

Establishing an International Criminal Court and an International Criminal Code

Observations from an International Criminal Law Viewpoint*

Kai Ambos**

I. Introduction

The almost total impunity for war crimes and grave human rights violations, be it in the former Yugoslavia or in States of less public interest like Columbia or Peru, Togo or Liberia – to mention only a few – has led to calls for the further development of mechanisms of international criminal justice. Efforts in this direction,¹ dating from the Nuremberg and Tokyo war crime trials, experienced an unexpected political push with the end of the Cold War and the establishment of the *ad hoc* tribunals for the former Yugoslavia² and Rwanda³. Recently, codification efforts

* I am very grateful to Ms. Virginia Morris, UN-Codification Division; Prof. Dr. Christian Tomuschat, Humboldt University Berlin; Dr. Simon, UN-library Geneva and Dr. Schlunck, Ministry of Justice (Bonn) for information provided for this article. I am indebted to Emily Silverman, J.D. (Berkeley), LL.M. (Freiburg/Br.), for refining the English and for critical comments.

** Dr. jur. (University of Munich). Research fellow of the Max-Planck Institute for foreign and international criminal law (in charge of the sections international criminal law and Spanish speaking Latin America); Scientific Assistant at the University of Freiburg.

1 The work for a permanent ICC began at the end of the 40s but was then suspended from 1954 until 1981 (for background and development see: J. Deschênes, 'Towards International Criminal Justice', 5 *Criminal Law Forum* (hereinafter *CLF*) (1994), at 249-278, 272ff.; P. Burns, 'An international Criminal Tribunal: the Difficult Union of Principle and Politics' 5 *CLF* (1994), at 341-380, 351ff.). In the post-war period, in particular the Association Internationale de Droit Pénal (AIDP) as well as the professors H. H. Jescheck (Freiburg, former president AIDP), O. Triffterer (Salzburg) and – currently – Ch. Bassiouni (Chicago) have continued working in this area. Bassiouni himself proposed his own draft: *Draft Statute International Tribunal*, Toulouse (AIDP/èrès) (1993).

2 Hereinafter 'Yugoslavia Statute'. The text can be found in the UN-document S/25704, 3 May 1993, par. 32ff. It was approved by resolution 827 of the UN-Security Council of 25 May 1993. The 'Rules of Procedure and Evidence' were adopted by the Tribunal on 11 February 1994 (UN-Dok. IT/32, 14 March 1994; 33 ILM, 1994, at 493ff.) and amended most recently in December 1996 (IT/32/Rev.10). Regarding the assignment of defence counsel see 'Directive on Assignment of Defence Counsel' (IT/73/Rev. 3, 25 June 1996). Regarding the *Statute* see in particular K. Oellers-Frahm, 'Das Statut des Internationalen Strafgerichtshofs zur Verfolgung von Kriegsverbrechen im ehemaligen Jugoslawien', *ZaöRV* 54/2 (1994), at 416-445; B. Graefrath, 'Jugoslawien

can be seen both on the procedural and on the substantive level. The UN-International Law Commission (hereinafter 'ILC') prepared a draft-statute for a permanent International Criminal Court ('ICC') in 1994 (ILC-Draft Statute⁴) and began reworking its 'Draft Code of Crimes Against the Peace and Security of Mankind' whose preliminary version was approved in 1991 (hereinafter Draft Code 1991⁵) and the final version in 1996 (Draft Code 1996⁶).

