ESTABLISHMENT OF THE PROPOSED INTERNATIONAL CRIMINAL COURT *

BIENVENIDO C. AMBION**

PLAN OF THE INTERNATIONAL CRIMINAL COURT AND ITS UNDERLYING GENERAL PRINCIPLES

The statute drafted by the United Nations General Assembly 1951 Committee on International Criminal Jurisdiction which met in Geneva is not self-sufficient and still needs further implementation. For the system of international penal jurisdiction envisaged by the statute to function, there is a necessity for implementation by subsequent conventions. Thus certain important matters as jurisdiction of the court, obligation to surrender the accused, and to produce witnesses and documents and obligation to execute sentences are left to be decided by later conventions or unilateral declarations.[1] Nevertheless the draft has constituted a concrete proposal upon which the General Assembly may make its final decision. The Committee did not pass upon the desirability of setting up an international tribunal as this question is not covered by its terms of reference.[2]

Organization[3]

Among the modalities for the creation of the Court which had been considered by the Committee, the instrumentality of a convention has been preferred to a resolution of the General Assembly. The former has been chosen as this would give the required dignity to the Court and would do away with any doubts as to the competence of the General Assembly to establish such a judicial organ. To maintain a link with the United Nations, the convention shall be held under the aus-

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** Associate Professor of Law, College of Law, University of the Philippines.

[1] *Cf.* Articles 26, 31, 52 of the Draft Statute. It is advisable to refer also to the Revised Draft Statute prepared by the 1953 Committee on International Criminal Jurisdiction. See U.N. Doc. No. A/AC.48/4 (now distributed as U.N. Doc. No. A/2136) and U.N. Doc. No. A/AC.65/L.13. For an exposition of the principal decisions of the 1953 Committee and the significant substantial amendments to the 1951 Draft Statute, see YUEN-LI LIANG, Notes on Legal Questions Concerning the United Nations—The Establishment of an International Criminal Jurisdiction: The Second Phase, 47 AMERICAN JOURNAL OF INTERNATIONAL LAW, pp. 638-657 (1953).

[2] Resolution 489 (V) of the General Assembly of December 12, 1950, contains the terms of reference. See also U.N. Doc. No. A/AC.48/SR 2.

[3] Articles 4 to 24 inclusive constitute the Draft Statute's Chapter II—that is the chapter on Organization of the Court which is the subject matter of this work, thus all of the said articles appearing in the Draft Statute and the Revised Draft Statute, will be analyzed and discussed at length.

pices of the United Nations through a conference called by the General Assembly. The 1953 Committee, however, decided from among four different methods of establishing the Court, that the best method would be by means of a "convention prepared by an international diplomatic conference convened under the auspices of the United Nations." It was unanimously agreed that the Court shall be a permanent body and not an *ad hoc* organ. Permanence as here understood is in the organic and not the functional sense so that the Court would convene only when cases are submitted to it.

As to its composition the Court will consist of nine judges under the Draft Statute and fifteen under the Revised Draft Statute, of good moral character and of competence in international law, especially in international criminal law, and must as far as possible be representative of the main forms of civilization and the principal legal systems of the world.[4] These judges will be nominated by states parties to the Statute and will be elected by representatives of such states. In the same manner, these parties to the Statute will contribute and form a joint fund for the expenses of the maintenance and operation of the Court, thus its finances will not be a part of the United Nations budget. However, under the Revised Draft Statute, the nomination and election of judges, as well as the contribution to the joint fund, shall be accomplished by "States which have conferred jurisdiction upon the Court" instead of "States parties to the present Statute."

Jurisdiction

Jurisdiction with respect to cases arising from one or more groups of crimes shall be conferred upon the Court by a subsequent convention among states parties to the Statute. The Committee decided that the Court will have jurisdiction *ratione materiae* on crimes generally recognized (as required by the Revised Draft Statute) under internationla law as may be provided in conventions or special agreements among the States who are parties to the Statute. Jurisdiction relative to any particular crime which had already been perpetrated may be conferred by a special agreement between two or more States parties to the Statute or by a unilateral renunciation of jurisdiction by such a state in favor of the Court.[5] Under the Draft Statute, any jurisdic-

[4] U.N. Doc. No. A/AC.48/SR 23. See also U.N. Doc. No. A/AC.65/SR.21; Articles 5, 7, 8, 9, 11, 23 of the Revised Draft Statute, and the U.N. Docs. No. A/AC.65/L.13, No. A/AC.65/SR.19, No. A/AC.65/SR. 22, and No. A/AC.65/SR.9 and No. A/AC.65/SR.10.

[5] Jurisdiction may be conferred *ex post facto* by special agreement or by unilateral declaration because certain states may be reluctant to confer jurisdiction upon future cases unless they have already an experience on the nature of the working of the Court—so they may therefore submit particular cases which have already occurred, for judgment of the International Criminal Court. If the working of the Court turns out to be satisfactory in the cases submitted, then it will be but natural

tion conferred will require the affirmation of the General Assembly, otherwise such would amount to a "political screening" of the Court's jurisdiction. The Court will apply international law, including international criminal law, and where appropriate, national law. The Committee decided that the International Criminal Court will not pass upon crimes under national law which are of international concern as piracy, counterfeiting, slave-trade, attacks on members of foreign governments, traffic in persons, to mention some.[6]

Two principal schools of thought manifested themselves in the Committee during its deliberations on the question of conferring of jurisdiction. One school believed that jurisdiction should be attributed by the Statute itself.[7] On the other hand, another group entertained the fear that states may be hesitant to become parties to the statute if they thereby become automatically bound to accept the jurisdiction of the Court.[8] The latter view prevailed so that the question of conferring jurisdiction will be left to future conventions. These conventions will be general in character, and will relate to future cases which might arise relative to one or more groups of crimes and may also specify the conditions under which jurisdiction would be conferred. It should be mentioned that in the Draft Statute states not parties to the Statute shall have no right to confer jurisdiction upon the Court; however, in the Revised Draft Statute, a State can confer jurisdiction upon the Court though not a party to the Statute.[9]

These three methods of conferring jurisdiction — convention, special agreement, and unilateral declaration — require the approval of the General Assembly of the United Nations[10] for there is a fear especially with respect to the last two methods that an individual state or a small group

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for them to later on confer wider jurisdiction upon the Court. Cf. U.N. Doc. No. A/AC.48/SR 7.

The 1951 Committee believed that the above-mentioned conferring of authority will not be considered contrary to the accepted principle of *nullum crimen sine lege*. Cf. U.N. Doc. No. A/AC.48/4.

As mentioned later, States not parties to the Statute are authorized by the Revised Draft Statute to confer jurisdiction upon the Court.

[6] See U.N. Doc. No. A/AC.48/SR 3, U.N. Doc. No. A/AC.48/SR 4, U.N. Doc. No. A/AC.48/SR 5, U.N. Doc. No. A/AC.48/SR 25, U.N. Docs. A/AC.65/L. 7 and A/AC.65/SR. 17.

[7] U.N. Doc. No. A/AC.48/SR 4.

The method of conferring jurisdiction by a special protocol attached to the statute has been ruled out since the drafting of a protocol requires a considerable length of time, and besides a protocol by its legal nature will not be different from a convention not attached to the statute. Cf. U.N. Doc. No. A/AC.48/4.

[8] U.N. Doc No. A/AC.48/SR 3, U.N. Doc. No. A/AC.48/SR 4, U.N. Doc. No. A/AC.48/SR 6.

[9] U.N. Doc. No. A/AC.48/SR 4. In the Draft Statute, for the same reasons underlying the restriction of rights to nominate and elect judges of the International Criminal Court, conferring of jurisdiction is allowed only to States which have associated themselves in a more permanent way with the Court by adhering to the Statute. However the Revised Draft Statute shifted emphasis from "States parties to the Statute" to "States which have conferred jurisdiction upon the Court."

[10] Article 28 of the Draft Statute; Cf. U.N. Doc. No. A/AC 65/SR 17.

of states may create new categories of crimes, and thus regard certain acts as crimes under international law when they are not regarded as such offenses by the international community.[11] The approval by the General Assembly is not required under the Revised Draft Statute, for any conferment shall not be subject to review by the General Assembly.

The 1951 Committee approved certain limitations in the Court's jurisdiction. The Court could have jurisdiction *ratione personae* only over natural persons including those who have acted as Heads of States or agents of governments but not over States, corporations, or juristic persons.[12] Penal responsibility of States is of a political character and the Committee decided that it does not fall within the competence of the Court.[13] In some national systems legal entities as corporations are criminally liable and often punished by fines, confiscation of property, or even by dissolution. But this liability is unknown in some other legal systems, and therefore the Committee concluded that the introduction of such type of criminal responsibility in international criminal law will arouse considerable controversy.[14] The precedents established by the Nuernberg and Tokyo judgments and the corresponding rule expressed in Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide have been confirmed by Article 25 of the draft statute which makes heads of states or representatives of governments amenable to the jurisdiction of the Court.[15]

Only the criminal liability of the accused can be adjudged by the Court. It cannot grant any civil damages arising from the crime. It seems an imperfect penal tribunal if it cannot rule on the civil liability but the Committee believed that to allow such competence the emphasis of the trial will be shifted to the civil responsibility of the State, and would therefore be converted into a trial of the State instead of the accused individual. Besides in war crimes or crimes against humanity, the number of victims will be so great that it will not be practicable to allow each of them to be a *partie civile*. Furthermore ,a considerable length of time will be consumed in the examination and assessment of the damage incurred by every individual victim.[16]

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[11] U.N. Doc. No. A/AC.48/SR 7.

[12] Article 25 of the Draft Statute. Refer also to U.N. Docs. No. A/AC.65/L. 7; No. A/AC.65/SR 11; No. A/AC.65/SR 17.

[13] U.N. Doc. No. A/AC.48/SR 9.

[14] U.N. Doc. No. A/AC.48/4.

[15] U.N. Doc. No. A/AC.48/4.

For the text of the Convention on the Prevention and Punishment of the Crime of Genocide please refer to U.N. Doc. No. A/810, p. 174, U.S. Department of State Publ. 3416; LOUIS B. SOHN, CASES AND OTHER MATERIALS ON WORLD LAW, pp. 1019 *ff.* (1950).

[16] A proposal to consider the civil liability of the accused as a necessary consequence of his conviction and should therefore be allowed by a national court or by other special indemnization tribunal has been disapproved. U.N. Doc. No. A/AC.48/4.

It is humbly submitted that at least this proposal should have been approved for why should a criminal who is civilly liable by his domestic law be exempt from such civil liability if the commission of the crime is on an international level?

Another limitation imposed upon the competence of the Court is the requirement that no individual could be tried unless jurisdiction has been conferred upon the Court by both the State or States of which he is a national and the State or States in which the crime was alleged to have been perpetrated.[17] It was contended that if a State of which the accused is a national has not accepted the jurisdiction of the Court but is a party to the Statute then it can be interpreted as a delegation of its territorial jurisdiction to the International Criminal Court. But such contention did not prosper inasmuch as the trial of a national who may be a high-ranking political leader of a State also involves a review of the international or foreign policy of that government. The consent of the State of which the accused is a national must therefore be required, and incidentally this will encourage a large number of states to adhere to the Statute.[18] Under the territorial principle, the State in which the offense is alleged to have been committed must also give its assent. In case of an accused with double nationality or a crime being committed in two or more states, the consent of all states concerned will be required.[19]

Conferment of jurisdiction can be withdrawn by the State concerned such withdrawal to become effective one year after notification to that effect to the Secretary General. Still another limitation to the Court's competence is the right of the above-mentioned States and of the accused individual, to challenge the Court's jurisdiction in which case the Court shall resolve the matter.[20] The individual's right to question the jurisdiction is a consequence of his right to a fair trial. The corresponding right of the state which intervenes, as already mentioned, is an independent right, over and above that of the individual, since the proceedings may involve implicitly or explicitly a passing of judgment upon the internal or foreign policy of that State.[21]

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[17] Article 27 of the Draft Statute which is left intact in the Revised Draft Statute. See U.N. Docs. Nos. A/AC.65/SR 11; A/AC./65SR 12 and A/AC.65/SR 18.

[18] U.N. Doc. No. A/AC.48/4.

[19] Idem.

[20] Article 30 of Draft Statute. U.N. Doc. No. A/AC.48/4. Cf. Article 28 of the Revised Draft Statute, and U.N. Doc. No. A/AC.65/SR 19.

[21] A question of jurisdiction raised by a State intervening under Article 30 will necessarily mean an interpretation of provisions of a treaty, convention, or other agreements. It was therefore proposed to have the matter referred to the International Court of Justice. But States are admitted only as parties by the International Court of Justice in contentious litigations and this question is not one. So at most it will be an advisory opinion that shall be asked of the International Court of Justice, granting that provisions of Article 96 of the Charter authorizing organs of the United Nations or specialized agencies could be invoked. But a State may raise question of jurisdiction at an advanced state of the trial, and thus the proceedings in the International Criminal Court will have to be suspended for a considerable time. Besides a decision of the International Criminal Court on the point raised by an individual may vary from the opinion of the International Court of Justice raised by a State on the same point. Finally the Committee decided that challenge of jurisdiction shall be decided by the International Criminal Court itself. U.N. Doc. No. A/AC.48/4.

Procedure

Access to the Court has been granted to the General Assembly, to organizations of States authorized by the Assembly and to a State party to the Statute which has conferred jurisdiction on the Court over the offense subject of the proceedings.[22] The Revised Draft Statute provides merely that a State which has conferred jurisdiction upon the Court can institute proceedings before the Court. Proposal to have the General Assembly act on this matter with a two-thirds majority vote was defeated.[23] The plan to authorize the Security Council to file actions was also dropped. Regional organizations of States may seize the Court if so authorized by the General Assembly. A move was launched to curtail from the State the independent right of instituting a proceeding since it has been feared that it may set the judicial machinery for purely political motives. But it was disaproved and thus the State need not submit its complaint for the sponsorship or approval of the General Assembly, as proposed, otherwise the political aspect of the trial will precede the trial proper. There is an element of reciprocity inasmuch as a State party to the Statute cannot lodge complaint against the national of another State unless the crime is one over which the complaining State has conferred jurisdiction over the Court. Thus her own national may be sued for the same kind of crime. However, this right of the State may on some occasion counteract the policy of the General Assembly for a State may insist on filing proceedings against the individuals responsible for the aggression committed, while the General Assembly is in the meantime exerting efforts to mediate and bring the aggression to an end through peaceful means. A plan to authorize the Security Council to institute proceedings at the International Criminal Court was rejected by the Committee.[24]

An essential pre-requisite to the proper functioning of the Court is the power to issue warrants of arrest in order that the accused can be brought before the Court for trial. Thus an article is inserted empowering the Court to do such.[25] However, there is no connection between a conferring of jurisdiction on the Court by a State and its obligation to execute the warrant of arrest and to carry out requests by the Court for other assistance as the producing of documents and of witnesses. The foregoing obligations do not arise as a consequence of a State becom-

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[22] Article 29 of the Draft Statute and carried over in a modified form in the Revised Draft Statute. Cf. U.N. Doc. No. A/AC.65/SR 18.

[23] Since the Draft Statute contains no rule regarding the required majority for the General Assembly in instituting a proceeding, Article 18 of the Charter relative to voting in the General Assembly is therefore applicable.

[24] U.N. Doc. No. A/AC.48/SR 26.

[25] Article 40 of the Draft Statute.

[26] The reason for this state of affairs is the immediate aim of establishing the Court. Thus additional measures for the functioning of the Court will be adopted later. To burden participation of States with such obligations may deter many States from adhering to the Statute. U.N. Doc. No. A/AC.48/4.

[27] Article 20 of the Draft Statute.

ing party to the Statute—thus these obligations will still be the subject matter of future conventions, or can be included in conventions conferring jurisdiction on the Court with respect to particular crimes, or in unilateral declarations of States.[26]

Besides the bench of nine (fifteen, under the Revised Draft State) judges and the Registry of the Court,[27] the draft statute provides for two other organs. One is the Committing Authority who determines whether a prima facie case exists against the accused after a preliminary examination of the evidence adduced in support of the charge.[28] This is some sort of a screening process to protect the individual from any frivolous prosecution. The desire of some members of the Committee to empower the Committing Authority to decide whether a trial is expedient, from the point of view of world politics and of public interest, was not gratified. The Committing Authority is composed of nine members to be elected in the same manner, on the same terms, at the same time, from among persons possessing the same qualifications as members of the Court. Believing that such a set-up of the Committing Authority would "unnecessarily complicate the organization of the Court", the 1953 Committee decided that the Committing Chamber shall be composed of five judges appointed annually at a sitting of the whole International Criminal Court by a majority of the members present. The accused may introduce evidence in his favor before the Committing Authority. This Authority requires the assistance of the Court in summoning witnesses and in the production of evidence, but it can adopt its own rules of procedure relative to quorum, voting and other similar matters.[29]

The other organ is the Prosecuting Authority consisting of a prosecuting attorney appointed on an *ad hoc* basis. Under the 1951 Draft Statute every time a case is before the court, a panel of ten persons elected by the States parties to the Statute appoints a prosecuting attorney who would not necessarily be appointed from among them.[30] The Prosecuting Attorney who must possess the same qualifications as a member of the Court under the Draft State, will file the indictment and conduct the prosecution. He should be independent of the complaining State or entity, and should not be a second screening authority. He represents the international society, thus there have been proposals for his appointment by the United Nations Secretary-General, or by the President of the International Court of Justice from among ten persons previously elected for the purpose, but both suggestions have been rejected.[31] Under the Revised Draft Statute, a jurisconsult appointed by the complainant or

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[26] Article 33 of the Draft Statute. U.N. Doc. No. A/AC.65/SR. 14 and A/AC.65/SR. 19.

