international law, criminal law, and military law, this latter both from the aspect of the internal discipline of the armed forces (chain of command) and from the point of view of military criminal law as such. The application of a rule of criminal law by a court-martial can be very different from the application of that same rule by a civil criminal court.

In 1948 the General Assembly also correctly linked the Convention on the Prevention and Punishment of the Crime of Genocide with the eventual establishment of an international criminal court, without prejudice to the general international responsibility of a State in the event of breach by the State of its obligations under that Convention, and without prejudice to the obligation

imposed by Article V on all parties to enact appropriate legislation to give effect to the provisions of the Convention and in particular to provide effective penalties for persons guilty of genocide.<sup>53</sup> At the same time it placed States under the obligation to enact the necessary legislation to give effect to the provisions of the Convention, and in particular to provide effective penalties for persons guilty of genocide or other offenses enumerated in the Convention (Article V). The International Law Commission continued along those lines by linking its proposed court to the Draft Code of Crimes. Again, in the 1980s, the General Assembly seems to have invited the International Law Commission to "address" the question of establishing an international criminal court, answered by the Commission in its report of 1992 (note 41 above). In 1992 the General Assembly, in a complete reversal of its earlier position, and possibly without fully considering the implications, requested the Commission to prepare the draft statute, which the Commission did in 1994 (note 45 above). It is to be observed that the International Law Commission, hurried by the General Assembly, did not follow its customary practice of giving its text two readings, the second taking place after an interval of two years on the basis of the observations, written and oral, of governments on the first draft. The result was that the Commission's final text did not take sufficient account of the political attitudes of the different governments and comment on them in its final report on the topic. The General Assembly accordingly had to establish two intersessional committees to study the text in light of political considerations, and yet the final report of the Preparatory Committee (note 48 above), which became the basic proposal for consideration by the Conference,<sup>54</sup> contained a large number of square brackets, footnotes and options, pinpointing the absence of agreement on major issues. It was not a true basic text as that term is commonly understood in conference practice.<sup>55</sup> What is more, it was completed and circulated to States only a short while before the opening of the Conference, allowing Governments little time or opportunity to give it the full consideration that it deserved and required, or to undertake the usual diplomatic consultations with other participants in the Conference. If the Rome Statute has defects, without doubt one explanation lies in the haste with which the Conference was convened, without adequate or completed preparatory work.

Given this slow progress in the preparatory work and its incompleteness, it is difficult to understand how in Resolution 52/160, December 15, 1997, the General Assembly decided to convene a diplomatic conference of plenipotentiaries a bare six months later to complete and adopt the convention, and allowed only for five working weeks in all, that is thirty working days for that

Conference to complete its work. This final rush contrasts strangely with the slow and careful work that had been undertaken before 1992.

It also seems that the organization of the Conference itself was atypical. Rule 48 of the Rules of Procedure required the Conference to establish a Committee of the Whole. Normal conference practice is for the committee of the whole to examine the basic text, article by article, and to submit its conclusions to the plenary conference. It is not clear that this was done in all cases. From some of the statements made at the concluding session on July 17, 1998, it appears that delegations had not been given a proper opportunity to express their views on portions of the text before it was put to the final vote in the Conference. In addition, the long list of corrigenda submitted by the Secretariat, itself incomplete as mentioned, confirms that the arrangements for verification of the concordance of the six authentic language versions of the Convention were unsatisfactory. The extraordinarily large number of typographical corrigenda suggested by the Secretariat shows that the Drafting Committee (Rules of Procedure, Article 49) and the Secretariat were not given sufficient time to complete their work properly. This adds up to a sorry story.

\* \* \*

In 1996 the International Law Commission completed the first reading of its draft articles on the topic of State responsibility. Article 24, paragraph 5, of the Rome Statute lays down that no provision in the Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.<sup>56</sup> Likewise, Article 4 of the draft Code of Crimes against the Peace and Security of Mankind also states that the fact that the Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law. The Commentary to that article suggests that it is possible, indeed likely, that an individual may commit a crime against the peace and security of mankind as an "agent of the State," "on behalf of the State," "in the name of the State," or even in a *de facto* relationship with the State, without being invested with legal power. The State may remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime.<sup>57</sup> This is pointing the way to a complicated set of legal relationships between States, and perhaps also between courts and tribunals.

Article 19 of the draft articles on State responsibility as adopted on first reading has a direct bearing on this. Article 19 in that form is headed "International

crimes and international delicts." It is, however, a confused article, not differentiating clearly between acts of State of particular gravity and acts of the individual that are themselves violations of rules of international law to which an individual is subjected, such as genocide.<sup>58</sup>

It is interesting to note that throughout the prehistory of the Rome Statute, in which the applicable law was a central issue, little thought appears to have been given to the relationship of the general law of State responsibility and the international criminal law to be applied by the International Criminal Court. So far, the International Law Commission does not appear to have faced the matter until 1998, when it was raised for the first time.<sup>59</sup> This issue was apparent during the drafting of the Genocide Convention, as appears from the combination of Articles VI and IX of that Convention, discussed earlier. Article 19 was introduced into the draft articles on State responsibility in 1976, and therefore has been present throughout the greater part of the renewed discussions on the establishment of an international criminal court. This interrelationship is a matter to which further thought should be given, especially in connection with the provisions in the articles on State responsibility regarding the discharge of the international responsibility, and in regard to the settlement of disputes. Trial and punishment of the individual responsible for the crime coming within the jurisdiction of the International Criminal Court, and that in fact includes all the crimes listed in Article 19 as it now stands that can be committed by an individual, may well be included as an element of satisfaction for the directly injured State. For this reason, the question arises whether the completed codification of the law of State responsibility should not contain a parallel provision, to the effect that nothing in that codification affects any question of criminal responsibility coming within the jurisdiction of the International Criminal Court.