Regarding the *ILC-Draft Statute* the General Assembly (GA), at its 49th session in 1994, decided to establish the 'Ad Hoc Committee on the Establishment of an ICC' which held two sessions in 1994. At its 50th session in 1995 the GA decided on the basis of the Ad Hoc Committee's report⁷ to establish the 'Preparatory Committee on the Establishment of an ICC' (PrepCom) which has to prepare a consolidated text of a convention to be considered by a conference of plenipotentiaries. At its first session, held in March/April 1996, the PrepCom considered substantive,

und die internationale Strafgerichtsbarkeit', in Hankel and Stuby (eds), *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen*, (1995), at 295-324; J. C. O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the former Yugoslavia', 87 *AJIL* (1993), at 639-659 and R. Zacklin and D. Shraga, 'The International Criminal Tribunal for the Former Yugoslavia', 5 *EJIL* (1994), at 360-380. Regarding the first *practical cases (Tadić and Nikolic)* see L. Vierucci, 'The First Steps of the International Criminal Tribunal for the Former Yugoslavia', 6 *EJIL* (1995), at 134-149; R. Maison, 'La décision de la Chambre de première instance n° 1 du Tribunal pénal international pour l'ex-Yugoslavie dans l'affaire Nikolic', 7 *EJIL* (1996), at 284-299; and below note 99. About the *political background* see D. Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia', 5 *CLF* (1994), at 401-422. Concerning the 'Rules' see J.E. Schutte, 'Legal and practical implications from the perspective of the host country, relating to the establishment of the International Tribunal for the Former Yugoslavia', 5 *CLF* (1994), at 423-450, 431ff.; D. Nseroko, 'Rules of procedure and evidence of the International Tribunal for the Former Yugoslavia', 5 *CLF* (1994), at 507-555. Concerning the *Dayton agreement*: 7 *EJIL* (1996), at 147-244. An overall analysis is now provided by Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, (1996).

- 3 SC Res. 955 (1994). Rules of procedure and evidence adopted on 29 June 1995 (ITR/3/Rev. 1); amended on 5 July 1996 (ITR/3/Rev. 2).
- 4 *Draft Statute for an International Criminal Court*, (Report of the ILC on the work of its forty-sixth session, 2 May - 22 July 1994, GA, official records, forty-ninth session, supplement No. 10 (A/49/10), pp. 29-161). Regarding the Draft of the 'Working Group' see J. Crawford, 'The ILC's Draft Statute for an international Criminal Tribunal', 88 *AJIL* (1994) at 140-152; the same, 'The ILC Adopts a Statute for an International Criminal Court', 89 *AJIL* (1995) at 404-416. In addition, various other drafts have also influenced the ILC (see Bassiouni, *supra* note 1, at 3ff., 28ff., enumerating in total 11 official and 10 unofficial drafts).
- 5 *Draft Code of Crimes against the Peace and Security of Mankind*, (Report of the ILC on the work of its forty-third session, 29.4.-19.7.1991, General Assembly, Official Records, Forty-Sixth Session, Supplement No. 10, A/46/10, at 238ff.). See Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind*, (1993); C. Tomuschat, 'Die Arbeit der ILC im Bereich des materiellen Völkerstrafrechts', in Hankel and Stuby, *supra* note 2, at 270-294; T. McCormack and G. Simpson, 'The International Law Commission's Draft Code of Crimes against the peace and Security of Mankind: An Appraisal of the Substantive Provisions', 5 *CLF* (1994), at 1-55.
- 6 Report of the ILC on the work of its forty-eighth session, 6 May-26 July 1996, GA, official records, fifty-first session, supplement No. 10 (A/51/10), pp. 9-120.
- 7 See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Official Records, Fiftieth Session, Supplement No. 22 (A/50/22).

procedural and administrative issues;⁸ at its 2nd session in August 1996 it took into account the Draft Code 1996 and dealt with further procedural and organizational questions regarding the establishment of an ICC.⁹

In a parallel development, an independent committee of experts met to work on an alternative draft to the ILC-Draft Statute in June of 1995 in Siracusa, Italy ('Alternative-Draft').¹⁰ This Alternative Draft was later amended by a Draft General Part, containing in 21 articles the most relevant criminal law provisions of a *general* part.¹¹ Many of these proposals have been adopted by the PrepCom¹² and have influenced the Draft Code 1996. The *diagram* set out at the end of this article gives an overview of the most important *procedural* provisions of the Yugoslavia Statute, the ILC Draft Statute and the Alternative Draft.