[27] U.N. Doc. No. A/AC.48/4; U.N. Docs. Nos. A/AC.65/SR 13, A/AC.65/L. 6 and A/AC.65/SR. 14 and A/AC.65/SR. 19.

[28] Article 34 of the Draft Statute and appearing in modified form in the Revised Draft Statute.

[29] U.N. Doc. No. A/AC.48/4. See also U.N. Doc. No. A/AC.65/SR. 14.

complainants shall perform the functions of Prosecuting Attorney. He is therefore the representative of the complainant.

The indictment shall include a statement of the facts and also of the law violated.[32] The Draft Statute explicitly provides that trial shall be without jury under their national law.[33] However, in the Revised Draft Statute, trial shall be with a jury if provided in the instrument by which jurisdiction has been conferred upon the Court. Among the rights guaranteed to the accused is the right to a fair trial, and the minimum conditions involved in the concept of a fair trial are stated, which enumeration should not be considered exhaustive and can therefore be supplemented by the rules of the International Criminal Court.[34] Publicity of hearings has been assured although exceptional circumstances may require the Court to sit in private for the interests of justice. Deliberations of the Court will be in private.[35] The accused is presumed to be innocent until his guilt has been proved.[36] The accused has the right to be present in all stages of the proceedings and may have his defense conducted by counsel or by himself. As to who are qualified to appear as counsel will be determined by the rules of Court. Another right guaranteed to the accused is the free assistance of counsel if he is not able to defray the expenses himself. Fees of the counsel will be charged against the fund collected and administered, by the States parties to the Statute under the Draft Statute, and by the States which conferred jurisdiction upon the Court under the Revised Draft Statute ,for the maintenance and operation of the Court. The accused can adduce oral and documentary

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[32] Articles 35 and 36 of the Draft Statute. The indictment need not contain the list of witnesses and of documentary evidence to be presented at the trial. It was the experience of the Nuernberg and Tokyo trials for the prosecutor to continue collecting evidence during the course of the proceedings. U.N. Doc. No. A/AC.48/4.

[33] Article 37 of Draft Statute. International military tribunals constituted for the trials of war criminals are not "courts of the United States" as the term is used in the United States Constitution. The accused is not entitled to a trial by jury, nor to the due process as guaranteed by and understood under the United States Constitution. Thus the U.S. Supreme Court will not entertain a petition for a writ of habeas corpus filed in behalf of such war criminals. *Ex Parte Quirin* 317 U.S. 1 (1942) and *In re Yamashita* 327 U.S. 1 (1945).

Refer also to PAUL M. HERBERT, The Nuernberg Subsequent Trials, citing the case of *U.S. v. Flick, et al.* XVI INSURANCE COUNSEL JOURNAL, pp. 226-227 (1949). Cf. Article 37 of the Revised Draft Statute and U.N. Doc. A/AC.65/SR. 15.

[34] Article 38 of the Draft Statute.

[35] Article 39 of the Draft Statute.

[36] U.N. Doc. No. A/AC.48/SR 28.

As to whether the accused shall remain in custody or be at provisional liberty during the trial, shall be determined by the Court. Cf. Article 41 of the Draft Statute. Articles 40, 42, 43, and 44 enumerate the other powers of the Court as to issuance of warrants of arrest, also the powers necessary for the proper conduct of the trial, as the requirement of attendance of witnesses, production of documents and other evidentiary materials, maintenance of order at trial, power to strike out irrelevant issues, evidence, and statements at the trial, and power to dismiss any case where fair trial cannot be had, and power to approve the withdrawal of the prosecution. Refer to the Revised Draft Statute especially Articles 38 and 43 on dismissal of the case and withdrawal of prosecution respectively. Cf. U.N. Docs. Nos. A/AC.65/SR. 15; A/AC.65/SR. 19; and A/AC. 65/L. 8.

evidence in his favor. He has the right to confrontation and interrogation of witnesses and the inspection of documents presented at the trial. He has also the right to the assistance of the Court in obtaining access to the relevant materials.

Participation of seven judges is required to constitute a quorum. Final judgments and sentences require a majority vote of the judges participating.[37] Relative to other decisions of the Court, the same rule is followed but if there is an equality of votes, the Presiding Judge shall have a casting vote. This differentiation is not preserved in the Revised Draft Statute. The Court will determine the penalty as well as its severity.[38] Article 51 of the Revised Draft Statute states that sentences shall be executed in accordance with conventions with respect to the matter. Convention conferring jurisdiction upon the Court with respect to particular crimes need not specify the penalty.[39] Neither should this be expected in a convention defining a crime, as the Convention on Genocide. The details of procedure and the rules on admission of evidence are to be provided for in the rules to be adopted by the Court under Article 24 of the Draft Statute. With respect to the rules of procedure appearing in the Statute the Committee formulated them in as plain and non-technical language as possible, avoiding the use of legal terminology which may have different meanings in different countries.[40] There is therefore no implied reference to the body of rules of procedure which may be in force in a particular country. After the constitution of the

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[37] Article 46 of the Draft Statute.

If there be an equality of the votes in final sentences or judgments, no judgment of conviction could be handed down by the Court and consequently a verdict of acquittal must be promulgated. U.N. Doc. No. A/AC.48/4. Under Article 44 of the Revised Draft, seven judges would be sufficient to constitute the Court which is similar to the 1951 Draft Statute. In Article 45 of the Revised Draft Statute, majority votes of the judges participating in a trial shall be required to decide all questions. Excepting a decision imposing the death penalty or life imprisonment, the presiding judge shall have a casting vote in the event of an equality of votes. Cf. U.N. Doc. No. A/AC.65/SR. 19.

[38] Article 32 of the Draft Statute.

Article 47 requires the judgment to state the supporting reasons in relation to each accused, and must contain the names of the judges who participated in the decision and must be signed by the President and the Registrar. If there be dissent from the majority opinion then separate opinions may be penned under Article 48.

[39] Cf. U.N. Doc. No. A/AC.48/SR 28.

[40] The terms "double jeopardy" and "cross-examination" have not found their way into the statute, although articles of the same import have been provided therein. Under Article 52, for example, any person tried and convicted or acquitted before the Court shall not be subsequently tried for the same offense before any national court of any State which has conferred jurisdiction upon the Court relative to such offense. Judgment of the International Criminal Court will be the basis of determining whether double jeopardy will result or not from a subsequent trial. If the accused is acquitted by the International Criminal Court of the offense of genocide due to absence of the subjective element of intent to destroy a national, ethnical, racial or religious group, then a national court can try him for homicide. Whereas if the acquittal by the International Criminal Court is based on the absence of the objective element of killing of men, then he should not be tried subsequently by a national court for homicide which also requires such objective element. U.N. Doc. No. A/AC.48/4.

Court it has been assumed that the rules will be promulgated and published immediately in order to inform the parties before the hearing of any case. It has also been taken for granted that rules of procedure will not be altered and be made applicable to a particular case, while proceedings are pending.

It was the unanimous opinion of the Committee that there shall be no appeal to any outside body, for to allow such, it seemed to them, would undermine the authority and prestige of the judgments of the court.[41] Since the Court is not divided into Chambers, there is therefore no possibility of an appeal from a chamber to the plenary. The Court may revise its judgment in case of newly discovered facts which were not known to the parties and to the Court at the time of the trial.[42] The danger of this remedy being resorted to for political reasons has been feared by the Committee. A Board of Clemency composed of five members to be established by States Parties to the Statute shall have the power of pardon, parole, suspension, reduction, and other alterations or commutations of sentence.[43] The same provision appears in the Revised Draft Statute, with the only differences that the body is designated as a Board of Clemency and Parole and to be elected by States which have conferred jurisdiction upon the Court.

As a final provision, the Committee decided that nothing in the statute would prevent two or more States parties to the Statute or which have conferred jurisdiction upon the Court from setting up special tribunals to try crimes over which each has jurisdiction under international law.[44] This article upholds therefore the principles of the Nuernberg and Tokyo trials.[45] Finally the 1951 Committee adopted a draft resolution recommending that at the conference of States convened for the purpose of establishing the Court, a protocol be drawn up conferring jurisdiction, with respect to the crime of genocide, upon the International Criminal Court.[46]

Modality for Creation of the Court

One of the basic preliminary decisions undertaken by the Committee is the procedure for the establishment of the Court. A solution arrived at on the matter also determines the future relation of the International

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[41] Article 50 of the Draft Statute. U.N. Doc No. A/AC.48/SR 20.
See Review of International Criminal Convictions, 59 YALE LAW JOURNAL, pp. 997-1005 (1950) wherein attention has been called to the fact that war crimes defendants have wandered in an appellate no-man's-land for international criminal procedure has not yet devised any appellate review. Lack of precedent and difficulty of reaching an accord on review procedures have retarded the introduction of an appellate machinery.

[42] Article 53 of the Draft Statute.

[43] Article 54 of the Draft Statute. Cf. U.N. Docs. Nos. AC/AC.65/L. 5, A/AC.65/SR. 20; A/AC.65/SR. 22.

[44] Article 55 of the Draft Statute.

[45] U.N. Doc. No. A/AC.48/4.

[46] Voeu, Annex II to A/AC.48/4.

Criminal Court to the United Nations.[47] Three modes for the creation of the International Criminal Court have been pointed out by the Secretary-General of the United Nations in the Memorandum submitted by him to the Committee.[48] First method is by resolution of the General Assembly, second is by an international convention, and third, which is a combination of the foregoing, is by a resolution of the General Assembly, and a convention defining the duties of the States relative thereto, which shall be adopted by the General Assembly and shall be open for accession by the States.[49] Of course, the best procedure is to establish the Court as a principal organ of the United Nations, but to follow this fourth method will mean an amendment of the Charter, and the Committee stated that such amendment was ruled out by the then existing state of international relations.[50]

Among the other alternatives left, the mode of creation by resolution of the General Assembly, it is submitted, seems the most preferable. This will solve many difficulties especially in connection with obtaining of services and facilities of the United Nations. There will be no budgetary problem for the finances of the International Criminal Court will then be covered by the United Nations budget. Besides under such a set-up, the members of the Court without any further arrangements, can readily avail themselves of the diplomatic privileges and immunites and facilities accorded to the United Nations and which are discussed at length in a subsequent section dealing with the rights and duties of judges of the International Criminal Court. Among the disadvantages, however, is that to be established as a subsidiary organ under the Charter, its principal organ will presumably be the General Assembly. It has been contended that the competence of the subsidiary organ cannot be beyond that of the principal, and doubts have been raised as to whether the General Assembly has judicial competence. Besides the Committee found it objectionable to subject the Court to the General Assembly which is a political body.[51]

The General Assembly resolution method has been defended by Mr. Quincy Wright, of the Board of Editors of the American Journal of

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[47] YUEN-LI LIANG, Notes on Legal Questions Concerning the United Nations, 46 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 74 (1952).

[48] U.N. Doc. No. A/AC.48/1.

[49] U.N. Doc. No. A/AC.48/SR.3
U.N. Doc. No. A/AC.48/SR 22.

[50] U.N. Doc. No. A/AC.48/4.
U.N. Doc. A/AC.48/SR 3.
Subsequent to the establishment of the International Criminal Court by some other method, there is still a chance to avail of this method, when under Article 108 of the Charter, the proposal to call a conference for the amendment of the Charter is placed on the agenda of the tenth annual session of the General Assembly or any annual session earlier than this, and when said proposal has been approved by the required votes of the General Assembly and of the Security Council, and in which ensuing conference the corresponding amendment may be introduced.

[51] U.N. Doc. No. A/AC.48/4.

International Law. He stated that legislative bodies without any power to administer justice have created courts, and once established they do not interfere with the judicial activities. It seems conceivable that the General Assembly's extensive powers to encourage the progressive development of international law and the peaceful adjustment of situations allow it to establish an International Criminal Court.[52] Instances have been cited where the General Assembly has established tribunals as the United Nations Administrative Tribunal, the United Nations Tribunal in Libya and agencies as the United Nations High Commissioner for Refugees with powers to pass judgment to some extent over individuals.[53]

The methods of establishment of a convention is the one adopted as it will give the Court the dignity required of such an important organ. This will give States which wish to adhere to the Statute, total independence in framing the Statute of the International Criminal Court.[54] The weakness of this method appears when the convention is not widely ratified. The Court will not be a world court but merely an organ composed by some members of the United Nations. Non-participating governments cannot be expected to render assistance in obtaining of evidence, execution of warrants, in short the administration of international penal justice.[55] The 1953 Committee on International Criminal Jurisdiction considered the advantages and disadvantages resulting from the four methods of establishing the Court, to wit, by amendment of the Charter of the United Nations, by unilateral convention, by resolution of the United Nations General Assembly, and by resolution of the General Assembly implemented by conventions. The 1953 Committee decided that the best method would be "by means of a convention prepared by an international diplomatic conference convened under the auspices of the United Nations."

Permanent Nature of the Court

A unanimous opinion was enterained by the 1951 Committee with respect to the permanent nature of the Court but sessions shall be called only when matters before it require consideration.[56] The permanence referred to is of the organic or organizational and not of the functional type. The rules of Court can prescribe when sessions are to be convened. Diverse reasons sustained the permanent rather than an *ad hoc*

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[52] Articles 13 and 14 of the United Nations Charter.

[53] Cf. QUINCY WRIGHT, Proposal for an International Criminal Court, 46 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 66 (1952).

[54] U.N. Doc. No. A/AC.48/4.

[55] WRIGHT, op. cit., p. 67.

[56] Article 3 of the Draft Statute. The International Court of Justice, like its predecessor the Permanent Court of International Justice, sits permanently at the Hague—always ready to exercise its functions. It meets annually in a designated date and continues holding sessions until all pending matters are settled. It may be convened by the President for an extraordinary session. Cf. ANTONIO S. DE BUSTAMENTE, The Permanent Court of Internationl Justice, p. 11 (1952). Reprinted from 9 MINNESOTA LAW REVIEW, 122-29 (1925).

character of the International Criminal Court. Interests of justice will better be served if the Court is already constituted before the commission of the crime. If a court is to be appointed for a particular case, passions may run high and unduly influence the choice of judges. National interests and political expediency may take the place of judicial standards, and the spirit of revenge and hate may take the upper hand.[57] Permanent existence of the Court saves unnecessary expense and loss of time in the creation of a new court. Furthermore, continuity will enhance the development of international criminal law which will not be the case if decisions are the sporadic judgments of temporary bodies.[58]

Professor Pella before entertained the idea that a criminal chamber in the International Court of Justice would ideally be preferable to an independent tribunal. But then this would require an amendment of the Statute of that Court in conformity with Article 108 of the Charter of the United Nations which will be very difficult to obtain as long as there are States opposing the creation of an international penal tribunal.[59] For this reason, and also considering the fact that the International Law Commission in its second session's report recommended not to establish a criminal chamber of the International Court of Justice, the Committee therefore did not discuss the possibility of introducing such a chamber.[60]

Plurality of Courts and Division into Chambers

Relative to the question as to whether there should be one or more international criminal courts, and as to whether there shall be division in chambers, it is better to have a single court. Professor de Vabres once contemplated two courts but his scheme will involve also an amendment of the Charter of the United Nations in order to make the International Court of Justice rule supreme in questions of law and also on questions of facts in cases of the gravest nature. In a later article, Professor de Vabres advocated that the International Criminal Court can have a special appellate section and another section which would deal with the criminal responsibility of public officials. He believes that the liability of governments must also be passed upon.[62] The Committee decided that there shall be only one international penal tribunal but this does not preclude two or more States parties to the Statute to set up jointly, special tribunals for trials of criminals over which such States have jurisdiction under the general rules of international law.[63] The deci-

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[57] U.N. Docs. Nos. A/AC48/4; U.N. Doc. No. A/AC.48/8R 21.