\* \* \*

When the Rome Statute enters into force, the international community will have three standing international tribunals at its disposal—the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and the International Criminal Court (ICC). There is very little overlap between them as to jurisdiction, and the risk of the fragmentation of the law is slight. The case law of the two *ad hoc* criminal tribunals, ICTY and ICTR, established by the Security Council, shows a marked tendency to seek guidance from the jurisprudence of the International Court. The limited experience to date of ITLOS shows a similar inclination, and one must presume that

the new International Criminal Court will act similarly if it is to gain general confidence. However, the existence of the ICJ and ITLOS alongside the ICC is likely to give rise to an unsuspected conflict, not of jurisdiction but of propriety, of whether one or other of these “civil” tribunals, the ICJ and ITLOS, can determine a case before it without causing detriment to the criminal tribunal. The difference has been pithily explained by the Trial Chamber of ICTY in the *Celebici* case: “The International Tribunal [ICTY] is a criminal judicial body, established to prosecute and punish crimes for violations of international humanitarian law, and not to determine State responsibility for acts of aggression or unlawful intervention.”<sup>60</sup>

The potential conflict is demonstrated by the *Application of the Genocide Convention* case in the International Court of Justice between Bosnia and Herzegovina on the one side, and Yugoslavia on the other. In that case the applicant’s claims have been met by the respondent’s counterclaims.<sup>61</sup> Both parties are alleging violations of the Genocide Convention by the other. The crime of genocide, when committed by an individual, comes within the jurisdiction of ICTY, and in due course of that of the International Criminal Court also (but that aspect can be ignored for present purposes). The Rwanda Tribunal has, as mentioned, already tried two cases of individuals accused of the crime of genocide (see note 50 above). The dispute between States over the interpretation, application or fulfillment of the Genocide Convention comes within the exclusive jurisdiction of the International Court of Justice. Although it is clear that the International Court itself is dealing with the “civil” responsibility of the parties, in the pleadings, the allegations and the defenses rest upon the actions of individuals. Should those individuals be called to testify in the International Court, they may be forced either not to reply to questions or to incriminate themselves. In that way the question arises how to reconcile the claims of States parties to reparation for alleged violations of the Genocide Convention as a matter of State responsibility, with the claims of the international community for criminal trials before a competent international tribunal of those individuals accused of committing acts of genocide. The matter can be put the other way round. How, in such circumstances, can the right of an individual, accused of genocide, to a fair trial, required by Article 14 of the International Covenant on Civil and Political Rights of December 16, 1966,<sup>62</sup> with the possibility of an acquittal, be reconciled with the right of the States parties to the litigation in the International Court to have their claims decided by the principal judicial organ of the United Nations?

In such circumstances, the human rights law, many elements of which are regarded as possessing the quality of *jus cogens*, should have priority over the law of State responsibility.

\* \* \*

It has been seen how in the intermediate stage of this history, the General Assembly found a close connection to exist between three separate topics on a shared agenda with the International Law Commission: the definition of aggression, the Draft Code of Crimes, and the international criminal court. For a certain period the General Assembly attempted to keep them in step. To that triad there has also to be added the codification of the law of State responsibility, which the International Law Commission is planning to complete by the year 2001. Events, however, have unraveled the initial triad, which never, until now, has considered the law of State responsibility to belong to this complex.

Under a series of resolutions annexed to the Final Act of the Rome Conference (note 42 above), unfinished business of the Conference to be considered in due course by the Review Conference envisaged in Article 123 of the Statute includes an acceptable definition of terrorism and drug trafficking and their inclusion in the list of crimes within the Court's jurisdiction. In addition, the Preparatory Commission is required to prepare draft texts for what is termed "Elements of Crimes" addressed in Articles 9 and 21 of the Statute, this to be done before the year 2000. It is also to prepare proposals for a provision on aggression, including the definition and elements of crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to that crime.

This wide remit to the Preparatory Commission, far beyond what is usual for a preparatory commission, coinciding in time with the second reading of the draft articles on State responsibility in the International Law Commission, and during the process of the final decision on the draft Code of Crimes, provides the opportunity to put together a complete and properly co-ordinated set of black letter texts embracing the whole law of international responsibility, including the "civil responsibility" of States, international organizations, and other actors on the international scene capable of sustaining a claim of international responsibility, and the international criminal responsibility of individuals charged with breaching the basic rules of international humanitarian law and other rules of international law laying down international crimes.

## **Appendix**

French Translation of Letter of F. Lieber to  
General G. H. Dufour, New York, April 10, 1872 (See note 8)

Monsieur,

J'ai reçu il y a quelques jours votre honorée lettre du 1 février . . . Je m'empresse de vous donner mon opinion, malgré la divergence qui peut exister entre nos vues concernant l'application des principes sur lesquels nous sommes complètement d'accord.

Je suis un des juristes qui se sont déclarés, de la manière la plus claire et la plus expresse, en faveur de l'expansion et de la multiplication constante de l'arbitrage et de la conciliation entre nations.

J'ai même fortement recommandé de retourner à la coutume de moyen-âge, et de prendre pour arbitres internationaux les facultés de droit des universités en renom; mais je me suis prononcé déjà dans mes *Political Ethics* contre l'idée d'une Haute-Cour internationale, par laquelle tous les différends entre nations seraient décidés. J'ai cru que la réalisation de cette idée, quand même elle serait possible, ne serait ni souhaitable ni efficace. Je n'ai pas changé d'opinion.