The following observations intend to give an overview over some procedural and substantive problems of the aforementioned statutes and the Draft Codes 1991 and 1996. Given the limited length of this article and the number of provisions to be considered it was not possible to examine all problems as thoroughly as is necessary. However, it is hoped that the bibliographical references will encourage the reader to research further.

II. The Procedural Level: Observations on an ICC

A. Legal Basis and Jurisdiction

A *legal basis* of an ICC can, in principle, be established in two different ways: by an international treaty or by a Security Council (SC) resolution. The advantage of the latter model, employed in Yugoslavia and Rwanda, is evident. It allows the establishment of an ICC as a subsidiary organ of the SC with the approval of only nine of

8 Draft Report on 'General Principles of Criminal Law', UN-Doc. A/AC.249/CRP.9, 4 April 1996; see also Lehtonen, IELR (1996), at 274-276.

9 See Report of the Preparatory Committee on the Establishment of an International Criminal Court, General Assembly, Official Records, Fifty-First Session, Supplement No. 22 and (22 A = 2 vol.) (A/51/22). See also the press releases in <http://www.un.org/smlgo.gif> (Internet).

10 Association Internationale de Droit Pénal (AIDP)/International Institute of Higher Studies in Criminal Sciences (ISISC)/Max-Planck-Institute for Foreign and International Criminal Law (MPI), *Draft Statute for an International Criminal Court-Alternative to the ILC Draft (Siracusa Draft)*, prepared by a Committee of Experts, Siracusa/Freiburg, July 1995.

11 The drafting group met in the Max-Planck Institute for Foreign and International Criminal Law in January 1996, on the initiative of a Siracuse meeting of December 1995, and worked along the lines of the 'elements' of a general part included in the Alternative Draft, *supra* note 10 (commentary to Art. 33). Participants were Prof. Eser (Freiburg), Prof. Triffterer (Salzburg), Prof. Koenig (Michigan, USA), Prof. Lagodny (Dresden), Dr. Ambos and Dr. Vest (both Freiburg). A modified version of this draft is to be found in the updated Siracusa-Draft, Siracusa/Freiburg/Chicago, 15 March 1996, (Art. 33-1 to 33-18 and 47 to 47-2). The original version can be obtained from the author. See also Triffterer, 'Österreichs Verpflichtungen zur Durchsetzung des Völkerstrafrechts', *ÖJZ* (1996) 321-343, at 326.

12 See the general principles, *supra* note 8, and the Report, *supra* note 9 (suppl. 22 A), pp. 79 ff.

the 15 members of the SC, including the five permanent members (article 27 III UN-Charter).¹³ Therefore, there is no need for long treaty negotiations or countless substantive compromises¹⁴. However, in spite of this rather practical argument, the legal basis of such a tribunal is questionable from a public international law viewpoint.¹⁵ Although it can certainly be argued that in the case of grave human rights violations an international right and even duty to prosecute exists (which can be implemented against the will of the affected State if this State is not willing to prosecute seriously)¹⁶, an ICC's legitimacy depends heavily upon the acceptance of its jurisdiction by as many States as possible. This, in turn, is a prerequisite of global acceptance and effective implementation of its sentences. Against this background, the SC model appears to be a kind of coercive measure that can only be justified in exceptional cases which call for an *ad hoc* jurisdiction in order to satisfy an internationally recognized need for action (as in the case of the former Yugoslavia) or the demand of a new government (as in Rwanda). In fact, in such a situation the establishment of an International *ad-hoc* Tribunal can be based on chapter VII of the UN Charter with quite convincing arguments.¹⁷ The treaty model, on the other hand, does not hinder the establishment of an ICC as an organ of the UN, but rather – and this is the important difference – requires that the ICC will be established as a main