[58] Besides, permanence of the Court will give rise to a corps of international lawyers. Cf. ANTONIO S. DE BUSTAMENTE, THE WORLD COURT, p. 21 (1925).

[59] VESPASIAN V. PELLA, Towards an International Criminal Court, 44 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 59 (1950).

[60] U.N. Doc. No. A/AC.48/4.

[61] Pella, supra.

[62] H. DONNADIEU DE VABRES, DE L'ORGANISATION D'UNE JURIDICTION PENALE INTERNATIONAL, pp. 2-3 (1948).

[63] Article 55 of the Draft Statute.

sion to adopt nine members as the well-balanced composition of the Court to a certain extent influenced the 1951 Committee's subsequent decision on the non-division of the Court into chambers.[64] Division into chambers will not enhance the unity of jurisprudence of the Court, unless there be appeal to the plenary court.[65] It was decided finally to adopt liberal provisions on revision of the statute to allow amendments establishing chambers or increasing the number of judges if the work becomes voluminous.[66]

Law to be Applied

The International Criminal Court would apply international law, including international criminal law, and where appropriate, national law.[67] The Memoradum of the Secretary-General suggested the inclusion of a list of sources of the law to be applied similar to the enumeration in Article 38 of the Statute of the International Court of Justice.[68] The 1951 Committee did not find such enumeration of any value as issues will be decided by the judges without scrupulously following the enumerated sources of the law.[69] However, it believed that since a new court is to be established there must be at least a general formula as to the law applicable.

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[64] Cf. U.N. Doc. No. A/AC.48/SR 24.
A division of three members each will be too small, whereas if there be two chambers, then there will be an unequal division. Besides the chamber will not be so well-balanced a body as the whole court.

[65] To allow an appeal to the full court will instead decrease the capacity for work of the court. Cf. U.N. Doc. No. A/AC.48/4.
Furthermore, a judgment of a chamber is regarded as the Court and no appeal lies to the full court. Thus the chamber for Summary Procedure of the Permanent Court of International Justice rendered a decision as regards the Interpretation of the Treaty of Neuilly and the following year a second judgment was given by the chamber interpreting the first decision. Cf. MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, pp. 346-347 (1943).

[66] Any way the trend is towards the abolition of chambers. The special chambers for labor cases and for transit and communication cases of the Permanent Court of International Justice have been abolished. The Statute of the International Court of Justice provides that the Court can create chambers as may be needed in addition to the chamber for summary procedure. Before this abolition, there had been movements for such reform. The Inter-Allied Committee meeting in London in 1944, proposed such abolition, which was also advocated two or three years earlier by Judge Manley O. Hudson in a Philadelphia address before the Academy of Political and Social Sciences. And even before then, in the words of Judge Hudson, the enlightened jurist Mr. J. A. Buero of Uruguay, had suggested such abolition at the International Conference of American States. MANLEY O. HUDSON, THE LAW OF NATIONS IN COURT, p. 4 (1949). Speech delivered before the Brandeis Lawyers' Society on January 3, 1946.

[67] Article 2 of the Draft Statute.

[68] U.N. Doc. No. A/AC.48/1.

[69] U.N. Doc. No. A/AC.48/SR 11. The Secretary of the 1951 Committee brought out the fact that Judge Hudson in his treatise, the Permanent Court of International Justice, has mentioned how scrupulous the Permanent Court of International Justice was in applying international law on the basis of the enumeration appearing in Article 38 of its Statute. The Secretary believed that this statement is also true insofar as the International Court of Justice is concerned.

As pointed out in the first article of the series international criminal law is already a reality. But mere mention of international criminal law will not be sufficient since application of the same often refers to other branches of international law and also national law. Thus in determining whether an act is a war crime or not it will be necessary to refer to the customs and laws of war. National laws will be consulted in determining for example the effect of superior orders with respect to the exemption from or mitigation of penal responsibility; and the acquisition and loss of nationality with respect to the preliminary question of jurisdiction.[70]

Purpose of the Court

An international penal tribunal has the object of "assuring the punishment for acts which world opinion regards as peculiarly destructive of international peace and order, peculiarly shocking to the conscience of mankind, and peculiarly likely to escape the punishment by national authority."[71] The International Criminal Court is established to try persons accused of crimes under international law, as may be provided in conventions or special agreements among States parties to the Statute.[72] The Court, according to the Revised Draft Statute, is established to try natural persons accused of crimes generally recognized under international law. These crimes against international law will be provided for in separate conventions or unilateral declarations under Article 26 of the Draft Statute, thus giving the Court jurisdiction and can be said to be in all fairness to the accused.[73] Since jurisdiction is not to be presumed and must necessarily be conferred, such conferment by a State can take place by convention, by special agreement, or by unilateral declaration. It is fair and logical to assume that the offenses against peace and security of mankind as defined by the International Law Commission's Draft Code of Offenses, of the foregoing nature, are the types of crimes over which jurisdiction will be conferred by the States under the aforementioned article of the Draft Statute.[74]

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[70] QUINCY WRIGHT, Proposal for an International Criminal Court ,46 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 63 (1952). Diverse terms used to cover these crimes in general include crimes against international public order, against the universal law of nations, offenses against peace, against the law of war, against humanity, and particularly genocide.

[72] Article 1 of the Draft Statute, as amended appears in the Revised Draft Statute. Refer to U.N. Docs. Nos. A/AC.65/SR 16 and A/AC.65/L. 7.

[73] U.N. Doc. No. A/AC.48/4. See also U.N. Docs. Nos. A/AC.65/SR. 16; A/AC.65/SR. 17 and A/AC.65/L. 7.

[74] GEORGE A. FINCH, Editorial Comment on the Draft Statute for an International Criminal Court. 46 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 93 (1952). The above-stated Draft Code of Offenses Against Peace and Security of Mankind defined the following crimes for trial by an International Criminal Court, threats of and preparation for, aggression, invasion by armed bands, fomenting civil strife in other countries, encouragement of terrorist activities, violations of treaty obligations concerning armaments, annexation of territory, genocide, inhuman acts, violations of the laws and customs of war, as well as conspiracy, incitement, at-

Certain national crimes which are of international concern have been proposed to come within the purview of the court's jurisdiction. Such crimes as counterfeiting of currencies, traffic in persons or narcotics, damaging of submarine cables, or attacks upon foreign heads of States or diplomatic or United Nations missions could better be punished by an impartial international tribunal rather than by the national court concerned. A judgment rendered by a national tribunal in such cases may be too lenient or too severe from the point of view of the foreign party concerned. But the 1951 Committee decided not to include such crimes which are of minor importance and may be a risk to the prestige of the Court and which are not covered by the Committee's terms of reference.[75]

ORGANIZATION OF THE PROPOSED COURT

The provisions of the Draft Statute pertaining to the organization of the International Criminal Court are to a certain extent patterned after those of the Statute of the International Court of Justice, thus an editor entertains the opinion that these provisions will probably arouse little controversy.[1] However, because of the difference in functions of the two courts and due to the fact that the International Court of Justice, the principal judicial organ of the United Nations[2] was established by the Charter while the International Criminal Court will be established by a convention distinct from the Charter,[3] there has therefore been a modification on the corresponding provision on qualification by the addition of the specification that the competence in international law shall be competence especially in international penal law.[4]

Qualifications of Judges

Judges will therefore be elected without regard to their nationality. Judges may be nationals of a member or non-member state of the United

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tempts or complicity to commit any of the aforesaid acts.

For the report relative to the said Draft Code of offenses prepared by the International Law Commission's special rapporteur, see J. SPIROPOULOS, Draft Code of Offenses Against the Peace and Security of Mankind, 3 REVUE HELLENIQUE DE DROIT INTERNATIONAL, pp. 141 *ff.* (1950). See also CLIVE PARRY, Some Considerations Upon the Content of a Draft Code of Offenses Against the Peace and Security of Mankind, INTERNATIONAL LAW QUARTERLY, pp. 208 *ff.* (1950).

[75] U.N. Doc. A/AC.48/SR 3.
U.N. Doc. No. A/AC.48/SR 4.
U.N. Doc. No. A/AC.48/4.

For a comprehensive discussion of crimes under national legislations implementing international conventions, refer to GEORGE WEISS, International Criminal Justice in Time of Peace, XXVIII TRANSACTIONS OF THE GROTIUS SOCIETY, pp. 31 *ff.* (1943).

[1] QUINCY WRIGHT, Proposal for an International Criminal Court, 46 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 62 (1952).

[2] Cf. Article 92, United Nations Charter.

[3] U.N. Doc. No. A/AC.48/4. Cf. also U.N. Doc. No. A/AC.65/SR. 21.

[4] An examination of Article 4 of the Draft Statute reveals that it is a verbatim reproduction of Article 2 of the Statute with the addition of the phrase "especially in international criminal law."

Nations or they may even be stateless[5] for "Knowledge has neither frontiers nor nationality."[6] The International Criminal Court is an international judicial organ and the judges therefore represent the universal community and not their respective governments. But a British jurist says that the clause "elected regardless of their nationality" may appear to express not an actual reality but a mere ideal or standard.[7] While it has been clearly provided in another article[8] of the Draft Statute requiring as far as possible, fair representation of the main forms of civilization and the principal legal systems of the world, Article 4 is a reminder that the merits of the members and not their nationality is the criterion in electing the members of the penal tribunal. This provision on the representative character of the Court promotes the internationalization of the tribunal and is a departure from the prevailing concept that the great powers must have a pre-ordained representation in international tribunals.[9]

Two qualifications for membership of the Court are therefore required: (1) high moral character and (2) either eligibility for appointment to the highest judicial offices in their respective countries or being a jurisconsult of recognized competence in international law, especially international criminal law. High moral character is not an absolute definitive concept and it will therefore be left to the sound judgment of the nominating and electing authorities.[10] Lord Phillimore enumerates the essential characteristics of a good judge of the international court, to wit: "loyalty, probity, a certain breadth of vision, patience and courage."[11]

The alternative qualifications mentioned in (2) above depict the Anglo-Saxon and Latin systems similar to the Statute of the International Court of Justice. In England and the United States, judges of the highest courts are generally chosen from the best lawyers and have usually to decide constitutional and international law questions. However, in Continental Europe and in Latin-American countries, the rule

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[5] Article 6, section 1 of the Draft Statute.

[6] Nationality will not be a determining factor, for their recognized competence in inter-state penal law and international law will be the criterion by which the judges shall be chosen. Cf. ANTOINE SOTTILE, The Creation of a Permanent International Criminal Court. 29 REVUE DE DROIT INTERNATIONAL, p. 348 (1951).

[7] ALEXANDER P. FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 34 (1932). His comments are directed towards a provision of the Statute of the Permanent Court of International Justice which has been the pattern of the Statute of the International Court of Justice.

[8] Article 10 of the Draft Statute.

[9] ANTONIO SANCHEZ DE BUSTAMANTE, The World Court, p. 112 (1925). But refer to the U.N. Secretary-General's Memorandum on the Creation of an International Criminal Court wherein he advocates that each of the permanent members of the Security Council will be assured a seat in the International Criminal Court, U.N. Doc. No. A/AC.48/1.

[10] VESPASIAN V. PELLA, Towards an International Criminal Court, 44 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 60 (1950).

[11] Cited in FACHIRI, op. cit., p. 34.

is that university professors and private jurisconsults are the leaders in the legal field.[12] The first alternative is not uniform for different countries usually require different qualifications for appointment to the highest judicial tribunal thus one may prescribe at least ten years of the practice of law while another may call for at least twenty years of practice or having held certain offices for the same period.

In civil matters, judges with a modicum of expert knowledge may be eligible, but in criminal matters where the honor and freedom of persons are involved, every assurance must be made not to tamper with these priceless possessions of the accused. Profesor Pella deired to give equal weight to the knowledge of criminal law and of international law since complex problems of both branches of the law will surely arise in the penal court.[13] The Secretary-General of the United Nations recommended that majority if not all the members of the International Criminal Court must possess proficiency in criminal law — not of any specific country — but of the various countries which includes a body of principles and techniques which are more or less common to all. Half or at least one-third of the members of the Court should be equipped with a thorough knowledge of international law.[14] Judges of the proposed Criminal Court must be criminologists preferably those who have been members of criminal courts.[15]

Since the International Criminal Court is intended not to have jurisdiction over minor international crimes, that is national crimes with international complications as piracy, slave-trade, traffic in women and children, it is not knowledge of national legislations which is required, otherwise there will be as many judges as there are countries acceding to the convention. In such a case judges will be on an *ad hoc* basis and this is contrary to the basic concept of international criminal jurisidiction.[16] It is therefore competence in international criminal law which is required. As discussed before, there are oppositions from var-

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[12] Idem. It is interesting to note that for membership in the Arbitration Court under the Hague Conventions of 1899 and 1907, the qualifications were "high moral character and recognized competence in questions of international law" which would of course allow the appointment of political leaders and members of the diplomatic corps. Article 2, paragraph 1, Chapter I of the Statute of the International Law Commission states that the Commission shall be composed of 15 members who shall be persons of recognized competence in international law. U.N. Doc. No. A/CN.4/4. Cf. LOUIS B. SOHN, CASES AND OTHER MATERIALS ON WORLD LAW, p. 455 (1950).

[13] PELLA, op. cit., p. 60.

[14] U.N. Doc. No. A/AC.48/1.

[15] Caloyanni goes one step further by requiring judges should not be merely experts in book-learning in erudite chairs but must also have wide experience with general procedure of criminal law by having sat and passed judgments in Courts before. He says, only then will the penal tribunal inspire and commend the confidence and obtain complete acceptance by the international community. H. E. MEGALOS CALOYANNI Proposals of M. Laval for an International Permanent Tribunal in Criminal Matters—XXI TRANSACTIONS OF THE GROTIUS SOCIETY, pp. 88-89 (1935).

[16] U.N. Doc. No. A/AC.48/SR 4.

ious quarters to the use of said phrase which refers to a specialized branch which have neither been fully developed nor even formulated "and which has no scientific basis whatsoever."[17] An amendment was proposed in the Committee meetings to emphasize the prominent position that international criminal law should occupy in the law to be applied by the judges, which is more limited in scope than international law itself, but the proposal did not materialize.[18]

Number of Judges

The International Criminal Court shall consist of nine judges.[19] In the Revised Draft Statute, the 1953 Committee, however, increased the number to fifteen judges for it decided to establish a Committing Chamber to consist of five judges of the Court; but in maintained the same number of seven judges as sufficient to constitute the Court. The 1951 Committee unanimously agreed that no provision would be made as regards deputy judges.[20] The Rapporteur of the Committee explained that deputy judges will not be necessary. It is humbly submitted deputy judges could be of great aid to the International Criminal Court and thus at least four to six deputy judges should be added to the membership of the Court. Deputy judges had been of very valuable assistance to the Permanent Court of International Justice from its creation up to the time of the abolition of the post of deputy judges when there was an increase in the number of judges. They had been designated as judges *ad hoc* and had been called in rotation in accordance with a precedence based on priority of election and ages.[21] Deputy judges may be summoned in lieu of ordinary judges who fail to or are unable to attend the session of the court, and thus make a quorum, or in lieu of judges who become disqualified to sit in a case either by self inhibition or by decision of the Court under the Article on disability of judges.[22]

Two considerations had been taken into account in arriving at a decision as to the number of judges — namely, (1) that the number should not be too large and (2) that the Court should be representative of the diverse legal systems and main forms of civilization.[23] Thus nine (9) is considered as fairly large number which will sufficiently

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[17] U.N. Doc No. A/AC.48/SR 22.

[18] U.N. Doc No. A/AC.48/SR 25.

[19] Article 5 of the Draft Statute. See also Articles 5 and 44 of the Revised Draft Statute in U.N. No. A/AC.65/L.13 and U.N. Doc. No. A/AC.65/SR 19.

[20] U.N. Doc. A/AC.48/SR 23. Deputy judges have been availed of by the Permanent Court of International Justice. Cf. Article 3, Chapter I of its Statute, provided for in Article 14 of the Covenant of the League of Nations, specified that of the fifteen members of the Court, eleven are ordinary judges while four are deputy judges, but under the Revised Statute it was to consist of fifteen judges—no deputy judges being mentioned. Cf. ANTONIO SANCHEZ DE BUSTAMANTE, THE WORLD COURT, pp. 129-131 (1925).

[21] MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942, pp. 339-340 (1943).

[22] Article 16 of the Draft Statute.