Qui serait le *sheriff* (l'exécuteur des décisions) d'une haute Cour des nations? Et quel est même le tribunal ordinaire dont les jugements feraient quelque impression, si l'on ne savait que ses arrêts seront appliqués par le pouvoir public? Il est vrai que Hugo Grotius fut cité comme autorité au Congrès des nations Européennes à Vienne. Mais s'il fut cité ainsi au-dessus des monarques, des ministres et des nations, c'est précisément *parce qu'il* n'était qu'un simple particulier, absent de la lutte et ayant écrit son ouvrage sur la paix et la guerre, sous la dictée de la raison et de la justice, sans se préoccuper aucunement des cas en question, qui appelaient les lumières de la raison et de la justice.

Des nations libres seraient toujours dans une position désavantageuse devant un pareil tribunal: car les gouvernements plus ou moins despotiques sont toujours mieux placés que les nations libres pour cabaler et intriguer, et les nations libres ont spécialement besoin d'autonomie. Ce besoin, sans équivaloir à l'isolement, croîtra avec les progrès de la liberté et le développement du *self-government*. Je suis parfaitement certain que peu des citoyens américains consentiraient à confier une affaire litigieuse dans laquelle leur république serait intéressée, à une Haute-Cour internationale permanente, quelque favorable qu'il puisse être à des tribunaux d'arbitrage



établis par des traités spéciaux. Le pouvoir de ces derniers tribunaux et l'autorité de leurs décisions sont dûs précisément à la raison qu'ils sont constitués par consentement mutuel, et pour l'occasion spéciale dont il s'agit. Ce n'est pas une jalousie puérole, mais le besoin de l'autonomie qui empêcherait une nation libre de quelque importance de se rallier à une Haute-Cour internationale permanente.

Toutes ces raisons s'appliquent avec beaucoup plus grande force au tribunal international que vous proposez pour juger les infractions à la convention de Genève en cas de guerre. Vous dites, art. 6 ; *les jugements du tribunal seront notifiés par lui aux gouvernements intéressés et ceux ci seront tenus d'infliger aux coupables les peines prononcées contre eux.*

*Tenus?* Par qui les gouvernements respectifs seront-ils *tenus* de punir ceux qui ont violé les règles de la Convention de Genève, si les belligérants ne le font par leur propre volonté? Les temps récents nous ont fourni deux exemples de peuples,—l'un en Europe, l'autre en Amérique,—succombant l'un et l'autre parce qu'ils étaient énervés par la vanité. Les infractions aux principes protecteurs de la Convention de Genève ont été fréquentes; peut-on imaginer la soumission aux jugements du tribunal international de la part de ceux qui fréquemment ont méconnu les lois les plus élémentaires de la guerre? Et quand je parle de la Convention de Genève ne vous méprenez pas, je vous prie, sur mes sentiments à son égard. Rien n'est plus sacré à mes yeux que ce spectacle de la charité se mettant au pas du tambour et marchant en avant, non pour se battre, mais pour relever les blessés or pour succomber elle-même dans l'accomplissement de cette tâche. Mais je m'occupe seulement ici de ce qu'il y a de praticable ou de désirable dans l'exécution de votre plan.

Si la Confédération suisse doit être à perpétuité la gardienne de ce tribunal international, qu'arrivera-t-il au cas où la Suisse elle-même serait enveloppée dans une guerre? Elle l'a été, pourquoi ne le serait-elle pas de nouveau? Il ya des moments où les nations ne peuvent s'empêcher de faire ce que Solon exigeait de chaque citoyen en temps de discorde civile.

Vous voyez par ce que j'ai dit que, quant à moi, je ne suis pas partisan de l'établissement permanent de tribunaux chargés de statuer entre belligérants. Cependant j'applaudis à tout ce qui, à quelque degré que ce soit, tend à faire planer la raison, la justice et la charité, comme une nuée bienfaisante, sur la plus ardente chaleur du combat. C'est ce que savent tous ceux qui ont connaissance du Code des lois de la guerre sur terre, que j'ai conçu et écrit, et que le Président Lincoln a publié comme ordre général pour la conduite des armées américaines, en 1863. Je ne voudrais

donc pas vous conseiller d'arrêter brusquement tous vos efforts pour donner une efficacité de plus en plus grande à la Convention de Genève. Poursuivez-les avec zèle et ne regardez les contrariétés que comme au stimulant à des nouvelles tentatives. Car votre cause est sacrée.

Comme remarque générale, je me permets de répéter à cette occasion qu'une des choses les plus efficaces et les plus utiles que l'on puisse faire, en cette matière, pour améliorer les rapports entre nations dans la paix ou dans la guerre (et il y a des *rappports mutuels* [*intercourse*] dans la guerre, attendu que l'homme ne peut se rencontrer avec l'homme sans qu'il en résulte un échange de rapports),—une des choses dont il y aurait le plus à attendre dans l'intérêt de l'internationalisme, serait la réunion des plus éminents jurisconsultes du droit des gens que possède notre race cis-caucasienne,—un de chaque pays,—en leur capacité individuelle et non en vertu de quelque mandat public, pour régler entre eux certaines grandes questions du droit des nations, qui sont encore indécisées,—telles que la neutralité, l'emploi de troupes barbares comme auxiliaires, la durée des droits ou des obligations fondées sur la qualité de citoyen. J'entends régler comme Grotius réglait ce dont il s'occupait, par le grand argument de la justice. Ce qui émanerait d'un pareil corps, code ou proclamation, serait certain d'acquérir bientôt une autorité supérieure au livre du plus grand juriste isolé. J'espère qu'une pareille réunion pourra avoir lieu en 1873 ou 1874.