- 13 Regarding the distinction between procedural and other questions within the meaning of Art. 27 II and III UN-Charter see Simma and Brunner in Simma (ed.) *Charta der Vereinten Nationen* (1991) Art. 27, marginal notes 11 ff. Resolutions based on Ch. VII, therefore, are not procedural questions within the meaning of Art. 27 II, but always require the qualified majority of Art. 27 III UN-Charter (*ibid.*, marginal note 13). On the other hand, one can consider the establishment of a subsidiary organ in principle as a procedural decision, but Art. 29 only gives organisational and not substantive competence (Hilf on Art. 29, marginal note 27, and Bothe on Art. 38, marginal note 39 in Simma, *ibid.*). Only Ch. VII gives this competence; turning, however, the question into 'another' question within the meaning of Art. 27 III.
- 14 These have been the main arguments in favour of the SC model in the case of the former Yugoslavia. See O'Brien, *supra* note 2 at 643: '... a treaty would be uncertain and slow ...' or Shraga and Zacklin, *supra* note 2, at 361: '... would take years.' Also R.A. Kolodkin, 'An ad hoc international tribunal for the prosecution of serious violations of international humanitarian law in the Former Yugoslavia', 5 *CLF* (1994), at 381-399, 385ff., 391: '... the establishment ... by means of a Security Council resolution appeared to the majority of analysts to be the sole option that answered both the legal and practical demands of the situation.'
- 15 It is particularly uncertain from where the SC derives the competence to submit acts committed on a State's territory and within its jurisdictional power to an ICC without asking this State to accept this submission by way of a formal act of cession or transfer (see S. Oeter, 'Kriegsverbrechen in den Konflikten um das Erbe Jugoslawiens. Ein Beitrag zu den Fragen der kollektiven und individuellen Verantwortlichkeit für Verletzungen des Humanitären Völkerrechts', 53 *ZaöRV* (1993) 2-48, 34ff.; Oellers-Frahm, *supra* note 2, at 417, 418). For additional criticism from a Serbian point of view see D. Cotić, Introduction, 5 *CLF* (1994), at 223-236, 233.
- 16 See Oellers-Frahm, *supra* note 2, at 417; C. Tomuschat, 'International Criminal Prosecution: the Precedent of Nürnberg Confirmed', 5 *CLF* (1994), at 237-247, here 241, 242 (also for the establishment on the basis of Ch. VII UN Charter). For more details regarding such a duty to prosecute see also K. Ambos, *Straflosigkeit von Menschenrechtsverletzungen. Zur 'impunidad' in süd-amerikanischen Staaten aus völkerstrafrechtlicher Sicht* (with an English summary), (Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht) (1997), pp. 163 ff.
- 17 Cf. International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber): Decision in *Prosecutor vs. Dusko Tadic*, October 2, 1995, in 35 *I.L.M.* 32 (1996), para. 32 ff. (also HRLJ 1995, 437). For a critical analysis with regard to the legal basis see J.E. Alvarez, 'Nuremberg Revisited: The Tadic Case', 7 *EJIL* (1996) 245-264.

organ in addition to the other UN organs on a treaty basis (as for the ICJ, compare article 7 paragraph 1 UN Charter with article 1 ICJ Statute).¹⁸ Given the recent comments of the government delegations in the UN *ad hoc* Committee, it seems to be clear that an ICC will be established as an 'independent judicial organ by means of a multilateral treaty'.¹⁹