[23] U.N. Doc. A/AC.48/SR 23.

enable the Court to handle the possible pressure of business. In the Secretary-General's Memorandum on the Creation of an International Criminal Court, he believes it advisable to fix the number of judges who will normally constitute the Court when called upon to try cases and the number should be at the Court's disposal to enable the constitution of a quorum. For the first he believes it may be 9, 11, 13, or 15, and the second must of course be greater.[24]

It will be interesting to review the composition of the International Criminal Court as proposed by other draft conventions. The *Commission Francaise du Droit Commun International* meeting in Paris in 1948 recommended the number of eighteen judges in a draft statute.[25] The Secretary-General of the United Nations in the first schedule (Article 6) of the draft convention on genocide recommended that the court be composed of seven judges and seven alternate judges, but each should belong to a different nationality, though this proposed tribunal is limited only to the crime of genocide. In 1943 the London International Assembly prepared a draft convention on the creation of an International Criminal Court and it provided for thirty-five judges.[26]

In 1919 the Allied Commission on Responsibility of the Authors of the War and on Enforcement of Penalties to the Preliminary Peace Conference provided for a tribunal of 22 members to try ex-Kaiser Wilhelm II, but the Treaty of Versailles in Article 227, provided for five judges. Baron Descamps of the 1920 Advisory Committee of Jurists drafted a plan for a High Court of International Justice and, recommended that there be one member for each state.[27] The Convention for the Creation of an International Criminal Court in 1937 which was made to depend on the Convention on Terrorism of the same date, recommended five judges and five alternate or deputy judges. In comparison with the others this is a smaller number inasmuch as this Court was to deal solely with cases of terrorism.[28] The Draft Statute for a Criminal Chamber within the International Court of Justice, adopted by the International Association of Penal Law in Paris in 1928 and revised in 1946 provided for fifteen judges and eight alternate judges. The draft plan for a Pan-American Court of International Justice adopted by the Seventh Pan-American Conference in Montevideo in 1933 provided for one member of the Court for each of the signatory states.

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[24] U.N. Doc. No. A/AC.48/1. For purposes of comparison, Article 3 of the Statute of the International Court of Justice provides that the Court shall consist of fifteen members, no two of whom shall be nationals of the same state.

[25] VESPASIAN V. PELLA, Towards an International Criminal Court, 44 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 60 (1950).

[26] HISTORICAL SURVEY OF INTERNATIONAL CRIMINAL JURISDICTION, U.N. Doc. No. A/CN.4/7 Rev. 1, pp. 97, 124.

[27] ANTOINE SOTTILE, The Creation of a Permanent International Criminal Court. XXIX REVUE DU DROIT INTERNATIONAL, pp. 348-349 (1951).

[28] MANLEY O. HUDSON, The Proposed International Criminal Court, XXXII AMERICAN JOURNAL OF INTERNATIONAL LAW, pp. 551 ff. (1938).

Mr. Miglioli proposed seven judges and two alternates, Professor Kelsen favored twenty-four judges of whom seventeen are experts in international law and seven are experts in criminal law. This figure was also adopted by Professor Pella, while Mr. Sottile proposed fifteen judges and eight alternate or deputy judges.[29]

Nationality of Judges

A judge can be of any nationality or without any nationality whatsoever.[30] The selection of judges will have to assume a universal character, meaning that no factor of nationality will be taken into consideration for the criterion must be their competence. But within the Court, no two judges should be of the same nationality. If a person is of multiple nationality, he shall be regarded as a national of the State where he ordinarily exercises his civil and political rights.[31] However, in case of subordinate officials as in the Registry, there can be representatives of more than one nationality.[32] The limitation of no two judges of the same nationality has in mind the representative character of the Court.[33]

Nomination of Candidates

A proposal was introduced by the United States representative in the 1951 Committee extending the right of nominating judgeship to all State members of the United Nations.[34] But this was disapproved and instead only States parties to the Statute can nominate candidates and not more than four candidates may be submitted by each state.[35] This decision has to a large extent been determined by the decision on the form by which the statute is to be adopted, that is, by a convention. The electors shall be representatives of the States parties to the statute, and not by the General Assembly as proposed. But as already mentioned, the 1953 Committee shifted emphasis from the states parties to the statute of the Court to states which had conferred jurisdicion upon the Court, thus only the latter states should participate in the nomination and election of judges of the Court.

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[29] SOTTILE, op. cit., pp. 348-349.

[30] U.N. Doc. No. A/AC.48/SR 25.

[31] Article 6 of the Draft Statute. Save for the number of judges, the entire Article 3 of the Statute of the International Court of Justice, has been reproduced in this article of the draft statute.

[32] ANTOINE SOTTILE, The Creation of a Permanent International Criminal Court, 29 REVUE DE DROIT INTERNATIONAL, pp. 349 ff. (1951).

[33] Article 10 of the Draft Statute, requiring that the judges as a body should as far as possible be representative of the main forms of civilization and the principal legal systems of the world, and this should be observed by the electors.

[34] U.N. Doc. No. A/AC.48/SR 23.

[35] Article 7 of the Draft Statute. But refer to Articles 7, 8, 9 and 11 of the Revised Draft Statute wherein the 1953 Committee substituted "States which have conferred jurisdiction upon the Court" instead of "States parties to the present Statute" as the states which should participate in the nomination and election of judges of the Court. Cf. U.N. Doc. No. A/AC.65/L.13 and U.N. Doc. A/AC. 65/SR 22.

Several reasons have been advanced by the majority in the 1951 Committee. If States not parties to the Statute will also be allowed to nominate and take part in the elections there will be very little incentive to become a party to the Statute. The common will of the States should be considered as the basis of the Court so that States which have opposed the creation of the Court should not be allowed to determine or have a voice in its composition. Besides every election, if undertaken by the General Assembly, will always be an opportunity for those adversaries of the Court to reopen the question of the principles underlying the establishment of the Court, thus undermining the prestige and authority of the Court.[36] However, if the General Assembly will not adopt the 1951 Committee's decision on the method of establishing the Court, and decides that the Court should be established by United Nations action, the link between the Court and the United Nations will warrant the election of the judges by the General Assembly and the representatives of such non-member States as may have subsequently acceded to the Statute or are original parties thereto.[37] In the event that it should be decided that the Court should be closely linked with the United Nations, the 1953 Committee adopted as alternative texts, that the nomination and election of judges would be by "members of the United Nations and by those non-member States which have conferred jurisdiction upon the Court."

Nominations should be made in order that there may be a limited number and so that there may be assurance that candidates have the required qualifications. In the Memorandum submitted by the Secretary-General nominations may be by (1) governments, (2) by national groups of the Permanent Court of Arbitration or by similar groups, and (3) by associations, institutions, courts, and faculties.[38] He desired that nominations should be by governments of member States of the United Nations and possibly governments of non-member States to whom an invitation to nominate has been sent by the General Assembly. If a maximum number is fixed, States can nominate a smaller number. There are numerous advantages in a liberty to nominate aliens. Judges should be nominated and elected for their merits and qualifications and not by their nationality. Under the Convention of November 16, 1937, for the Creation of an International Criminal Court for the Punishment of Terrorism, the method adopted was nomination by governments.[39]

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[36] U.N. Doc. No. A/AC.48/SR 23.

[37] U.N. Doc. No. A/AC.48/4. See also the alternative texts (alternative B of Articles 7, 8, 9, and 11). U.N. Doc. No. A/AC.65/SR 6; U.N. Doc. A/AC.65/SR 10; and U.N. Doc. No. A/AC.65/1.13.

[38] U.N. Doc. No. A/AC.48/1.

[39] Article 7 provides: Any member of the League of Nations and any non-member State, in respect of which the present Convention in force, may nominate not more than two candidates for appointment as judges of the Court. Freedom of choice is left to the governments to nominate either aliens or nationals, and governments nominate two candidates each, but the Court set up was to consist of five regular and five deputy judges.

This method is also prescribed by the Statute of the International Law Commission for the election of its members.[40] The International Criminal Court created by a convention the nomination could be reserved to States parties to convention even if election shall be by a League or United Nations organ.[41]

Another method of nomination proposed by the Secretary-General is by national groups of the Permanent Court of Arbitration or by similar groups. This system has been adopted for nominating candidates for the International Court of Justice.[42] Two or more national groups may nominate the same person or persons. A country knows her men of worth and capacity so her national groups can bring them to the attention of other States by nominating them. If other national groups nominate strangers — not their own nationals — the latter must be authorities at home and must have an international reputation abroad.[43] The nomination of candidates by national groups makes it more likely that the nominations will be based on judicial qualifications and less likely that they will be influenced by political considerations than would be the case if nominations are made directly by the governments of the various States.[44] Members of the Permanent Court of Arbitration, who are members of the Court appointed under Article 44 of the Hague Convention of 1907, are themselves nominated by the governments which have option to nominate either nationals or aliens but the governments generally nominate nationals. The effect is that candidates for International Court of Justice are indirectly nominated by governments, but the advantage is that members of the Permanent Court of Arbitration are less influenced by political consideration than the governments. The third system of nomination proposed by the Secretary-General is by legal bodies and tribunals and learned institutions. There are associations of specialists in international law and criminal law — and their controlling bodies can nominate candidates to the International Criminal Court. Besides the highest criminal jurisdictions or tribunals in each State can also effect the nomination. But there will be difficulties as

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[40] Article 3, Chapter I of Statute of the International Law Commission which provides that members shall be elected by the General Assembly from a list of candidates nominated by the governments of members of the United Nations. U.N. Doc. No. A/CN.4/4. Cf. LOUIS B. SOHN, CASES OTHER MATERIALS ON WORLD LAW, p. 455 (1950).

[41] This system has been provided for in the Convention of November 16, 1937, for the Creation of an International Court for the Punishment of Terrorism.

[42] Article 5 of the Statute of the International Court of Justice provides: "1. At least 3 months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the States, which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court."

[43] ANTONIO S. DE BUSTAMANTE, THE WORLD COURT, p. 119 (1925).

[44] F. N. KEEN, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 9 (1922).

there are many associations and some have consultative status with the United Nations while others do not have. It would therefore be difficult to form all the representatives of these institutions, faculties, and tribunals into a group to nominate candidates for the proposed Court. If support of these learned associations and faculties and tribunals be desired, then the nominating authorities — either States or national groups should consult them.[45]

The Committee finally decided that candidates shall be nominated by States parties to the present Statute for reasons already stated, and each State may submit the names of not more than four candidates. Of similar nature are candidates nominated for the International Law Commission as well as for the International Court of Justice who should not be more than four, and not more than two of whom shall be of their own nationality.

Invitation to Nominate

The Secretary-General of the United Nations shall fix the date of the election. At least three months before the election date, he shall address in writing a request to States parties to the Statute (as provided in the Draft Statute) or to States which have conferred jurisdiction upon the Court (as provided in the Revised Draft Statute) an invitation to undertake within a specified time the nomination of qualified persons who are in a position to accept the duties of a judge of the proposed court.[46] The last clause is no more than a statement that persons nominated should be qualified to serve on the Court for nominating authorities are not under obligation to make sure that their nominees are willing to accept membership if elected. This invitation to nominate should not be considered merely as a reminder to the gov-

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[45] The Statute of the International Court of Justice adopted this method. Article 6 reads as follows: "Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties, and schools of law, and its national academies and national sections of international academies devoted to the study of law."

By so doing the national group obtains the benefit of a viewpoint generally diverse from or in opposition to that of the national government—thus assuring impartiality and competence, arrived at through this kind of judicial plebiscite. Cf. ANTONIO S. DE BUSTAMANTE, THE WORLD COURT, pp. 118-120 (1925).

[46] Article 8 of the Draft Statute altered and appearing as Article 8 of the Revised Draft Statute. In the case of candidates for the Permanent Court of International Justice, they must know French and English, the designated official languages of the Court, for it would be hard for such judges who know not both languages to follow the hearing, the oral pleadings of counsel, and the testimony of witnesses, and it is not desirable for them to rely on translations. Cf. ANTONIO S. DE BUSTAMANTE, op cit., p. 115.

Since 1930 the Secretary-General followed the recommendation of the 1929 Conference of Signatories and endorsed by the Tenth Assembly, that when issuing invitations for nominations, the national groups should be advised to satisfy themselves that the candidates nominated should possess recognized practical experience in international law and they should be able to at least read both official languages and speak one of them; and that to the nominations should be attached a statement of the careers of the candidates justifying their candidacies. Cf. MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 244 (1934).

ernments but it also marked the actual initiation of the process of election of judges.[47] The electoral process with respect to the Permanent Court of International Justice and also the International Court of Justice consists of two stages, one which may be called social, and this deals with the nomination of candidates, and another which may be called political or diplomatic, dealing with the final election of the judges from the list of nominees.[48]

List of Candidates

The nomination process being complete, the Secretary-General of the United Nations shall prepare a list, in alphabetical order of all candidates, which list he submits to the States parties to the Statute.[49] The Draft Statute does not specify whether the list will give an indication of the source of nominations in each case. Speaking of the Permanent Court of International Justice, Mr. Fachiri says that the list should be without indication of the source of their nomination.[50] But Judge Hudson says that the list gives an indication of the source of nomination in each case and this opinion he supports with documentation.[51] The Rapporteur of the Committee, Mr. Sorensen, explained that Article 9 of the Draft Statute based on Article 7 of the Statute of the International Court of Justice, has for its purpose in drawing up the list in alphabetical order the assurance that candidates would be considered as individuals and not as representatives of any State.[52]

Election of Judges

A strong advocate for the creation of a permanent international criminal court suggested two systems of electing judges, namely, (1) by the United Nations General Assembly and Security Council, acting independently of each other, and (2) by the International Court of Justice. As to the first method he said that a majority vote will be sufficient and in the Council there will be no distinction between permanent and non-permanent members, and the veto power shall not be used for he claimed this not a matter relating to peace and security. He continued: "No matter what people say, the veto was provided in the Charter solely for questions relating to peace and security."[53] This method worked well in the election of judges of the Permanent Court of International Justice and had resulted in the election of the best judges, without con-

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[47] U.N. Doc. No. A/AC.48/SR 23.

[48] ANTONIO S. DE BUSTAMANTE, op. cit., p. 116.

[49] Article 9, Draft Statute.

[50] ALEXANDER P. FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 37 (1932).

[51] MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 244 (1934) citing League of Nations Official Journal, 1921, p. 811; League of Nations Documents, A.31.1930 V.

[52] U.N. Doc. No. A/AC.48/SR 25, p. 59.

[53] ANTOINE SOTTILE, The Creation of a Permanent International Criminal Court, 29 REVEU DE DROIT INTERNATIONAL, p. 350 (1951).

sidering their nationality.[54] The *French Commission du Droit Commun International* recommended the election of judges by the General Assembly and the Security Council from a list supplied by the Secretary-General enumerating inter-state penal law and international law experts. This method had also been proposed by Professor Vespasien Pella. The Convention on Terrorism in 1937 adopted the method of election by the International Court of Justice, that is, by a majority of the judges present who choose among the experts listed by the Secretary-General.

To the Committee had been suggested six (6) possible methods of electing the judges. First method suggested was election by an absolute majority of the General Assembly; second, election by an absolute majroity of the General Assembly, provided that such majority included three of the five permanent members of the Security Council. The third was election by the General Assembly with a two-thirds majority; fourth, election by the General Assembly and the Security Council provided that there be an absolute majority in each of these bodies. The fifth method was election by the International Court of Justice by an absolute majority; and sixth, election by an electoral college consisting of representatives of States parties to the convention and also by an absolute majority.[55] The method used in the election of judges of the Permanent Court of International Justice and the International Court of Justice has gained many adherents but it was discarded by the Committee for this would afford an opportunity to the States against the creation of the International Criminal Court to re-open discussions and advance criticisms on the Court with a consequent impairment of its authority.[56] The sixth method was the one incorporated into the statute. A change in the wording was made so that this expression "electoral college" as used in the initial draft was changed to "meetings of the representatives of the States parties to the present statute."

The judges of the International Criminal Court shall be elected at meetings of representatives of the States which are parties to the Statute. The 1953 Committee, however, decided that the judges of the International Criminal Court shall be elected by the representatives of States which have conferred jurisdiction upon the Court. These meetings are convened by the Secretary-General of the United Nations after due notice to each of such States. To be elected, the candidate

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[54] The objection to this method lies in the fact that this will give double votes to states represented in both the General Assembly and the Security Council. Thus some advanced the alternative of an election solely by the General Assembly. These views have been reconciled by the United Nations Committee of Jurists by deciding that both organs shall participate in the elections and an absolute majority shall be required of each organ, and no distinction in voting shall be made between the permanent and non-permanent members of the Security Council. Cf. UNCIO Verbatim Minutes of the Second Meeting of Commission IV, June 15, 1945, Doc. No. 1007, IV/12 p. 3-4 (Doc. XIII, pp. 55-56) LELAND M. GOODRICH AND EDUARD HAMBRO, CHARTER OF THE UNITED NATIONS, p. 481 (1949).