Avec la plus haute considération, etc.

Notes

1. Originally issued as doc. A/CONF.183/9\*. That contained many errors in each one of its authentic texts and has been replaced by PCNICC/199/INF.3, August 17, 1999, in the documentation of the Preparatory Commission for the International Criminal Court. Further corrections to one or the other of the authentic texts are still being circulated by the United Nations Secretariat, as depositary of the Rome Statute. For an account of the Rome Conference through the eyes of participants, see Roy S. Lee (ed.), *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* (1999).

2. Cf. L.C. Green, *Law of War in Historical Perspective*, International Law Studies Volume 72, *THE LAW OF MILITARY OPERATIONS: LIBER AMICORUM* PROFESSOR JACK GRUNAWALT, pp. 39, 48 (M. Schmitt, ed., 1998); Howard S. Levie, *War Crimes*, *ibid.*, p. 95. And see G. SCHWARZENBERGER, *INTERNATIONAL LAW (THE LAW OF ARMED CONFLICT)*, p. 462 (1968); J.H.W. VERZIJL, *I INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE*, p. 407 (1968); TH. MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVE ON THE LAW OF WAR IN THE LATER MIDDLE AGES*, pp. 12, 167 (1993).

3. I am grateful to Mr. Ch. Keith Hall for bringing this to my attention. And see L. Bethell, *The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century*, *JOURNAL OF AFRICAN HISTORY*, vol. VII (1960), p. 79. For an example of this type of treaty and the detailed regulations for a mixed commission, see H. LA FONTAINE, *PASICRISIE INTERNATIONALE 1794–1900, HISTOIRE DOCUMENTAIRE DES ARBITRAGES INTERNATIONAUX*, p. 84 (reprint, 1997, with preface by Pierre Michel Eisemann).

4. See COMPTE RENDU DE LA CONFÉRENCE INTERNATIONALE RÉUNIE À GENÈVE LES, 26, 27, 28 ET 29 OCTOBRE 1863 POUR ÉTUDIER LES MOYENS DE POURVOIR À L'INSUFFISANCE DU SERVICE SANITAIRE DANS LES ARMÉES EN CAMPAGNE (deuxième édition 1904).

5. 1 Bevans 7; 129 CONSOLIDATED TREATY SERIES (hereafter: CTS) 361; reproduced in D. Schindler and J. Toman, *THE LAWS OF ARMED CONFLICTS; A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* (hereafter: Schindler and Toman), p. 279 (1988), supplemented by the Additional Articles extending the Provisions of the Convention of August 22, 1864, to Naval Warfare, of October 20, 1868, 138 CTS 189; Schindler and Toman, p. 285 (never in force), replaced by Hague Convention III of 1899, 187 CTS 443; Schindler and Toman 289.

6. On this see P. BOISSIER, *HISTOIRE DU COMITÉ INTERNATIONAL DE LA CROIX-ROUGE, DE SOLFÉRINO À TSOUSHIMA*, p. 395 (1978); Ch. Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 38 *INTERNATIONAL REVIEW OF THE RED CROSS*, p. 57 (1998). An English translation of Moynier's proposal appears at p. 72. Curiously, this initiative is not mentioned in the Historical Survey of the Question of International Criminal Jurisdiction, Memorandum submitted [to the International Law Commission] by the Secretary-General (hereafter: Historical Survey), doc. A/CN.4/7/Rev.1 (Sales No. 1948.V.8) (1949).

7. Circular of January 28, 1872, reproduced in *BULLETIN INTERNATIONAL DES SOCIÉTÉS DE SECOURS AUX MILITAIRES BLESSÉS PUBLIÉ PAR LE COMITÉ INTERNATIONAL DE LA CROIX ROUGE*, No. 11, p. 121 (1872). This circular was signed by General Dufour in Moynier's absence. The ICRC took that initiative very seriously. A note in the ICRC Archives shows that, with regard to another idea of Moynier's, the Committee approved it but decided not to insert a reference to it in the upcoming issue of the Bulletin, for fear it would divert attention from the proposal for the establishment of an international criminal jurisdiction. E-mail, Hans-Peter Gasser to the author, January 11, 1999.

8. Letter of April 10, 1872. The English original of this letter has not been found. The French translation given in the article by Rolin-Jacquemyns (see next note) is reproduced in the Appendix to this article. Many of Lieber's remarks presage the position adopted by the American delegation regarding the Rome Statute in 1998. For the American position on the Rome Statute, see the statement of Ambassador D. Scheffer at the 9th meeting of the Sixth Committee in the 53rd session of the General Assembly on October 21, 1998; and his *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

9. G. Rolin-Jacquemyns, *Note sur le projet de M. Moynier, relatif à l'établissement d'une institution judiciaire internationale, protectrice de la Convention [de Genève]*, 4 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE, p. 325 (1872).

10. 1 Bevans 631; 203 CTS 227; Schindler and Toman, p. 63.

11. ICRC, Revised and New Draft Conventions for the Protection of War Victims: Remarks and Proposals submitted by the International Committee of the Red Cross, Article 40 (1949). H-P. Gasser to the author, November 16, 1998. Common Article 49/50/129/148, dealing with penal sanctions in general, obliges a party to bring persons accused of grave breaches before its own courts or, if it prefers, and in accordance with the provisions of its own legislation, to hand such persons over for trial to another party concerned. As far as is known, there has been no experience of that provision in practice. At the Rome Conference, the ICRC changed its position and strongly supported the establishment of the International Criminal Court. See the statements of the President of the ICRC, C. Sommaruga, and of its chief Legal Adviser, Y. Sandoz, at the commencement of the Conference. It also submitted important comments on the jurisdiction of the Court. See docs in A/CONF. 183/SR. 4, para. 68, and SR. 9, para. 113. A check of the records of the Hague Conferences of 1899 and 1907 likewise discloses that the idea of an international criminal jurisdiction was not raised on either occasion when those Conferences were discussing rules for the conduct of warfare. The position of the Institute of International Law was similar. Cf. its resolution of 1895 on penal sanction for breaches of the Geneva Convention, *op. cit.* in the next note at p. 69.