Secondly, the question of the *subject matter jurisdiction* of an ICC arises. Should only those crimes which are 'beyond any doubt part of customary law'²⁰ – as in the SC statutes and to some extent the ILC- and Alternative Drafts (Art. 20 para. 1) – be included or all crimes or offences codified in international instruments?²¹ It is clear that there is a relationship of inverse proportion between the number of included acts and the number of assenting States: the more punishable conducts included in the jurisdiction, the fewer the States that will be willing to accept jurisdiction.²² This problem can be reduced by referring all crimes that are (only) recognized by treaty to an *ad hoc* jurisdiction with the consequence that the parties to the statute can still decide whether they are willing to accept an ICC's jurisdiction on a case by case basis. The more important *exclusive (original/inherent)* jurisdiction implying an *ipso facto* acceptance of the ICC's jurisdiction with the act of becoming party to the statute should be limited to the most serious crimes of concern to the international community. This is the position of the ILC²³ and the majority of States involved in the current debate.²⁴ It is a practical compromise between the politically feasible short-term and legally desirable long-term objective: 'We can start with the establishment of a court with a modest jurisdictional scope, provided that it can one day ripen into the type of universal court many of us hope for'.²⁵ The *ad hoc* jurisdiction would have the function of gaining the confidence of States and of convincing them

- 18 This certainly requires an amendment of the UN-Charter (Jaenicke, on Art. 7, marginal notes 1f., in Simma, *supra* note 13; Schutte, *supra* note 2, at 447).
- 19 Report of the Ad-Hoc Committee, *supra* note 7, par. 15; cf. also Crawford, 1995, *supra* note 4, at 409, 410.
- 20 UN-Doc. S/25704, par. 34. This includes the crimes referred to on pp. 535 ff., notes 92 ff. One has to keep in mind that the corresponding Arts. 2-5 of the Yugoslavia Statute have not created substantive law but only defined the scope of the subject matter jurisdiction of the Tribunal (Tomuschat, *supra* note 16, at 242, 243).
- 21 See Bassiouni, *supra* note 1, at 33ff. See also Art. 20 par. 2 ILC-Draft and Art. 20 e Alternative Draft, *supra* note 10, with annex which seeks to include certain treaty crimes in addition to the four groups of crimes (see pp. 534 ff.).
- 22 Therefore, there was consensus at the XIV Conference on International Criminal Law that 'the competence of such a tribunal should be limited to politically less important international crimes' (O. Triffterer, 'Die völkerrechtlichen Verbrechen und das staatliche Strafrecht', in *Zeitschrift für Rechtsvergleichung* 30 (1989), at 83-128, 123).
- 23 See para. 2 of the preamble to the ILC Draft: 'Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole;' (emphasis in the original; Report of the ILC, *supra* note 4, at 44).
- 24 Cf. Report of the Ad Hoc Committee, *supra* note 7, par. 54, 91; Crawford, 1995, *supra* note 4, at 410.
- 25 Bassiouni, *supra* note 1, at 19. See also *ibid.*, at 57 ff, the commentary to Art. 19 Bassiouni-draft, stating correctly that the exclusive original jurisdiction is 'the most politically difficult to achieve' (at 59).

of the necessity of an ICC in order to bring about the general acceptance of its jurisdiction in the long run.²⁶

However, a mere reference to international treaty instruments is not convincing and entails the risk of trivializing the role of the court.²⁷ This method, the so called 'treaty-approach', leads to contradictions if the treaty character of a particular crime is taken as the sole or decisive indicia of its importance. There are crimes which are virtually unrecognized by the State community in spite of their codification in international treaties, for example mercenarism. Or there are treaty crimes, whose wrongfulness is less than that of other non-treaty crimes, which are nevertheless recognized by customary international law. In spite of this fact, these non-treaty crimes do not – according to the treaty approach – fall within the jurisdiction of an ICC. Bassiouni, for example, includes within the jurisdiction *relatively* minor and practically irrelevant treaty 'crimes' such as 'offences against international civil maritime navigation', 'drug offences'²⁸, and 'international traffic in obscene materials' but does not include extra-legal executions and disappearances.²⁹ The mere formal argument that for the latter crimes treaties do not exist is unconvincing as the scope and gravity of these crimes make them part of customary international law subject to duties of prosecution and punishment.³⁰ Moreover, offenses codified in international instruments are frequently too vague to be directly applicable in national law; therefore, they require an internal process of transformation.³¹ If one wants to include all internationally recognized crimes one should not limit this exercise to universal treaties. Instead, it is much more consistent to extend subject matter jurisdiction only to those crimes whose recognition by general international law, including customary law, is beyond question – irrespective of their codification in international instruments.³² This approach does not imply a qualitative 'less' compared to the quanta-

26 See Bassiouni, *supra* note 1, at 61: 'This approach creates an inducement for State-Parties to experiment with the Court's jurisdiction and eventually to gain the confidence necessary to rely more frequently on the Court.'