[55] U.N. Doc. No. A/AC.48/SR 23.

[56] Idem.

must obtain the votes of an absolute majority of those present and voting. If more than one national of the same State obtain a sufficient number of votes for election, the one who obtains the greatest number of votes shall be considered elected, and if the votes are equally divided, then the elder or eldest candidate shall be considered elected.[57] The reason underlying the provision is to prevent any country from securing a position of preponderance in the Court and to serve as an additional assurance of a widely representative character of the Court.[58] If by the first balloting the required number of selections has not been made, then successive ballotings shall be performed. A second or third meeting may take place until all the seats are filled. Under the Rules of Procedure of the General Assembly and the Security Council, a meeting covers a series of ballotings in conformity with the League of Nations practice. Prior to the adoption of such practice, both organs considered a meeting similar to a balloting.[59]

Representative Character of the Court

The composition of the International Criminal Court will also be effected by the article on the representative character of the Court which requires the electors to bear in mind that the judges as a body should, as far as possible, represent the main forms of civilization and the principal legal systems of the world.[60] This is identical with the provisions of Article 9 of the Statute of the International Court of Justice save for the addition of the phrase "as far as possible." This additional qualification was inserted for it is possible that countries belonging to certain legal systems might not be parties to the Statute and so candidates representing those systems might therefore not be nominated, although there is nothing to prevent member-States from nominating said candidates who are not their nationals.[61]

The intention is not to refer to the various systems of international law which govern — for if this be the case then this will be contrary to the principle of unity and universality of international law upon which the establishment of an international court is based. Rather the objective is to secure representation of the various systems of legal education and various types of civilization so that the Court will be in a position to appreciate fully any question on national law, custom, insti-

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[57] Article II of the Draft Statute, altered and appearing as Article II of the Revised Draft Statute.

[58] ALEXANDER P. FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 38, (1932).

[59] The meaning of "meeting" appearing in Articles 11 and 12 (1) of the Statute of the International Court of Justice was raised during the election of judges. It was upon suggestion of the Secretariat of the United Nations that the League of Nations practice on the matter has been adopted by the two abovementioned organs. U.N. Doc. No. A 25 and U.N. Doc. No. A/314. Cf. GOODRICH and HAMBRO, op. cit., p. 482.

[60] Article 10 of the Draft Statute.

[61] U.N. Doc. No. A/AC.48/4.

tution, or practice.[62] The draft statute commented upon by H.E. Megalos Caloyanni provided that there may sit on the international penal tribunal a special judge from the country of the accused but he would act in an advisory capacity.[63] Such provision on the representative character of the Court will tend to internationalize the Court so its decisions will be based on a world-wide comprehension of the problems presented and the applicable principles of law.[64] However, in spite of this last-cited provision and the other provisions on nomination and election of judges, a canvass of the election results, for example those of the 1930 elections to the Permanent Court of International Justice, will show that there must also be some definite electoral arrangements between the various groups of powers.[65]

Solemn Declaration

After the election each judge shall, before discharging his functions, make in open court a solemn declaration that he will perform his functions impartially and conscientiously.[66] Although Article 13 of the Draft Statute is based on Article 20 of the Statute of the International Court of Justice, the Committee believed that the clause "he will exercise his powers" will be improved by making it read "he will perform his functions."[67] The oath of office will be prescribed by the Rules of the International Criminal Court. It may be patterned after the oath prescribed for judges of the Permanent Court of International Justice which reads as follows: "I solemnly declare that I will exercise my powers and duties as a judge honorably and faithfully, impartially and conscientiously." This declaration is made at the public inaugural session held after a new election of the Court.[68]

Terms of Office

Judges of the International Criminal Court are to be elected for a term of nine years and they are eligible for reelection. However, among the judges elected at the first election, the terms of three judges shall expire at the end of three years, and the terms of three more shall expire at the end of six years, thus the periods of service are staggered so much so that three judges shall be elected every three years. The judges whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot drawn by the Secretary-General of the United Nations after the first election has been com-

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[62] FACHIRI, op. cit., p. 38.

[63] H. E. MEGALOS CALOYANNI, Proposals of M. Laval for an International Permanent Tribunal in Criminal Matters, XXI TRANSACTIONS OF THE GROTIUS SOCIETY, pp. 88 *ff.* (1935).

[64] ANTONIO S. DE BUSTAMANTE, THE WORLD COURT, p. 115 (1925).

[65] CALOYANNI, op. cit., p. 89.

[66] Article 13 of the Draft Statute.

[67] U.N. Doc. No. A/AC.48/SR 23. U.N. Doc. No. A/AC.48/SR 25.

[68] ANTONIO S. DE BUSTAMANTE, THE WORLD COURT, p. 160 (1925).

pleted. Each judge shall continue discharging his duties until his place has been filled. Though already replaced, he shall finish any case which he may have begun. In case of resignation, it shall be addressed to the President of the Court who shall transmit the resignation to the Secretary-General and this transmission shall make the seat vacant.[69]

Like any other judges, those of the International Criminal Court must also be independent. They should not hold office at the pleasure or whim of any power or authority. However, as the Court is an international one, there must be some provision for the periodical renewals or elections to assure proper distribution of representation. Besides the eventuality of a judge reaching such ripe old age in which he is already unfit to exercise his functions must also be guarded against. The Draft Statute therefore does not provide for any life appointments.[70] Moreover the term of nine years is a sufficient time to satisfy the conditions of independence and continuity of jurisprudence. During the term of office, the judge enjoys absolute security of tenure unless dismissed by the unanimous opinion of all the other judges. The considerations therefore involved in the term of office of judges are: (1) irremovability, (2) continuity of jurisprudence, and (3) possibility of removing unsatisfactory judges.[71]

By the provision of the Draft Statute, the Court is always in being. If there be a delay in the election, the continuity of the functioning of the Court is not hampered.[72] The judges continue to act till their seats have been filled and there is therefore no vacation of office. Even after the election of a successor a judge continues to act and to finish any case which he may have begun to hear at the time of the expiration of his term, otherwise it will be inconvenient for the parties as well to have the case whose hearing has already commenced, be taken over by the Court with new members.[73]

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[69] Article 12 of the Draft Statute. Paragraphs 3 and 4 of Article 13 of the Statute of the International Court of Justice are identical with paragraphs 2 and 3 of this article 12 of the draft statute. . Paragraph 2 is the mechanism for determining judges whose terms expire at the end of the initial periods of office. Cf. U.N. Doc. No. A/AC.48/SR 23.

A 10-year term of office is provided by the Convention on Terrorism and there is eligibility for reelection. SOTTILE, op. cit., p. 349.

[70] "If judges are to be appointed on a permanent basis and will therefore forsake all occupations, malevolent tongues would argue that their existence was not justified because in the nature of things few cases would be brought before them and that there was no reason to keep them idle while drawing substantial salaries," thus argued the delegate from the United Kingdom of Great Britain and Northern Ireland, Cf. U.N. Doc. No. A/AC.48/SR 2.

[71] ALEXANDER P. FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 40 (1932).

[72] EDWARD LINDSEY, THE INTERNATIONAL COURT, p. 89 (1931).

[73] Judge Hughes who had telegrammed his resignation as a member of the Permanent Court of International Justice, to the President of the Court and to the Secretary-General of the League of Nations, was requested to sit in the Free Zones case where he had before sat in an early stage of the proceedings, but he declined. MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 376 (1943).

Vacancies

Vacancies due to death, removal, or resignation are filled by the same method as that prescribed for the first election, except that the Secretary-General of the United Nations shall within one month of the occurrence of the vacancy, issue the invitations provided for in Article 8 to States parties to the Statute. The judge elected to replace a judge whose term of office has not expired shall hold office only for the remainder of his predecessor's term.[74] The alternative system of conferring upon the judges elected to fill casual vacancies the full term of nine years is not adopted. The necessity of affording to the States parties to the Statute a free hand in obtaining an equitable distribution of seats by means of a general election every nine years (actually every three years as terms of office have been staggered) had been emphasized not only by the Draft Statute but also by the respective statutes of the Permanent Court of International Justice and the International Court of Justice.[75]

There had been several instances of resignations by judges of international courts. The original Statute of the Permanent Court of International Justice had no provision on resignation. When the question was raised before the 1920 Committee of Jurists, the answer was that judges had a natural right to resign. The amended Article 13 of the Statute of the Permanent Court of International Justice states that the resignation should be addressed to the President of the Court for transmission to the Secretary-General of the League of Nations and it is the last notification which makes the place vacant. This was the basis of a similar provision of the Statute of the International Court of Justice. Some judges who resigned from the Permanent Court of International Justice were judges Urrutia, Nagaoka, Moore, Hughes, Kellogg, and Wang.[76] On January 31, 1946, the judges of the Permanent Court of International Justice submitted their resignation through the President of the Court to the Secretary-General of the League of Nations in order to give way to the International Court of Justice.[77] For reason of failing health, Judge Krylov of the International Court of Justice has resigned. Judge Golunsky, who had never taken his seat, resigned from the International Court of Justice, and the vacancy was filled in November, 1953, by the election of Mr. Kojevnikov, another Soviet national.

Vacancies in the Permanent Court of International Justice were also caused by the lamentable deaths of judges. The first vacancy in the Court was caused by the death of M. Ruy Barbosa in March, 1923,

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[74] Article 19 of the Draft Statute. Paragraph 2 of Article 19 is identical with Article 15 of the Statute of the International Court of Justice.

U.N. Doc. No. A/AC.48/SR 23.

[75] FACHIRI, op. cit., p. 41.

[76] MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, pp. 376-377 (1943).

[77] INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1946-1947, pp. 26-27.

who was never well enough to take his seat as one of the Judges of the Court.[78] M. Weiss, Vice-President of the Court from its inception, died in 1928 and Lord Finlay died in 1929. Their respective successors, M. Fromageot and Sir Cecil Hurst, were elected to replace the unexpired periods of their terms of office.[79] In 1940, another vacancy was created by the death of Count Rostwarowski.[80] The most recent death was that of Sir Benegal Rau, of the International Court of Justice, but the vacancy was already filled. As a consequence of this death, six instead of the usual five judges had been elected in the 1954 periodical elections. Sir Zafrulla Khan of Pakistan, Professor Lauterpacht of England, Mr. Cordova of Mexico, and Mr. L. M. Moreno Quintana of Argentina, were elected while Judges Basdevant and Guerrero were re-elected.

Dismissal of Judges

Vacancies may also be created by dismissal of judges. No judge shall be dismissed unless, the other judges are of the unanimous opinion that he has ceased to fulfill the conditions required for his continuance in office. A formal notification of such unanimous opinion shall be made to the Secretary-General of the United Nations by the Registrar of the Court, which notification shall make the place vacant.[81] The question is not referred to the electors or governments, but to the Court itself in order that impartiality and full knowledge of the necessary information can obtain in the premises. The Court itself shall declare the place vacant only when there is a unanimous decision that the subject judge has ceased to fulfill the required conditions.

By Article 6 of the Rules of Court for the regulation of the internal affairs of the Permanent Court of International Justice, in such an event, the President or if necessary, the Vice-President shall convene the judges and the number affected shall be allowed to give his explanations, and then he shall withdraw. The other judges shall then make their deliberations and then vote. Proceedings of such nature may be initiated by any member of the Court if any of the elected did not possess or later on lose high moral character, this defect being established by judgments against him. The full Court itself could by unanimous vote, after hearing him, dismiss him.[82] No definition has been made of the "required conditions" and the provision cannot be

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[78] ANTONIO S. DE BUSTAMANTE, THE WORLD COURT, p. 122 (1925).

[79] FACHIRI, op. cit., p. 16

[80] HUDSON, op. cit., p. 258. This death raised the question whether the death of a judge who had continued in office after the expiration of the nine-year term for which he was elected created a "vacancy." The Secretary-General proceeded to invite national groups to make nominations but no further steps were taken towards holding an election.

[81] Article 18 of the Draft Statute. This is a reproduction of Article 18 of the Statute of the International Court of Justice. U.N. Doc. No. A/AC.48/SR 23.

[82] DE BUSTAMANTE, op. cit., pp. 113, 137.

confined merely to physical incapacity — for the Permanent Court of International Justice had before thought that this article can also be invoked in extreme cases of unexcused absences.[83]

Rights and Duties of Judges

After a judge is elected and has taken the oath of office, certain rights and duties thereupon attach to him. Judges have the right to security of tenure for nine years and are irremovable except by the unanimous decision of the other judges as discussed before. A life tenure would free judges from all thoughts of self-aggrandizement and would make them fully devoted to their work as judges of the International Criminal Court. A more definite and certain law and jurisprudence will arise from such continuity of term. Nevertheless, however advantageous life tenure may be, yet it is impractical since there is a limited number of judges in the court and some nations would also desire to be represented on the International Court.[84]

Emoluments

Another right conferred on the judges is the right to emoluments. Each participating judge shall be paid travel expenses, and a daily allowance while sitting in sessions of the International Criminal Court. Each judge shall be paid an annual remuneration.[85] The remuneration of judge will therefore be in two forms—first, a fixed salary paid for the year, which as proposed by the Secretary-General of the United Nations in his Memorandum,[86] will be a nominal amount, and second, an allowance proportional to the time spent in participating in the sessions of the Court including travel expenses. Grants and allowances must be computed from the day the judge leaves his country to the day he returns to it by such length of time as a normal trip requires. The Draft Statute did not fix the amounts of such emoluments.

The question as to who would determine the emoluments of judges could not be left to the Court itself. The United States proposal that it be left to the General Assembly was premised upon the assumption that the International Criminal Court is to be established by a resolution of the General Assembly. Since the Court is to be created by an independent body—the convention, such proposal is not feasible. The power must therefore logically reside in the States parties to the Convention establishing the Court.[87] With respect to the International Court of Justice,

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[83] HUDSON, op. cit., pp. 374-375.

[84] ANTONIO SANCHEZ DE BUSTAMANTE, THE WORLD COURT, p. 135 (1925).

[85] Article 22 of the Draft Statute. It is submitted that like the salaries of judges of the International Court, salaries of the International Criminal Court judges may not be decreased during their term of office. An amendment of the draft statute to this effect will enhance the independence of the Court.

[86] U.N. Doc. No. A/AC.48/1.

[87] U.N. Doc. No. A/AC.48/SR 24.

salaries of judges are fixed by the General Assembly and may not be decreased during their term of office.[88] As regards the Permanent Court of International Justice, the annual indemnity or salary of judges had been fixed by the Assembly of the League of Nations on proposal of the Council.[89] The President is given a special annual allowance, which the Vice-President also receives every day he acts as President. The Draft Statute of the International Criminal Court is silent on the point. It is submitted that there should be such similar special allowances or grants in favor of the President and Vice-President of the International Criminal Court.

However, the judges of the International Criminal Court will not receive a remuneration as much as that of the International Court of Justice unless they are actually holding sessions. The Committee decided that they should receive a nominal annual allowance of a symbolic nature and in addition thereto a daily allowance when they are sitting in sessions. These amounts shall be determined by the States parties to the Statute as may be promulgated in the financial regulations governing the Court. Allowances for the usual travelling expenses will also be granted.[90] Article 23 of the Draft Statute creates a joint fund to be collected, maintained, and administered by States parties to the Statute and from this fund shall be paid, among other things, the costs of maintaining and operating the Court.

Separate Opinions

At the trial, each judge has the right to ask questions to the witnesses after the President is through. By Article 48 of the Draft Statute if the judgment does represent in whole or in part the unanimous opinion

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[88] Article 32, Statute of the International Court of Justice. Under this article, the General Assembly on February 6, 1946, adopted a Resolution which fixes the emoluments of judges. The President receives an annual salary of 54,000 florins. The Vice-President receives an annual salary of 54,000 florins and an allowance of 100 florins each day that he acts as President, up to a maximum of 10,000 florins. Members receive an annual salary of 54,000 florins. The judges referred to in Article 31 of the Statute of the International Court of Justice will be given an allowance of 120 florins a day on which they exercise their functions plus a subsistence allowance of 60 florins a day. Cf. INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1946-47, pp. 129-30.

However by virtue of Resolution No. 474 (V) of December 15, 1950, the General Assembly raised and fixed the emoluments of judges in U.S. dollars. Thus the President receives an annual salary of $20,000 and a special allowance of $4,000; the Vice-President an annual salary of $20,000 and an allowance equivalent to $30 for every day he acts as President but not to exceed the maximum of $3,000 per annum. Members are paid an annual salary of $20,000. Judges referred to in Article 31 of the Statute are entitled to an allowance of $35 for each day on which they exercise their functions plus a daily subsistence Regulations of the International Court of Justice. See INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1951-52, pp. 113-115.