12. INSTITUT DE DROIT INTERNATIONAL, TABLEAU GÉNÉRAL DES RÉOLUTIONS (1873–1956), pp. 180, 231 (H. Wehberg ed., 1957); Schindler and Toman, pp. 35 and 57.

13. See B. FERENCZ, I AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE, p. 5 (1980) (hereafter: FERENCZ).

14. Legality of the Threat or Use of Nuclear Weapons, advisory opinion, International Court of Justice Reports, 1996, pp. 226, 259 (para. 86). A partial explanation of the term is given in that advisory opinion at p. 257 (para. 78). According to the Court, there are two cardinal principles in humanitarian law: "The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants . . . According to the second principle, it is prohibited to cause unnecessary suffering to combatants." The term probably originated in the International Committee of the Red Cross through the works of Jean Pictet. See G. Abi-Saab, *The Specificities of Humanitarian Law*, STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET, p. 265 (Ch. Swinarski ed., 1984). For a recent assertion of the close tie between the Universal Declaration of Human Rights and the international criminal court, see the letter of the President of the International Tribunal for the former Yugoslavia, Judge Gabrielle McDonald, to the personnel of ICTY distributed on the 50th anniversary of the Universal Declaration, obtained from the ICTY website visited January 18, 1999, <[www.un.org/icty/news/Humanrights/unidechu.htm](http://www.un.org/icty/news/Humanrights/unidechu.htm)>.

15. 225 CTS 188. And see Department of State, *The Treaty of Versailles and After: Annotations of the Text of the Treaty* (Publication 2724, Conference Series 92, 1947).

16. The treaties which put an end to the Napoleonic Wars contained no provision regarding Napoleon's fate. Article XVI of the Treaty of Paris of May 30, 1814, provided that no individual of whatever rank or condition should be prosecuted, disturbed, or molested, in his person or property, under any pretext whatsoever, either on account of his conduct or political opinions, his attachment either to any of the Contracting Parties, or to any Government which has ceased to exist, or for any other reason except for debts contracted towards individuals, or acts posterior to the date of the treaty. I MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967, pp. 501, 509 (F.I. Israel, ed., 1967); 63 CTS 171. With regard to Napoleon himself, on March 13, 1815, (before the Battle of Waterloo) the Allies issued the Declaration of Vienna to the effect that he had placed himself beyond the protection of the law. 63 CTS 495. On his later surrender to and custody by the British authorities, see LORD MCNAIR, INTERNATIONAL LAW OPINIONS, vol. I, p. 104 (1956). This was unconditional surrender of an individual, not of the State.

17. See the State Department's annotations in the publication cited in note 15 above. More in J.H.W. VERZIJL, *op. cit.* in note 2 above, vol. IX, p. 381 (1978). In addition, note Article 226 of the Treaty of Sèvres, the Treaty of Peace with Turkey, apparently intended to enable the perpetrators of the genocide of the Armenians in World War I to be brought to trial and punished. That treaty never entered into force. For that Treaty see 15 AM. J. INT'L L. SUPPLEMENT, p. 179 (1920).

18. Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 18th-July 24th, 1920, with Annexes, p. 748 (1920). Reproduced in I FERENCZ, pp. 193, 225, 239. Summarized in Historical Survey at p. 10. See also M.O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, p. 85 (1943).

19. FERENCZ, pp. 244, 252; Historical Survey, pp. 12, 14, 15, 61, 70, 74, 75.

20. League of Nations, Proceedings of the International Conference on the Repression of Terrorism, Geneva, November 1st to 16th, 1937, League of Nations doc. C.94.M.47.1938.V (Sales No. 1938.V.3). Reproduced in I FERENCZ, p. 355 and Historical Survey, p. 88. This Conference was prompted by the terrorist murder of King Alexander of Yugoslavia together with the French Foreign Minister at Marseilles on September 9, 1934.

21. 3 Bevans 1140; 68 UNTS 189.

22. 3 Bevans 1238; 82 UNTS 279. Twenty-four States became parties to that Agreement. On this see Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945 (State Department Publication 3080, 1949).

23. 4 Bevans 20; Department of State, TIAS No. 1589.

24. 78 UNTS 277.

25. For an authoritative account of the drafting of that provision, see N. ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY, p. 80 (1960); and see Historical Survey, p. 30. A similar provision was later included in Article 5 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, annexed to General Assembly Resolution 3068 (XXVIII), November 30, 1973, 1015 UNTS 243. By Articles 5, 6 and 7, paragraph 1(j) of the Rome Statute respectively, genocide and the crime of apartheid are within the jurisdiction of the International Criminal Court.

26. For the sake of completeness it is recalled that in the Committee on the Question of the Progressive Development and Codification of International Law (the Committee of Seventeen), which proposed the establishment of the International Law Commission, the French representative, Donnedieu de Vabres (who had been the French member of the Nürnberg Tribunal) raised the question of an international criminal court. In its report on plans for the formulation of the principles of the Nuremberg Charter and Judgment, the Committee included

a paragraph drawing the attention of the General Assembly to the fact that the implementation of the principles of the Nürnberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international multipartite conventions may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes. United Nations, General Assembly, Official Records (hereafter: GAOR), second session, Sixth Committee (doc. A/332). And see Historical Survey, p.15. It is unusual, to say the least, that the Final Act of the Rome Conference ignores completely this earlier action of the General Assembly and its Committees, and that of the International Law Commission. Doc. A/CONF.183/10, July 17, 1998.

27. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1949, pp. 219, 238 (hereafter: YBILC). And see its Report to the General Assembly, GAOR, fourth session, Supplement 10 (A/925), paras. 32–34, *ibid.*, p. 283. At the same time, and indeed somewhat inconsequentially, the Commission noted that the punishment of war crimes would necessitate a clear statement of those crimes and consequently the establishment of rules which would provide for the case where armed force was used in a criminal manner. The majority of the Commission was opposed to the study of the problem at that stage. “It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.” *Ibid.*, para. 18.

28. Question of International Criminal Jurisdiction, Report by Ricardo J. Alfaro, special rapporteur (A/CN.4/13), YBILC, 1950-II, p. 1. Reproduced in II FERENCZ, p. 241. Article 34 of the Statute of the International Court of Justice provides that only States may be parties in cases before the Court.

29. Report, doc. A/CN.4/20, YBILC, *ibid.*, p. 131. Reproduced in II FERENCZ, p. 259.

30. Report of the commission on the work of its second session, GAOR, fifth session, Supplement 12 (A/1316), YBILC, 1950-II, at p. 378. Reproduced in II FERENCZ, p. 265. The formal reference is to Article 34 of the Statute of the International Court of Justice. But in fact more is required than that. Compare the qualifications required of a member of the International Court of Justice as set out in Articles 2 and 9 of its Statute with those required of a member of the International Criminal Court as set out in Article 36, paragraph 3, of the Rome Statute.

31. That resolution is reproduced in II FERENCZ, p. 312. The 17 Members of that Committee were Australia, Brazil, China (ROC), Cuba, Denmark, Egypt, France, India, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, United Kingdom, United States of America and Uruguay.

32. Committee on International Criminal Jurisdiction, Report to the General Assembly, GAOR, seventh session, Supplement 11 (A/2136). Reproduced in II FERENCZ, p. 337.

33. For the comments of governments, see doc. A/2186 and Add.1, GAOR, seventh session, Annexes, Agenda item 52. Reproduced in II FERENCZ, p. 365. For the debate in the Sixth Committee, see GAOR, seventh session, Sixth Committee, 321st to 328th meetings. Reproduced in II FERENCZ, p. 382. That debate is summarized in the report of the Sixth Committee on that agenda item (A/2275).

34. This resolution is reproduced in para. 3 of the report of the 1953 Committee. See next note.

35. Report of the 1953 Committee on International Criminal Jurisdiction, GAOR, ninth session, Supplement 12 (A/2645) (1954). Reproduced in II FERENCZ, p. 429. This Committee was composed of Australia, Brazil, China (ROC), Cuba, Denmark, Egypt, France, India, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, United Kingdom, United States and Uruguay—the same States that had participated in the previous Committee.

36. Report of the Commission on the work of its sixth session, GAOR, tenth session, Supplement 9 (doc. A/2693), YBILC, 1954-II, pp. 140, 149. Reproduced in II FERENCZ, p. 460.

37. Report of the Committee on the Definition of Aggression, GAOR 12th session, Supplement 16 (A/3574). Reproduced in B. FERENCZ, I DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS, p. 215 (1975).

38. All the documentation relative to this phase is contained in B. FERENCZ, *op. cit.* in previous note, from page 272. The International Court of Justice seems to have regarded that definition as addressing the “civil” responsibility of a State. Military and Paramilitary Activities in and against Nicaragua (Merits) case (Nicar. v. U.S., June 27, 1986), INTERNATIONAL COURT OF JUSTICE REPORTS, 1986, pp. 14, 103 (para. 195).

39. Article 112 of the Statute regulates the Assembly of States Parties. Article 123 deals with the Review Conference, which the Secretary-General is obliged to convene seven years after the entry into force of the Statute. By Article 126, the Statute will enter into force on the first day of the month after the 60th day following the date of deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. In Resolution 53/105, December 8, 1998, the General Assembly authorized the Secretary-General to convene the Preparatory Commission in 1999 and to provide it with the necessary services. For a consolidated report on the activities of the Preparatory Commission in 1999, see doc. PCNICC/1999/L.5/Rev.1 and Adds. 1, 2, December 22, 1999.

40. FERENCZ, *op. cit.* in note 37, p. 599.

41. For that final text, see Report of the International Law Commission on the work of its 48th session, GAOR, 51st session, Supplement 10 (A/51/10), Chapter II. At the same time, the Commission adopted on first reading its draft articles on State Responsibility. *Ibid.*, Chapter III. The change in the title of this item from Draft Code of Offenses to Draft Code of Crimes was suggested by the Commission and accepted by the General Assembly in Resolution 42/151, December 7, 1987. We shall return to that topic later in this article. See text to note 52 below. Outside the framework of the Sixth Committee, in 1981 a working group submitted to the Commission on Human Rights a draft convention on the establishment of an international criminal panel for the suppression and punishment of the crime of apartheid and other international crimes. See Study on the ways and means of ensuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid including the establishment of an international jurisdiction envisaged in the Convention. Doc. E/CN.4/1926 (1981). For the Convention of 30 November 1973, see 1015 UNTS 243.