27 Cf. Report of the *Ad Hoc* Committee, *supra* note 7, par. 81.

28 See also the appendix II to Art. 20 e), ILC-Draft, including Art. 3 (1) of the Vienna Drug Convention of 1988 (Report of the ILC, *supra* note 4, at 155-157). This provision neither makes a distinction regarding the very different conducts, ranging from cultivation to mere possession, and trafficking, nor regarding the substance – soft or hard drugs. Furthermore, the existing drug conventions do not contain sufficiently clear norms to be directly applicable (see K. Ambos, *Die Drogenkontrolle und ihre Probleme in Kolumbien, Peru und Bolivien – eine kriminologische Untersuchung aus Sicht der Anbauländer, unter besonderer Berücksichtigung der Drogengesetzgebung*, (1993) at 128). Submitting drug offences to the jurisdiction of an ICC would lead not only to a devaluation of the concept of crime but also to an immediate overburdening of the ICC (cf. Crawford, 1994, *supra* note 4, at 146; and Bassiouni *supra* note 1, at 98, 99).

29 The 24 'crimes' mentioned in the Bassiouni-draft are based on 316 international instruments (Bassiouni, *supra* note 1, at 40). Regarding a necessary distinction between international crimes in a more limited and in a broader sense in this context see also Triffterer, *supra* note 22, at 103, 112 (criticizing the lack of differentiation in the Bassiouni draft of 1980).

30 See references in note 16.

31 See Crawford, 1994, *supra* note 4, at 143.

32 However, this creates other problems as the number and the content of international crimes unanimously recognized internationally is highly debated. Therefore, the 'Working Group' of the ILC was of the opinion that 'the possible controversies over the identity and content of crimes under

tive 'more' of the treaty approach, particularly if the crimes against humanity recognized in all statutes are interpreted broadly. In conclusion, a kind of combined approach as pursued by the ILC and Alternative Draft (Art. 20) appears to be most convincing.³³ Adopting this approach, it is, for reasons of certainty, surely preferable to include a list of treaty crimes in an annex to the statute.³⁴

A further point to consider is the *relationship between an ICC and national jurisdiction*. The ILC follows the 'principle of complementarity' stating in the preamble that an ICC 'is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective'.³⁵ Although the principle is part of the context within which the statute should be interpreted,³⁶ its practical implications are not very clear. The text of the Draft itself has addressed this central question only indirectly (Art. 35). Consequently, some States understand it as 'a strong presumption in favour of national jurisdiction', others do not.³⁷ The very question is in which cases an ICC should 'complement' the national jurisdiction, or, to use the words of the ILC: when is a trial procedure not 'available' or 'ineffective'? The question is closely linked to the subject matter jurisdiction of an ICC and to the role national jurisdiction can play in a given case. Taking seriously complementarity implies in principle the limitation of the ICC's jurisdiction to a few 'hard core' crimes.³⁸ In these cases, the ICC's intervention depends on the functioning of the national criminal justice system concerned. If it is not functioning at all, i.e. neither the capacity nor the will to investigate seriously exist, the ICC's jurisdiction is compelling. If it functions in principle, i.e. more or less serious investigations are initiated, the difficult question arises where to draw the line between a sufficient and insufficient seriousness, the latter literally forcing the ICC to claim jurisdiction. The ILC's commentary to the preamble envisages a very high threshold stating that 'it is intended to operate in cases where there is no prospect of ... persons duly tried in national courts'.³⁹ The States themselves only point out that 'the intervention of the court in situations where an operating national judicial system was being used as a shield required very careful

general international law warranted more cautious treatment than that given to treaty-based crimes ...' (Crawford, 1994, *supra* note 4, at 145).