[89] There had been several changes in the salary of judges of the Permanent Court of International Justice. The remuneration may be said to have varied from 15,000 florins minimum to 35,000 florins maximum from 1922 to 1930; from 1931-1936; 45,000 florins from 1936 to 1939; and 36,000 florins in 1940. See MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, pp. 317-319 (1943).

[90] U.N. Doc. No. A/AC.48/4.

of the judges, the dissenting judges are authorized to deliver separate opinions. Two views are presented on this right. One which is in favor of the right says that the prestige and power of the Court are not impaired by the dissent. It is a help in the upholding of the national pride by the dissent of the national judge concerned and serves as an encouragement for awards to be complied with. As M. de Bustamente places it, "one must not stifle his individual conscience with the anonymous decision of an undertermined group."[91] The other view is that it is inadvisable to allow separate opinions for these will replace the necessary collective responsibility of the Court by the individual responsibility of the judges. The practice it is alleged will tend to destroy the unity of the Court. Besides with various separate opinions it may become difficult to secure the majority required for the sentence.[92]

Honors, Decorations, Pensions

During their terms of office, judges of the International Criminal Court may receive decorations and honors from national governments, inasmuch as the Draft Statute is silent on the point. A prohibition on the matter was contained in earlier drafts of the Statute of the Permanent Court of International Justice. No judge possessing the required qualifications will be capable of having his opinion or vote unduly influenced by such honors and decorations or expectancy thereof. In the financial regulations of the International Criminal Court, to be promulgated by the States parties to the Statute, (or the States which have conferred jurisdiction upon the Court under the Revised Draft Statute), it would be proper to provide for retirement pensions in favor of judges. This will enable the Court to avail of the services of capable persons who would be willing to change the course of their lives for nine years by becoming judges of the International Criminal Court.[93]

ORGANIZATION (CONTINUED) AND ADMINISTRATIVE STRUCTURE

Diverse obligations arise as a natural consequence of the acceptance of a seat in the International Criminal Court. The judge must therefore be present in every session of the Court. If he has sufficient reasons to justify his absence he must inform the Court through the President accordingly. He is expected to reside at the seat of the Court or in its vicinity during sessions. Another obligation is the preparation of reports or resolutions entrusted to him and of the opinion in every case heard and submitted for judgment. Every judge must participate in voting on a decision and he should therefore not abstain from voting.[1] The last statement refers to a judge who sits in the case for there are instances when a

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[91] DE BUSTAMANTE, op. cit., pp. 141-142.
[92] U.N. Doc. No. A/AC.48/4
[93] DE BUSTAMANTE, op. cit., pp. 140, 149.
[1] ANTONIO SANCHEZ DE BUSTAMANTE, THE WORLD COURT, pp. 148 *ff.* (1925).

judge is under a disability or disqualification from participating in a particular case. These disqualifications, disabilities and incompatibilities will be discussed. Then the privileges and immunities of judges will be treated of, and lastly the administrative structure of the proposed Court will be dealt with herein.

Occupations of Judges — Incompatibilities

No judge may hold an office or exercise a function which is incompatible with his position of an international judge. Thus no judge shall engage in any occupation which interferes with his judicial function during sessions of the Court. Any doubt on this point shall be settled by the decision of the International Criminal Court.[2] The article reconciles the principle of independence of the Court with the desire to utilize the services of the best men as judges which functions would not occupy their full time.[3] Since the International Criminal Court will not remain in permanent session, the Committee decided that judges should not be barred from engaging in other professional occupations. Since his duties as a member of the Court are the ones paramount, then such other occupations must not prevent him from attending sessions of the Court and neither should they be incompatible with his functions as a judge.[4]

As to what constitutes an incompatibility can be gleamed from the Statutes of the International Court of Justice and also of the Permanent Court of International Justice. Article 16 of the Statute of the latter provides that ordinary judges will not exercise political or administrative functions. The former's Statute goes further by prohibiting a judge from engaging in any other occupation of a professional nature. Political or administrative function has been interpreted by the Court as a function in the exercise of which the holder is subject to the direction and control of his government and is thus deprived of independence in judgment and action.[5]

Exercise of legislative functions at home, as the cases of Viscount Finlay, a member of the House of Lords, and Mr. Altamira, a Spanish Senator, would not amount to an incompatibility, unless active part be taken in the political activities of a popular chamber.[6] Judges can discharge judicial or quasi-judicial, and educational functions at home. They can sit in national courts and deliver lectures at universities and they can acts as arbitrators or members of conciliation comissions. A judge can

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[2] Article 15 of the Draft Statute. For its counterpart in the Revised Draft Statute, refer to U.N. Doc. A/AC.65/L.13.

[3] ALEXANDER P. FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 42 (1932).

[4] U.N. Doc. No. A/AC.48/4.
U.N. Doc. No. A/AC.48/SR 23.

[5] JOHN BASSETT MOORE, The Organization of the Permanent Court of International Justice, p. 13 (1922), Reprint from XXII COLUMBIA LAW REVIEW No. 6, June, 1922.

[6] FACHIRI, op. cit., p. 43.

continue being a member of the government commission preparing copyright legislation or testing candidates for the diplomatic service, and there will be no incompatibility.[7] But they cannot be member of a government, a minister nor under-secretary of state, nor a member of the diplomatic nor civil service and neither can they be a legal adviser to a foreign office, nor a member of the Secretariat, nor a permanent representative to the United Nations.[8]

Disability of Judges

No member of the International Criminal Court may participate in the decision of any case in which he has previously taken part in any capacity whatsoever—as an advocate, or counsel, or as a member of a national or international court or in any other capacity. Any doubt on this matter is again decided by the Court.[9] There have been occasions when members of an international court, as the Permanent Court of International Justice from whose statute this provision has been patterned, have submitted their doubts to the Court relative to their disability to participate.[10]

Disqualification of Judges

A judge who for some special reason considers that he should not participate in a particular proceeding must inform the President accordingly.[11] The special reason mentioned by the provision must relate to reasons of a personal nature as for example having a pecuniary interest in the matter at issue or being related to an individual who is interested in a pending case. In the International Criminal Court, if the judge is related to the accused, this may be a special reason for his disqualifi-

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[7] MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 373 (1943).

[8] *Cf.* DE BUSTAMANTE, op. cit., p. 146.

[9] Article 16 of the Draft Statute which also appears in the Revised Draft Statute, is identical in substance with Article 17, paragraphs 2 and 3 of the Statute of the International Court of Justice. U.N. Doc. No. A/AC.48/SR 23, U.N. Doc. No. A/AC.65/L.13. Article 33, paragraph 1 of the Revised Draft Statute, among other things, provides: "No judge who has participated in committing a case may adjudicate on the substance thereof." Cf. Also U.N. Doc. No. A/AC.65/SR.14 and U.N. Doc. No. A/AC.65/SR.19.

[10] Judge Huber who had acted as legal adviser to the Swiss Political Department before the *Free Zones* case arose, was not disqualified from participating in the case. Judge Fromageot though a member of an arbitral commission which passed upon certain claims made the basis of an application, sat in the *Phosphates* case. Judge Weiss participated in the *Wimbledon* case although he had been a member at the Paris Peace Conference of the Committee which drafted the Convention which interpretation was at issue. Judge Tenekides sat as a judge *ad hoc* in the *Societe Commerciale* case in 1939 although he had acted as adviser for Greece during the negotiations between Greece and Belgium prior to the filling of the case. Judge Papasoff, judge *ad hoc* nominated by Bulgaria, and who had been a member of the arbitral tribunal whose awards were invoked in the application was allowed to sit in the *Electricity Company* case. HUDSON, op. cit., pp. 369-370 (1943).

[11] Article 17, paragraph 1 of the Draft Statute and also appearing on the Revised Draft Statute. This reproduces the substance of Article 24 of the Statute of the International Court of Justice.

cation. This is a subjective disqualification as the judge himself withdraws. The withdrawal must take place as much as possible before the oral hearings, in order not to adversely affect the existence of a quorum.[12]

Any party to a proceeding may submit that a judge should not participate in that proceeding. Such submission shall be addressed to the President. Upon receipt of such submission, or on his own motion, if the President believes that the judge should not participate in that proceeding, he shall so advise the judge. If the President and the judge disagree on the matter, then it shall be decided by the Court.[13] As criminal jurisdiction is involved, special rules have been provided allowing the parties to submit that a judge should not participate in a particular proceeding. In a criminal case, the principle of national judges *ad hoc* is inapplicable, so that any party whether the prosecution, or the defense or a State intervening under Article 30 may challenge the right of a judge to sit in the case.

The mere fact that a party challenges the right of a judge to sit in the case will not mean the withdrawal of the judge otherwise such procedure may result in the court being paralyzed if there be several defendants, and if challenges have been made against each member of the Court. Neither would it be a satisfactory procedure to allow the challenge to be made in open court. If a party wishes to avail of this right, he must approach the President and inform him of his objection. If found justified, the President shall advise the judge to withdraw. If they disagree then the court decides.[14] An example may be cited in the proceedings of the Permanent Court of International Justice. In the Free Zones case in 1930, the President of the Court, Judge Anzilotti, expressed the opinion that Judge Fromageot, should not sit in the second phase of the case. Judge Fromageot was elected in 1929 after the promulgation of the order of August 19, 1929. Since he had represented the French government in the negotiations resulting in the signing of the special agreement of October 30, 1924, Judge Fromageot was of the same opinion and therefore withdrew from the case.[15]

Privileges and Immunites of Judges

Each judge, when engaged on the business of the International Criminal Court, shall enjoy diplomatic privileges and immunities.[16] As to what definite privileges and immunities will be accorded have not been decided by the Committee but will be the subject of a subsequent con-

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[12] HUDSON, op. cit., p. 371.

[13] Article 17, paragraphs, 2, 3, 4,. "No such right had been conferred on parties to proceedings before the International Court of Justice." U.N. Doc. No. A/AC48/SR 26.

[14] U.N. Doc. No. A/AC.48/4, U.N. Doc. No. A/AC.65/L.13.

[15] HUDSON, op. cit., p. 370.

[16] Article 14 of the Draft Statute and also incorporated in the Revised Draft Statute. This is a reproduction of Article 19 of the Statute of the International Court of Justice. Cf. U.N. Doc. No. A/AC.48/SR 23.

vention. Some delegates wish to include specifications of such privileges and immunities in the Draft Statue, for an acceding State may wish to know the extent of such. This did not materialize. There was also a proposal to grant such immunities and privileges to the Registrar, and other officers of the Court, the accused and their counsel, counsel for the prosecuting attorney, and for States intervening for purposes of Articles 27 and 30 on jurisdiction, and also to witnesses. This was disapproved and note was made of the situation which might arise if the accused were found guilty and then he claimed the right to certain privileges and immunities. But the proponent explained that it was intended to cover special cases where for instance the accused might not be allowed passage or transit through a given territory.[17]

It might be worthwhile to observe that with respect to the International Court of Justice, Article 42 of its Statute grants to the agents, counsel, and advocates of the parties before the Court, the privileges and immunities necessary to the independent exercise of their duties.[18] These privileges and immunities are set forth in an exchange of letters between the President of the International Court of Justice, Mr. J. G. Guerrero and the Minister of Foreign Affairs of the Netherlands, Mr. J. H. Van Roijon, on June 26, 1946. An Appendix to the Court President's letter enumerates the privileges and immunities which were in turn confirmed by the Netherlands government through its Minister of Foreign Affairs. Members and staff of the International Court of Justice, of other than Dutch nationality, will enjoy these privileges, immunities, and facilities and prerogatives within Netherlands territory. Members of the Court will be accorded the same treatment as heads of diplomatic missions accredited to Her Majesty, The Queen of Netherlands. These privileges and immunites also apply to the Registrar of the Court and the Deputy-Registrar when acting for the Registrar. The Deputy-Registrar of the Court will be accorded the same treatment as Consellors attached to Diplomatic Missions at the Hague. Higher officials of the Court as First Secretaries and Secretaries will be accorded same treatment as Secretaries attached to the Diplomatic Missions at the Hague. Other officials of the Court will be treated as officials of comparable rank attached to diplomatic missions at the Hague.

Members of the Court, the Registrar and higher officials of the Court who are of Netherlands nationality are not amenable to local jur-

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[17] U.N. Doc. No. A/AC.48/SR 26. U.N. Doc. No. A/AC.48/SR 29.

[18] In the course of the discussions, the 1951 Committee Secretary, Mr. Liang, made a distinction between diplomatic immunity and immunity in respect to official acts. While "Article 105 of the United Nations Charter covered the latter kind of immunity, the Statute of the International Court of Justice restricted diplomatic immunity to its judges only." U.N. Doc. No. A/AC.48/SR 26 and U.N. Doc. No. A/AC.48/SR 25. Several books have been written on the extension of diplomatic privileges and immunities to officials of international organizations. For a representative work on the subject, refer to MARTIN HILL, IMMUNITIES AND PRIVILEGES OF INTERNATIONAL OFFICIALS (1947).

isdiction for acts performed in their official capacity and within the limits of their duties. Nationals of Netherlands of whatever rank are exempt from direct taxation on their salaries derived from the Court. Wives and unmarried children of members of the Court, the Registrar and the higher officials of the Court, when of non-Netherlands nationality shall receive the same treatment as the head of the family, if they live with him and are without profession. "The private establishment" (as governesses, private secretaries, servants, etc.) or household of the family shall be treated in the same manner as the domestic staff of diplomatic persons of comparable rank.

These privileges and immunities are granted for the sake of the administration of justice and not for personal interests of the beneficiary — thus such immunities may be waived by the Registrar with the President's approval — for the officials of the Registry. In case of the privileges and immunities of the Registrar, the same may be waived or withdrawn by the Court. Assessors of the Court, agents, counsels, and advocates of the parties shall be granted such privileges, immunities, and facilities for residence and travel as may be required for the independent exercise of their functions. Experts and witnesses shall be accorded the immunities and facilities necessary for the fulfillment of their mission.[19]

The General Assembly on December 11, 1946, adopted a Resolution approving the above agreements concluded between the International Court of Justice and the Netherlands government, and recommended that a judge be accorded diplomatic privileges and immunities if he resides in a country other than his own for the purpose of holding himself permanently at the disposal of the Court; and also recommends that judges be granted every facility for leaving the country where he happens to be, for entering a country where the Court is sitting and again for leaving it.[20] The Resolution further recommends that officials of the Court shall enjoy in any country where they are on business of the Court or through which they may pass for such business, such privileges, immunities and facilities for travel as may be necessary for the independent exercise of their functions. The Registrar or any officer of the Court while acting as Registrar may enjoy such privileges and immunities while on business of the Court. The Resolution further recommends that agents, counsel, and advocates before the Court, assessors of the Court, and witnesses, experts, and persons performing a mission by order of the Court should be accorded during the periods of their missions, including time spent in journeys in connection therewith,

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[19] INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1946-47, pp. 88-94.