42. Report of the International Law Commission on the work of its 42nd session, GAOR, 45th session, Supplement 10 (A/45/10), YBILC, 1992-II/2, Chapter II, paras. 93–157. This was prepared by a Working Group composed of Doudou Thiam as chairman (he was special rapporteur for the topic of the Draft Code), H. Al-Baharna, J.A. Beesley, M. Benouna, L.D. González, B. Graefrath, J. Illueca, A.G. Koroma, S. Pawlak, P.S. Rao and E. Racounas, with G. Eiriksson, Rapporteur of the Commission, *ex officio*. See also Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 45th session, prepared by the Secretariat (A/CN.4/L.456, mimeographed, 1991); D. Thiam, Tenth Report on the Draft Code of Crimes against the Peace and Security of Mankind, YBILC, 1992-II/1 (A/CN.4/442). Given this historical background, it is ironic that the Rome Statute does not include drug trafficking amongst the crimes over which the new International Criminal Court at present has jurisdiction. The Rome Conference annexed to the Final Act Resolution E which, *inter alia*, recognized that international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the

political and social and economic order in States. The Conference regretted that no generally acceptable definition of drug crimes could be agreed upon for inclusion within the jurisdiction of the Court and recommended that a Review Conference (see note 39 above) consider drug crimes with a view to arriving at an acceptable definition and its inclusion in the list of crimes within the jurisdiction of the Court. This may well put the question off *ad calendas Graecas*. For that Final Act, see note 26 above.

43. See Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977, 17 volumes (1978). The major commentaries on those instruments are: INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949 (Y. Sandoz et al. eds., 1987); M. BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS (1982). For the text of Protocol I, see 1125 UNTS 3, and for that of Protocol II, see *ibid.*, p. 609. They are reproduced in Schindler and Toman, pp. 621, 689. In 1999 the International Committee of the Red Cross submitted to the Preparatory Commission of the International Criminal Court a detailed analysis of the war crimes as set out in Article 8 of the Rome Statute. This consists of an exhaustive research of the relevant case law, a review of cases from the Leipzig Trials, from post-Second World War trials, as well as national case law and decisions from the ICTY and ICTR. See docs. PCNICC/1999/WGEC/INF.1, February 19, 1999, PCNICC/1999/WGEC/INF.2 plus Adds 1-4, July 14, July 30, August 4, November 24 and December 15, 1999. This analysis was submitted under covering letter from Belgium, Finland, Hungary, the Republic of Korea, and the Permanent Observer Mission of Switzerland.

44. Report of the International Law Commission on the work of its 44th session, GAOR, 47th session, Supplement 10 (A/48/10), YBILC, 1993-II/2, Annex. For the written comments of governments, see YBILC, 1993-II/1 (A/CN.4/452 and Add.1). See also Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 47th session, prepared by the Secretariat (A/CN.4/446, mimeographed, 1993), paras. 17–134.

45. Report of the International Law Commission on the work of its 46th session, GAOR, 49th session, Supplement 10 (A/49/10), Chapter II, paras. 30–91, YBILC, 1994-II/2, p. 19. The Working Group was composed of J. Crawford (Chairman), H. Al-Baharna, A. Al-Khasawneh, G. Arangio-Ruiz, M. Bennouna, D. Bowett, C. Rodriguez, J. de Saram, G. Eiriksson, S. Fomba, M. Güney, Q. He, K. Idris, P.S. Rao, E. Razafindralambo, P.L. Robinson, R. Rosenstock, Ch. Tomuschat, V. Vereschchetin, F.V. Kramer, and A. Yankov. In addition, Doudou Thiam as special rapporteur on the Draft Code and P. Kabatsi as rapporteur of the Commission took part in the work of the Group, which was open to every member of the Commission who wished to participate. And see Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its 48th session, prepared by the Secretariat (A/CN.4/457, mimeographed, 1994), paras. 8–206; Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its 49th session, prepared by the Secretariat (A/CN.4/464/Add.1, mimeographed, 1995), paras. 1–188. And see the statement of Professor Crawford at the Conference, representing the International Law Commission, in A/CONF.183/SR.2, para. 102.

46. Report of the *Ad hoc* Committee on the Establishment of an International Criminal Court, GAOR, 50th session, Supplement 22 (A/50/22) (1995). The Chairman of this Committee was Adriaan Bos (the Netherlands).

47. Report of the Preparatory Committee on the Establishment of an International Criminal Court, vols. I and II, GAOR, 51st session, Supplements 22 and 22A (A/51/22) (1996). The Chairman of this Committee was Adriaan Bos. Sickness prevented him from being Chairman of



the Committee of the Whole at the Rome Conference, where his place was taken by Philippe Kirsch (Canada).

48. For the Preparatory Committee's final report, see doc. A/CONF.183/2 and Add. 1 (1998), the latter constituting the basic proposal before the Conference. Available on the UN Internet site <http://www.un.org/icc>. For accounts of its progress, see C. Hall, *On the Successive Sessions of the Committee*, in AM. J. INT'L L., vol. 91 (1997), p.177, vol. 92 (1998), pp. 124, 391, 548.

49. S/25704. Reproduced in INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991 (hereafter: ICTY), BASIC DOCUMENTS, p.155 (1995). See also on Internet site <http://www.un.org/icty>. For the Statute of ICTY and other relevant constituent documents, see that publication and Internet site. The question of the legality of the Security Council's action in establishing that tribunal was raised by the defence in the Tadic case, and upheld in the Appeals Chamber. 105 INTERNATIONAL LAW REPORTS, p. 427 (Trial Chamber, 1995), p. 453 (Appeals Chamber).