[20] These privileges and immunities must include at least a freedom to travel to and from the seat of the Court. In the *Electricity Company* case, the Bulgarian Government seems to have forbidden the departure of the Bulgarian judge *ad hoc*. Cf. MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 331 (1934).

such privileges and immunities as are provided for in the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on February 13, 1946. Further the Resolution recommends that authorities of member states recognize and accept United Nations *laissez-passer* issued by the International Court of Justice to members of the Court, Registrar and officials as valid travel documents, and that visas be granted as speedily as possible to holders of such *laissez-passer* and the same facilities should be granted to experts and other persons not holders of United Nations *laissez-passer* issued by the International Court of Justice, but travelling on business of the Court.[21]

Besides the above-mentioned exchange of letters on June 26, 1946, and the General Convention on Privileges and Immunities of the United Nations of February 13, 1946 there are other special agreements relative to diplomatic privileges and immunities of the United Nations. Mention should be made of the United Nations General Headquarters Agreement approved by the General Assembly on October 31, 1947, the exchange of notes between the Secretary-General and the French Government relative to facilities to be made available to United Nations for the Sixth Session of the General Assembly, made on August 27, 1951. There was also an exchange of letters on September 21, 1951, between the personal representatives of the Secretary-General and the Republic of Korea regarding the privileges and immunities to be accorded the United Nations in Korea. Of the same nature was an agreement made between Japan and the United Nations on July 25, 1952. An interim arrangement on privileges and immunities of the United Nations had

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[21] The pertinent provisions of the Convention on the Privileges and Immunities of the United Nations, Assembly Resolution, Doc. A/64, 1946, p. 25 follow:

Article IV Sec. 11. Representatives of members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(b) Inviolability for all papers and documents;

(c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration, or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions:

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

(g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes. Cf. 1 UNITED NATIONS TREATY SERIES, pp. 16-32 (1946-47).

been concluded between the Secretary-General and the Swiss Federal In addition to these there are agreements, exchange of letters, notes, Council and approved by the General Assembly on December 14, 1946. and cablegrams relative to the operations and offices, and conferences, and sessions, facilities and privileges, and immunities granted by the host countries to United Nations Commissions, Missions, and subsidiary organs, a few of which are: the United Nations Relief in the Far East, the Permanent Central Opium Board, Commission and Inquiry on the Coca Leaf, United Nations Commission in Libya, United Nations Commission for Indonesia, Advisory Council for Somaliland, Technical Assistance Programs, United Nations Tribunal in Eritrea, Economic Commission for Latin America, the Economic and Social Council, and the Commission on the Status of Women.[22]

There are certain national legislations granting certain privileges and immunities to international officials. Before the war, Hungary accorded certain privileges to members of international courts.[23] Prewar Poland granted customs exemptions to representatives of international institutions and express mention has been made of the Court.[24] The United States President approved the "International Organizations Immunities Act"[25] on December 29, 1945. A Joint Resolution was passed on February 26, 1947, granting in the case of income, estate and gift taxes, deductions for contributions to the United Nations.[26] A Joint Resolution was also passed on August 4, 1947, authorizing the President to implement the United Nations General Headquarters Agreement.[27] Various executive orders, administrative regulations and departmental opinions have been promulgated relative to privileges, immunities and exemptions of the United Nations: exemption from registration and service under the Selective Service Act of 1948, income tax exemption of foreign governments, international organizations, and their employees, and customs exemption of the public international organizations. Australia, Canada, China, Denmark, India, Israel, New Zealand. Norway, Pakistan, Sweden, Switzerland, Syria, Union of South Africa, and the United Kingdom are other countries which have national legis-

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[22] For a discussion of these special agreements, refer to the UNITED NATIONS HANDBOOK ON THE LEGAL STATUS, PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS. U.N. Doc. ST/LEG/2, September 19, 1952, pp. 3-155.

[23] FELLER AND HUDSON, DIPLOMATIC AND CONSULAR LAWS AND REGULATIONS (1933) I, p. 677.

[24] Idem—II, p. 1018. The Rumanian government did not go to the extent of embodying her attitude in a national legislation. In 1929 the Rumanian Minister of Foreign Affairs addressed a letter to the President of the Court informing that Rumania had accepted the interpretation of the Statute's Article 19 on diplomatic privileges and immunities of members of the Court, as embodied in the agreement concluded between the Court and the Netherlands government in 1928. Cf. MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 330 (1943).

[25] Public Law 291, 79th Congress, 59 Stat. 669.

[26] Public Law 7, 80th Congress, 61 Stat. 6.

[27] Public Law 357, 80th Congress, 61 Stat. 756.

lation on privileges, immunities and exemptions accorded to international organizations and the United Nations.[28]

Officers of the Court

The International Criminal Court shall elect its President and Vice-President for three years and each may be re-elected.[29] The Presidency of the International Criminal Court is bound to be an outstanding position. He will naturally preside at the meeting of the Court and will direct the work and administration of the Court. The Vice-President acts in the absence of the President. Similar to the procedure in the Permanent Court of International Justice, it will be desirable to have the election of the officers held in full court and by secret ballot. If both the President and Vice-President are unable to discharge their duties then the oldest among the judges who has been longest on the Bench shall act as President and he shall then be designated as Acting President or Officiating President.[30] In the International Criminal Court, if the President for any special reason withdraws from the case, then the Vice-President performs his functions in that particular case.[31]

Rules of Court

The International Criminal Court shall adopt rules for carrying out its functions. In particular, it shall prescribe rules of procedure and such general principles governing the admission of evidence as the Court may deem necessary. These rules and any amendment thereto shall be published without delay and shall not be altered to affect pending proceedings.[32] Rules must therefore be promulgated immediately after the establishment of the International Criminal Court. These rules will deal not only with the court's internal organization, but also with evidence and procedure. It is necessary to have the rules in advance so as to inform both the prosecution and the defense. In the Nuernberg and Tokyo trials, such rules had not been published in such a manner as to have afforded ample time for both sides to be fully conversant with the same.[33] Care must be taken to phrase the rules, especially

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[28] For a detailed recital of the provisions of these various national legislations, consult United Nations Doc. ST/LEG/2 of the United Nations Secretariat dated September 19, 1952, pp. 156-310.

[29] Article 20, paragraph 1 of the Draft Statute and also incorporated in the Revised Draft Statute. This is similar to Article 21, paragraph 1 of the Statute of the International Court of Justice.

[30] *Cf.* FACHIRI, op. cit., p. 47.

[31] In the Permanent Court of International Justice, if the President is a national of one of the parties to a case, the Vice-President sits as President with regard to the particular case, unless he is also a national of one of the parties, in which event, the Presidency passes to the oldest among the judges who have been longest on the Bench and who is not similarly inhibited. Thus in the *Memel and Chinn* cases, the Vice-President replaced the President. HUDSON, op. cit., p. 343.

[32] Article 24 of the Draft Statute with its counterpart in the Revised Draft Statute.

on procedure, in such a manner that it may not be implied that they have a special reference to any particular national legal system.[34]

Registrar of the Court

Like every judicial tribunal, the International Criminal Court will have a Registrar for the registry is indispensable. Some members of the 1951 Committee proposed that the Registrar of the International Court of Justice should perform the work of the Registry of the International Criminal Court.[35] There were objections to this suggestion but the possibility of such Registrar being appointed if he be authorized by the International Court of Justice to accept such position is not ruled out.[36] The Court shall therefore appoint its Registrar and shall provide for the appointment of such other officers as may be necessary.[37] Considering the probable amplitude of the task of the International Criminal Court, there must also be a Deputy-Registrar similar to the International Court of Justice. It has been suggested that they should be selected from a list of experts in inter-State penal law and international law as compiled by the President of the Court.[38] The Registrar and the Deputy-Registrar should be elected by the members of the Court from candidates proposed by them from the said list. If there be an equal number of votes received, then the President shall cast the decisive vote.

The Registry of the International Criminal Court is also bound to be an office with becoming dignity comparable to the Registry of the International Court of Justice. The Registry is the office through which all procedural work passes.[39] Manifold will be the duties of the Registrar, such as custody of the records or archives and seal of the Court, and he will be the Chief of the administrative machinery of the Court. The work of the Registry will perhaps have four aspects similar to the Registry of the International Court of Justice, namely: judicial, diplomatic, administrative, and linguistic.[40] Documents and pleadings submitted in a case will be examined by the Registry for the

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[33] Cf. U.N. Doc. No. A/AC.48/SR 21. U.N. Doc. No. A/AC.48/SR 24. U.N. Doc. No. A/AC.48/SR 26.

[34] U.N. Doc. No. A/AC.48/4.

[35] Mr. Caloyanni writing in 1935 advocated that the registry for an International Criminal Court should be the Registry of the Permanent Court of International Justice and this set-up will therefore constitute a link. Besides the Court as he saw it, would not sit continuously, but only when convened to try cases. H. E. MEGALOS CALOYANNI, Proposal of M. Laval for an International Permanent Tribunal in Criminal Matters. XXI TRANSACTIONS OF THE GROTIUS SOCIETY, pp. 87-88 (1935).

[36] U.N. Doc. No. A/AC.48/4. U.N. Doc. No. A/AC.48/SR 24.

[37] Article 20, paragraph 2 of the Draft Statute also embodied in the Revised Draft Statute.

[38] ANTOINE SOTTILE, The Creation of a Permanent International Criminal Court, 29 REVUE DE DROIT INTERNATIONAL, p. 351 (1951).

[39] CALOYANNI, op. cit., pp. 87-88.

[40] Cf. INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1946-47, pp. 57-65.

determination of propriety of form and that there is no need for further documents to supplement the same.

Necessary documentation of the case can be made prior to the proceedings in order to save the time of the Court. Publication of the proceedings, pleadings, documents, and judgments shall be undertaken by the Registry. The diplomatic work of the Registry deals with the conduct of the necessary correspondence relative to cases before the Court, conducting correspondence with States intervening under Article 30, and preparing publications of the Court. The linguistic portion on drafting and translation will cover the interpretations at Court Sessions and translations for the two-language system of international courts.[41] The administrative work of the Registry comprises the internal administration proper which includes financial administration, preparation and distribution of documents, custody of archives, and perhaps maintenance of a library.[42]

Finances of the Court

As a consequence of the modality of establishing the International Criminal Court by a convention, the expenses of the Court and of its organs will not be included in the budget of the United Nations. The States parties to the Statute (as provided in the Draft Statute) or the States which have conferred jurisdiction upon the Court (as embodied in the Revised Draft Statute) will create a joint fund. The parties will adopt regulations relative to the collection and administration of this fund. From this fund shall be paid the costs of maintaining and operating the Court, the Committing Authority, the Prosecuting Authority, and the Board of Clemency including the fees and expenses of counsel for the defense, when under Article 38, paragraph 2, sub-paragraph (c) the Court is satisfied that the accused is not financially able to engage services of counsel.[43] The financial regulations to be promulgated as above stated will determine the remunerations of the judges and other officials of the Court. A plan which has been advanced but disapproved is to the effect that judges shall be paid by the States of which they are nationals.[44]

In the event that the International Criminal Court is created not

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[41] It is assumed that similar to the International Court of Justice, the International Criminal Court will also adopt English and French as its official languages.

[42] Cf. HUDSON, op. cit., pp. 301-309.

[43] Article 23 of the Draft Statute, modified correspondingly in the Revised Draft Statute.

U.N. Doc. No. A/AC.48/SR 28, U.N. Doc. No. A/AC.65/L.13. However, in the Revised Draft Statute the functions of the Prosecuting Authority have been taken over by a Prosecuting Attorney who is a jurisconsult to be appointed by the complainant or complainants (Article 34); the Committing Authority has been changed to the Committing Chamber (Article 33); and the Board of Clemency has been converted to the Board of Clemency and Parole (Article 53). Refer also to U.N. Docs. Nos. A/AC.65/SR.14; A/AC.65/L.6; A/AC.65/SR.14; A/AC.65/SR.14; A/AC.64/SR.19; A/AC.65/L.5; A/AC.65/SR.20; and A/AC.65/SR.22.

[44] U.N. Doc. No. A/AC.48/SR 24.

by a convention but by a resolution of the General Assembly and be therefore an organ of the United Nations, then budgetary matters of the Court will be simplified. In such a case, the Court's budget will, similar to the budget of the International Court of Justice be prepared by the Registrar. Such budget will be submitted to the Court or to its President if the Court is not sitting, and when approved shall be forwarded to the Secretary-General of the United Nations who includes it in the budget of the organization.[45]

It will be worthwhile to examine how the expenses of the International Court of Justice are borne. Under Article 33 of the Statute of this Court, the expenses of the Court shall be borne by the United Nations in such manner as decided by the General Assembly.[46] At the start of the year the Court is supplied by the United Nations Secretariat with an advance of 200,000 florins. At the end of each month, the Secretariat is informed of the expenditures for the month and then an equivalent amount is sent to the Court in order to maintain the original figure of the advance. However, the Registrar may at any time ask for further sums if additional expenditures require these additional advances.[47] Outlay has been changed from florins into dollars, the appropriations for the International Court of Justice being included in the United Nations budget.

Seat of the Court

The permanent seat of the International Criminal Court is a matter left undecided by the Committee. The Draft Statute, however, provides that the Court may sit and exercise its functions elsewhere whenever the Court considers it desirable.[48] The Committee deemed it wise to leave the matter of the seat of th Court an open one since it would largely depend upon which States adhere to the Draft Statute.[49]

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[45] By a resolution of February 13, 1946, of the General Assembly an Advisory Committee on Administrative and Budgetary Questions has been created which examines the report on the budget submitted by the Secretary-General and on report of the Committe the budget is then approved. Cf. INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1946-47, p. 128.

[46] In 1949 the Court's expenses ascended a total of $588,512. Out of the total United Nations budget of $49,641,772 for the year 1950, the revised appropriation for the Court amounted to $592,115. Of course, provision is also made for contributions by States parties to the Statute of the Court but are non-members of the United Nations, and also by States appearing before the Court but are not parties to the Statute of the International Court of Justice. Cf. OLIVER J. LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE, p. 1 (1951). For the financial year 1952, the budget of the International Court of Justice amounted to $639,860. Cf. INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1951-1952, pp. 113-116.

[47] Special steps were taken in 1946 at the time of the constitution of the Court. An advance to the Court of 500,000 florins was requested by the United Nations Secretariat, which sum was subsequently repaid by the United Nations. Cf. INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1946-47, p. 127. See notes 88-89 of the preceeding section.

[48] Article 21 of the Draft Statute. The second sentence reproduces Article 22 of the Statute of the International Court of Justice.

[49] U.N. Doc. No. A/AC.48/SR 24.

Proposals have been made to establish the Court either at the Hague or at Geneva.[50] The draft convention on genocide submitted to the Sixth Committee of the General Assembly by the French delegation provided for the Hague as the seat of the International Criminal Court. The same is true with the Convention on Terrorism.

Weighing all considerations, it is suggested that the Hague seems to be the most logical choice. The Hague is the seat of the International Court of Justice and of the Permanent Court of Arbitration. Furthermore if it is likely that the Registrar of the International Court of Justice shall also perform the functions of the Registrar of the International Criminal Court, then the latter must also have its seat at the Hague. Contact will be easier among the three international organizations above-stated. The work of the International Criminal Court with respect to documentation will be expedited since the Hague is the depository of all the archives of the Nuernberg and Tokyo trials, and of all documents connected therewith.[52]

Whichever place is chosen as the permanent seat of the Court, yet the Court may sit elsewhere for reasons of necessity, expediency, or convenience. Emergency may require the International Court to convene somewhere else. For instance in 1940 the offices of the President and Registrar of the Permanent Court of International Justice were transferred to Geneva.[53] If it so desires the International Criminal Court may sit at some other place than the seat of the Court. Where such journeys are to be made for the sittings of the Court, then it is incumbent upon the Registrar to make the necessary preparations and to draw the expenses from the working capital. An inquiry may be made away from the seat of the Court by members of the Court, or the Court may procure evidence on the spot, or it may conduct an ocular inspection of certain premises material to the offense charged.

RECOMMENDATIONS RELATIVE TO THE ORGANIZATION OF THE COURT

No stretch of the imagination is necessary to visualize that the institution of an international criminal jurisdiction will constitute a revolutionary change in penal and international laws.[1] It is but natural that such project for an international judicial organ be received with skepticism and criticism. It needs time to fully understand the sig-

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[50] It was suggested before that the International Criminal Court may sit either at the Hague or provisionally in the country of the High Contracting Party which has requested the Court to be convened. CALOYANNI, op. cit., pp. 87 ff.

[51] U.N. Doc. No. A AC.6 211. Cf. HISTORICAL SURVEY OF THE QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION, p. 145 (1949). U.N. Doc. No. A/CN. 4/7. Rev. 1.

[52] ANTOINE SOTTILE, The Creation of a Permanent International Criminal Court, 29 REVUE DE DROIT INTERNATIONAL, p. 351 (1951).

[53] HUDSON, op. cit., p. 333

[1] ANTOINE SOTTILE, The Creation of a Permanent International Criminal Court, 29 REVUE DE DROIT INTERNATIONAL, p. 357 (1951).

nificance of such new institution.[2] Aware of these facts, the 1951 Committee on International Criminal Jurisdiction in submitting its Report together with the Draft Statute states that it does not wish to give its proposals any appearance of finality. They are offered as a contribution to a more elaborate study which has to be undertaken before the problem of an international criminal jurisdiction is finally solved.[3] Thus the Committee's Report which includes the Draft Statute had been submitted to the governments of member-states for study and comments. As pointed out in the foregoing sections, the Draft Statute has been re-examined and in several portions amended by the 1953 Committee.

Observations, Comments, and Recommendations by Member States

In the brief historical survey made in the first article of this series, it has been mentioned that by September 10, 1952, governments of eleven member-states had submitted their observations. Two more member-states had filed their comments some five days later. Iraq averred it had no comments, while India informed that at the moment it did not wish to make any comments on the proposal.[4] Norway did not comment in detail on the Draft Statute since it regarded International Law on the matter as still embryonic and therefore it is not expedient to establish such tribunal.[5] Pakistan gave its views as to possible changes in the Draft. It favored the creation of the Court by means of a Resolution of the General Assembly, and wished that Statute must make mention of the specific offenses falling within the competence of the tribunal.[6]

China gave suggestions for the improvement of the Draft Statute. It believed that recognition of jurisdiction of the proposed Court should be provided for in the Statute instead of being the subject matter of subsequent conventions. The law to be applied and the penalties to be imposed should be specified. The Draft Statute should have dealt with the necessary privileges, immunities and facilities for the agents, counsels, and advocates of the parties to a case before the International Criminal Court. Australia believed that the creation of such Court is

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[2] EDWARD LINDSEY, THE INTERNATIONAL COURT, p. vii (1931), quoting Dr. Loder, President of the Permanent Court of International Justice.

[3] U.N. Doc. No. A/AC.48/4, later distributed as U.N. Doc. No. A/2136. The 1953 Committee Report which contains the Revised Draft Statute, and which will be submitted to the General Assembly at its ninth session this fall of 1954, appears in U.N. Doc. No. A/AC.65/L. 13.

[4] U.N. Doc. No. A/2186 covers the observations of the governments of Australia, Chile, France, Israel, the Netherlands, Norway, Pakistan, Union of South Africa, India, Iraq, and the United Kingdom of Great Britain and Northern Ireland. These comments together with the remarks of the representatives on the Sixth Committee are embodied in U.N. Doc. No. A/AC.65/1. U.N. Doc. No. A/2186/Add. 1 states the answers of China and Denmark. Subsequent comments of the Belgian government are set forth in U.N. Doc. No. A/AC.65/3.

[5] Idem.

[6] Ibid.

[7] U.N. Doc. No. A/2186/Add. 1

still premature for political reasons and due to the dearth of applicable positive law, but it considered the Committee Report as a satisfactory working paper for discussions of the General Assembly.[8]

Chile made a favorable reply stating that the Draft is generally acceptable and no provision of the same conflicts with its public laws. It observed that Article 25 of the Draft Statute is vague and must therefore be clarified by suitable wording whether the Heads of States come under the Court's jurisdiction while exercising their governmental functions or whether proceedings can be initiated against those who have acted as Heads of State and are no longer in that capacity at the time the charges are filed. Article 34 should be amended so that the panel of ten members which has no other function except to elect a Prosecuting Attorney, should be abolished, and the Committing Authority itself upon the issuance of the certificate for trial could simultaneously appoint the Prosecuting Attorney. Article 54 on Board of Clemency must indicate the qualifications and manner of election of the five members of the said Board.[9]

In principle, Denmark is not opposed to the provisions of the Draft Statute and would be able to sign such a convention provided it receives general support of the member States. However, it is afraid it may not obtain such support, and that States may be reluctant to invest the required jurisdiction.[10] France approved the general lines of the Draft Statute, but it offered plenty of suggestions on the alterations thereof. As to the procedure for establishing the Court, France subscribed to a convention following a conference organized for that purpose by the United Nations. Articles 1 and 26 should be more clearly and precisely worded in order to specify the nature of crimes or offenses in respect to which jurisdiction may be conferred upon the Court. It disapproves of Article 28 which requires the approval of the General Assembly of the jurisdiction of the Court, which has been conferred upon it. This would necessarily slow down the procedure especially in cases of jurisdiction conferred by a special agreement or unilateral declaration of States, considering that under Article 55, two or more States may at any time establish special tribunals vested by them with jurisdiction. Article 2 on law to be applied has not been felicitously drafted. There must be a reference to the Court's possible application of the natural law.

France advanced the opinion that right of access to the Court should be limited to the States and the General Assembly should not be em-

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[8] U.N. Doc. No. A/2186.

[9] Idem. With differences in composition and appointment, the organs referred to herein have their corresponding counterparts in the Prosecuting Attorney, the Committing Chamber, and the Board of Clemency and Parole, of the Revised Draft Statute. See supra, pp.

[10] U.N. Doc. No. A/2186/Add. 1.

powered to refer cases to the Court. If the General Assembly has such a right, then the more reason should the Security Council be extended such right since the latter has the primary responsibility for the maintenance of international peace and security under the United Nations Charter. There is no need for a collective decision inasmuch as majority of the General Assembly or of the Security Council consists of States parties to the Statute which can institute the action individually. However, if said States constituting such majority are not parties to the Statute then they possess no right to deny competence to a judicial authority by which they are not bound. Furthermore, a discussion in the General Assembly will amount to a pre-trial by a political body which will crystallize public opinion to the detriment of the accused who is brought into disrepute before he has a chance of defending himself in the International Criminal Court.

Once a state becomes a party to the Statute, France believed that such State ought *ipso facto* to have committed itself to assist and collaborate with the Court for purposes of investigation and execution of sentences. To require a special convention for the purpose, under Article 31 may paralyze the Court's operation. France proposed that under Article 33, the authority concerned must conduct first a preliminary inquiry if the complaint is well founded. If it is not dismissed then it would discharge the indispensable function performed by the *juge d'instruction* under French law. Finally France desired that separate opinions of judges may weaken the authority of the sentence, and may make it hard to form a majority in Court, and may even encourage "splinter" opinions.[11]

Israel advocated for an amendment of the United Nations Charter[12] with the idea of creating the International Criminal Court as a principal organ of the United Nations without impairing the position of the International Court of Justice as the principal judicial organ. Further it suggested that there must be a provision on the admissibility as evidence of the confession of the accused before the Prosecuting Attorney or any other extra-judicial confession. The Prosecuting Attorney must be permanent and not *ad hoc*. States should be allowed to intervene even as *amici curiae*. Judgments must specify the facts. Transcript of proceedings must be provided for. Special allowance must be given the Vice-President who acts as President of the Court.[13] Lastly Israel observed that if the International Criminal Court is brought into correct constitutional relations with the United Nations,[14] then the General Assembly could define the conditions under which the International

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[11] U.N. Doc. No. A/2186.
[12] Cf. Article 109 paragraph 3 of the United Nations Charter.
[13] Cf. Article 32 of the Statute of the International Court of Justice.
[14] Cf. Article 96, paragraph 2 of the United Nations Charter.

Criminal Court could request the advisory opinions of the International Court of Justice.[15]

The Netherlands government believed that the International Criminal Court can function satisfactorily. However, there must be a codification of international criminal law. Since nearly all the States are represented in the General Assembly, a resolution of the General Assembly would be the best mode for establishing the Court. Attention has been called to the fact that other tribunals had already been established by the General Assembly. It adhered to the draft provision that jurisdiction should be conferred upon the Court by separate conventions instead of being granted by the Statute itself as had been proposed by some member States. Article 2 on law to be applied should be deleted as it is redundant of Article 1, for national law will only be important in determining internal responsibility. International law will refer to this national law. Besides International Criminal Law is already a part of International Law. If the Court be created by a resolution of the General Assembly then the nomination shall be by States members of the United Nations and also by non-members who have conferred jurisdiction upon the Court. Consequently the election of judges must also be done by the General Assembly, similar to the system followed in the election of members of the International Law Commission.[16]

Establishment of the proposed Court is a practical proposition according to the Union of South Africa. Although it is highly desirable, yet it has been feared to constitute a risk to the further development of international good feeling and cooperation.[17] The United Kingdom of Great Britain and Northern Ireland expressed skepticism as to the desirability and possibility of instituting an international criminal jurisdiction on a permanent basis. The creation of the Court wll be premature, and may amount to an empty gesture. Consent and active cooperation of the States must be required. Occurrence of war crimes is spasmodic. This Committee scheme assumes the occurrence of an international catastrophe.[18] As shown by the amendments introduced by the Revised Draft Statute, some of the suggested points of reform have already been acted upon by the 1953 Committee.

Additional Suggestions for Reforms of the Draft Statute and Revised Draft Statute

Various amendments to the Draft Statute have been proposed in the comments and observations submitted by the governments of the

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[15] U.N. Doc. No. A/2186.
[16] Idem.
[17] Ibid.
[18] U.N. Doc. A/2186 in which the United Kingdom of Great Britain and Northern Ireland quoted with approval the statement of M. Donnedieu de Vabres that the State will surrender its citizens for trial of war crimes only during an international

members states. In addition to these recommendations appearing in the foregoing discussion, the Sixth Committee of the General Assembly meeting in 1952, suggested some other reforms to the Draft Statute. They foresaw the extension of the Court's jurisdiction over lesser crimes of international concern such as traffic in narcotics and persons, counterfeiting, and damaging of submarine cables. They also hoped that the International Criminal Court might act as a court of appeals or cassation with respect to minor war crimes. They visualized that with the establishment of the permanent International Criminal Court, such a Court would serve as a deterrent to international criminals, would contribute abody of procedents to international criminal law, and would carry out the police action initiated by the Security Council.[19]

In the course of the dissertation on the Draft Statute and especially the provisions on Organization of the Court, several suggestions have been made. It has been humbly submitted that Resolution of the General Assembly is a better mode of creation of the International Criminal Court. It is preferable to a convention for reasons stated, principal among which are that the Court will be a truly representative international judicial organ, and that plenty of difficulties, such as the budgeting problem, will be obviated.[20] Generally a person criminally liable is also civilly liable. Since the International Criminal Court will not adjudicate the civil liability of an accused for the reason stated in the discussion on the matter, it is submitted that such civil liability of the accused arising from his conviction should be allowed by a national court or by other special indemnization tribunal.[21]

It has also been submitted that deputy judges can be of great assistance to the Court so that four to six deputy judges should be elected. They may be summoned to form a quorum, or sit in lieu of judges who become disqualified to act in a proceeding.[22] To insure the independence of this tribunal, it has also been suggested that a provision be inserted in the Draft Statute to the effect that salaries of judges may not be decreased during their term of office, similar to a corresponding provision of the Statute of the International Court of

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catastrophe—as defeat in a major war, or a political upheaval resulting in a change of government where there is a proscription or flight of former state officals and political leaders.

[19] U.N. Doc. A/2275. See also VII International Organization p. 108 (1953)

[20] U.N. Doc. A/AC. 48/4.

[21] Supra, p. 373.

[22] Supra, pp. 388-389. However, it is interesting to note a comment on the number of judges composing the Permanent Court of International Justice, then with fifteen judges which is also the number provided for in the Revised Draft Statute. A Court ought not to have very many members as it may assume the appearance of an assembly so that the discusions may blunt and delay its opinions. Even now, the actual number of judges would be somewhat large if it were not for the provision that the principal juridical systems of the world as well as the main forms of civilization should be represented in the Court. ANTONIO S. DE BUSTAMANTE, The Permanent Court of International Justice, p. 11 (1925) Reprinted from 9 MINNESOTA LAW REVIEW pp. 122-29, (1925).

Justice. Another suggested amendment is for the grant to the President and Vice-President of the International Criminal Court when acting as President, of special allowances similar to those received by the corresponding officials of the International Court of Justice.[23] Of course the amounts alloted for such purpose to the International Criminal Court will be smaller.

Ater weighing all considerations as regards the possible seat of the Court, it has been suggested that the Hague is the most logical choice. It is the seat of the International Court of Justice and the Permanent Court of Arbitration, and also the depository of the archives and documents of the war crimes trials. Lastly it is humbly submitted that the Draft Statute provision on execution of judgments be amended to the effect that in the absence of a convention, and in case the Secretary-General of the United Nations, upon motion of the Court, cannot make arrangements with any state for the execution of the sentence, then the execution of the judgment shall be undertaken by the Security Council. In cases of exceptional gravity, just as the Security Council may under Article 94 of the United Nations Charter decide upon enforcement measures to give effect to a judgment rendered by the International Court of Justice, it may also in the case of judgments of the International Criminal Court take the necessary action where grave situations are involved.[24]

Conclusions and Final Recommendations

From the foregoing discussions it can be discerned that there is plenty of room for the improvement of the Draft Statute and of the Revised Draft Statute. This should not be a matter of alarm for it is a law of nature that nothing is born into this universe in a state of perfection — neither man nor man-made institutions. Everything goes through a process of slow and painstaking evolution.[25] Man is slowly moving toward world law. The fundamental problem confronting the

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[23] Refer to Article 32, Statute of the International Court of Justice.
See also supra, pp. 402.

[24] Refer to Article 52 of the Draft Statute. However, Article 51 of the Revised Draft Statute provides that sentences shall be executed in accordance with conventions relating to the matter.
Cf. DONNADIEU DE VABRES, DE L'ORGANIZATION D'UUNE JURISDICTION PENALE INTERNATIONALE, pp. 4 *ff.* (1948).
There must be a force powerful enough to enforce the decisions of the Court. Thus there had been suggestions towards the development of an international executive with sufficient power at its command to enforce the decisions of a world court in the same manner that behind the Supreme Court of the United States has always stood the overwhelming power of the Nation as against any single state of the Union. THOMAS WILLING BALCH, A WORLD COURT IN THE LIGHT OF THE UNITED STATES SUPREME COURT, p. 123 (1918).

[25] President Loder of the Permanent Court of International Justice, cited by EDWARD LINDSEY, THE INTERNATIONAL COURT, p. vii (1931)

world today is to establish a world order under the rule of law.[26] International law must be fully and properly implemented with particular emphasis upon collective and individual responsibility in international crimes. International criminal law, which received unprecedented development from the Nuernberg and Tokyo judgments, and which has been proved to be an actuality today must be strengthened and codified. The earlier this task is undertaken, the greater will be the benefit to mankind.[27] The problem of creating and maintaining a permanent judicial machinery for the interpretation and application of international penal law must be solved immediately and effectively.[28]

Now is not the time for hesitation and skepticism. The International Criminal Court must be established and must receive the full support of all states which desire their dream of universal peace to become a lasting reality.[29] If a permanent international penal tribunal had been in existence, some of the principal criminals tried at Nuernberg and Tokyo would never have committed those heinous offenses.[30] The existence of such a tribunal may have and could have deterred the perpetration of the recent Korean atrocities. The absence of physical sanctions to enforce law in the international community invites the ever-recurring infraction of its law.[31] The individual has become a subject proper of the international legal order not only under the monistic school but in the dualistic school as well. As aptly pointed out by a noted writer, there is an imperative need for protection against the new forces of destruction, atomic, hydrogen, cobalt, and others, so that there must be agreements regulating the use of nuclear and fission materials only for peaceful pursuits, and for violations of said agreements there must therefore be sanctions against the erring individuals and states. Further, the same writer avers that with the establishment of international penal jurisdiction and the International Criminal Court, there will be no recurrence of the Vogeler and Oatis cases, and no national of one state shall undergo simulated trials in another state for espionage and other offenses under procedure violative of due process of law. The Draft Statute of the International Criminal Court specifically mentions such rights of the accused to a fair trial and to his day in court,

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[26] A Project for a World School of Law—Harvard Law School (1948) cited in TELFORD TAYLOR, An Outline of the Research and Publication Possibilities of the War Crimes Trials, 9 LOUISIANA LAW REVIEW p. 507 (1949).

[27] Cf. F. B. SCHICK, International Criminal Law—Facts and Illusions, 11 MODERN LAW REVIEW pp. 290 ff. (1949).

[28] TAYLOR, op. cit., p. 507.

[29] ANTOINE SOTTILE, The Creation of a Permanent International Criminal Court, 29 REVUE DE DROIT INTERNATIONAL, p. 357 (1951).

[30] ARTHUR K. KUHN, Current Notes: Pella Memoranda Relating to International Crimes and Criminal Jurisdiction, 46 AMERICAN JOURNAL OF INTERNATIONAL LAW, pp. 129-30 (1952).

[31] J. B. KEENAN and B. F. BROWN, CRIMES AGAINST INTERNATIONAL LAW, p. 6 (1950).

to a trial which must conform with the minimum standard of justice required by the family of nations.[32]

The Nuernberg and Tokyo judgments cannot and must not remain as mere pages of history — and the principles enunciated by them must be implemented through the establishment of the International Criminal Court.[33] Advantage must be taken of the present psychological moment which is especially propitious for the creation of such tribunal.[34] With the enthronement of international criminal law in its proper place in the international community, and the establishment of the International Criminal Court, mankind shall enter a new era of peace through supremacy of law, in which the scourge of a modern global war is avoided, and in which "all offenders against international law, whether in peace or in war, whether victor or vanquished, may be brought to justice."[35]

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[32] ARTHUR K. KUHN, PATHWAYS IN INTERNATIONAL LAW. pp. 210-211 (1953).
[33] U.N. Doc. A/AC. 48/4.
[34] SOTTILE, op. cit., p. 358.
[35] PAUL M. HERBERT, The Nuernberg Subsequent Trials, XVI INSURANCE COUNSEL JOURNAL, p. 232 (1949).

Of the same tenor is Kelsen's reminder that the International Criminal Court will be universally acclaimed as the dispenser of international justice and in no manner an instrument of revenge, only when the victorious together with the vanquished States surrender their erring nationals—perpetrators of war crimes, crimes against peace, and crimes against humanity—to the same independent and impartial international penal tribunal. HANS KELSEN, PEACE THROUGH LAW, pp. 114-115 (1944).