50. Prosecutor v. Akayesu, Judgment of September 2, 1998 (<http://www.un.org/ict/english/judgments/akayesu.html>, visited September 15, 1998) (the accused pleaded not guilty); Prosecutor v. Kambanda, judgment of September 4, 1998, (<http://www.un.org/ict/english/judgments/kambanda.html>, visited September 15, 1998) (the accused pleaded guilty). Relevant materials are available on Internet site <http://www.ict.org> or <http://www.un.org/ict>. Those judgements are excerpted in 37 ILM 1399 and 1411 (1998).

51. See note 41 above.

52. In the discussion in the International Law Commission on the law to be applied in the proposed court, some members considered that the problem could be resolved by completing the draft Code of Crimes. The other view was that the Court should apply existing law, but that the Statute should be drafted in such a way as not to foreclose the future application of the Code. Report for 1994, note 45 above, para. 56. To some extent Article 10 of the Rome Statute, to the effect that nothing in Part 2 should be interpreted as limiting or prejudicing existing or developing rules of international law for purposes other than the Statute, may reflect that point of view. When the International Law Commission adopted the Draft Code of Crimes, one of its recommendations was that the Code could be incorporated in the Statute of the International Criminal Court. The General Assembly took no direct action on that recommendation. See the Commission's Report for 1996 (note 41 above). The Report of the *Ad hoc* Committee (note 46 above) at para. 57 indicates reservations at using the Draft Code as a basis for defining the crimes, and the Report of the Preparatory Committee (note 47 above) confirms that there was little support for using the Draft Code, the general preference being to define each crime separately, as is done in Articles 6 to 8 of the Statute. In *Prosecutor v. Furundzija*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) considered the Draft Code as an authoritative international instrument which, depending on the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain content or are in process of formation, or, at the very least, (iii) be indicative of legal views of eminently qualified publicists representing the major legal systems of the world. Judgement of December 10, 1998, para. 227. The Trial Chamber also made use of the Commission's commentary on the Draft Code. Later the Trial Chamber used the Draft Code in examining the accused's *mens rea* (para. 242). Case No. IT-95-17/1-T 10, Judgement of December 10, 1998 excerpted in 38 ILM 317 (1999). In using the work of the International Law Commission in this way the Trial Chamber has followed the usage of the International Court of Justice in the *Gabcikovo-Nagymaros Project* case (Hung./Slovak.), INTERNATIONAL COURT OF JUSTICE REPORTS 1997, 7.54 (para. 79).

53. Article IX of the Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III (see text to note 25 above), shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. Interpreting that provision in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (preliminary objections) case, the International Court said that the reference in Article IX to the responsibility of a State for genocide or for the other acts enumerated in Article III does not exclude any form of State responsibility. INTERNATIONAL COURT OF JUSTICE REPORTS, 1996, pp. 595, 616 (para. 32). The drafting history of that provision, and indeed its own terms, indicates that this refers to what is sometimes loosely called "civil responsibility" as opposed to criminal responsibility. For my account and interpretation of the drafting history of that provision, see Sh. Rosenne, *War Crimes and State Responsibility*, in *WAR CRIMES IN INTERNATIONAL LAW* pp. 65, 74 (Tel Aviv University, Y. Dinstein and M. Tabor eds., 1996).

54. Rules of Procedure for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, doc. A/CONF.183/6, June 23, 1998, Rule 29.

55. Cf. R. Sabel, *PROCEDURE AT INTERNATIONAL CONFERENCES: A STUDY OF THE RULES OF PROCEDURE OF CONFERENCES AND ASSEMBLIES OF INTERNATIONAL INTER-GOVERNMENTAL ORGANIZATIONS* p.149 (1997).

56. That provision did not appear in the original draft statute prepared by the International Law Commission (see note 45 above). The Preparatory Committee reported that an essential question which should be addressed was whether some kind of safeguard provision was needed to ensure that individual criminal responsibility did not absolve the State of any of its responsibility in a given case, and it suggested texts to meet this problem (A/51/22, para. 192, and vol. II, Part 3 *bis*, article B, Proposal 1, paragraph 3; Proposal 2, paragraph 3; A/CONF.183/2/Add.1, Article 23, paragraph 4).

57. Report of the International Law Commission on the Work of its 48th session, note 41 above at p. 30.

58. For my criticism of Article 19, see Sh. Rosenne, *State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility*, 30 *NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS* p. 145 (1998). In 1998 the new special rapporteur of the International Law Commission, Professor James Crawford, recommended deleting Article 19 as such and related provisions. J. Crawford, *First Report on the Law of State Responsibility* (A/CN.4/490/Add.3), para. 100. This gave rise to a difficult but inconclusive discussion at the Commission's 50th session. See Report of the International Law Commission on the work of its 50th Session, GAOR, 53rd session, Supplement 10 (A/53/10), Chapter VII, paras. 241–331. And see Topical Summary of the Debate held in the Sixth Committee of the General Assembly during its 53rd session, prepared by the Secretariat paras. 110-115 (A/CN.4/496 mimeographed 1999).

59. Report cited in previous note, paras. 275–277. Issues of the relationship between the law of State responsibility and international criminal law have arisen in ICTY in the opinion and judgment of the Trial Chamber in *Prosecutor v. Duško Tadić* case. Case No. IT-94-1-T 112 ILR 1; and on appeal, judgement of July 15, 1999 and judgement in sentencing appeals of January 26, 2000.

60. The Celebici case, *Prosecutor v. Delalic, Mucic, Delic and Landzo*, judgment of November 16, 1998, Case No. IT-96-21-T, para. 230.

61. International Court of Justice, *Application of the Convention for the Prevention and Punishment of the Crime of Genocide case, Counter-claims (Bosn. & Herz. v. Yugo.)* International Court of Justice Reports 1997, 243.

62. 999 UNTS 171; 1057 *ibid.* 407; 1137 *ibid.* 396 (rectification).