33 The inclusion of the 'crime' of 'aggression', though, seems to be problematic. The dispute about the definition of aggression has impeded the work of the ILC for more than 20 years. As the corresponding GA-resolution does not clarify this point either, the ILC-draft determines that a complaint on the basis of aggression requires a constitutive SC resolution (Art. 23 par. 2 i.V.m. 20 par. 1 (b); see also Crawford, 1994, *supra* note 4, at 147; Graefrath, *supra* note 2, at 305ff. and below note 75 and p. 536.

34 See for example the list to Art. 20 e) of the ILC Draft referring to 14 treaties (Report of the ILC, *supra* note 4, appendix II, at 147-161).

35 Report of the ILC, *supra* note 4, at 44.

36 Cf. Art. 31 Vienna Convention on the Law of Treaties (UN Doc. A/Conf. 39/11/add.2, 1971, at 287).

37 Report of the *Ad Hoc* Committee, *supra* note 7, par. 29-37.

38 On these crimes see below pp. 535 ff.

39 Report of the ILC, *supra* note 4, at 44; see also Report of the *Ad Hoc* Committee, *supra* note 7, par. 42.

consideration'.⁴⁰ It clearly follows from that that we have to deal with a complementary or 'supplemental' ICC⁴¹, whatever the exact meaning is.

B. Procedural and Other Rules⁴²

The procedural rules are accusatorial as the prosecutorial organ investigates and prepares the accusation. The tribunal intervenes in a kind of intermediate procedure at latest after the filing of the accusation; it can confirm, refuse or modify the accusation. In a treaty model the question arises whether the SC itself, independent of a member State, can initiate proceedings on the basis of a measure under chapter VII of the UN-Charter.⁴³ One may be skeptical of the legitimacy of such an action, but ultimately it cannot be totally excluded if one wants to avoid the parallel creation of *ad hoc* tribunals by the SC in cases where the SC does not feel that its interests are being sufficiently taken into account by the ICC.⁴⁴ The question does also play a role for the further proceedings since – at least according to the ILC Draft (Art. 23 par. 3) – a prosecution arising from a situation being dealt with by the SC under chapter VII may not be commenced without the SC's prior authorization. Generally speaking, the crucial issue is to find the right balance between the necessary independence of an ICC and the primary role of the SC in the maintenance of international peace and security. States have particularly criticized the SC's exclusive exercise of jurisdiction in the case of aggression (Art. 23 par. 2 ILC Draft).⁴⁵

In all other cases the prosecutor must prove that there is a *prima facie* case, and the tribunal must determine the admissibility of the accusation. However, the ILC does not provide a definition of a *prima facie* case. It must be remembered that the mere accusation represents an important interference in the rights of the affected persons; for that reason, a *prima facie* case should be interpreted restrictively. Rightly, therefore, the Alternative Draft defines it as 'a credible case which would – if not contradicted by the defence – be a sufficient basis to convict the accused' (Art. 27 para. 2). This definition is similar to the so-called strong suspicion of a criminal offence (*dringender Tatverdacht*) employed by the German Code of Criminal Procedure (*Strafprozeßordnung*) as a requirement for an accusation (*Anklage*).

Art. 37 para. 4 ILC-Draft further provides for the establishment of a special 'indictment chamber' which, however, does not appear in the provisions about the chambers (Art. 9). The function of this chamber is to carry out a written evidentiary procedure or evaluation. The resulting 'record of evidence' can be used in a subse-

40 Report of the *Ad Hoc* Committee, *supra* note 7, par.45.

41 Crawford, 1995, *supra* note 4, at 415.

42 See generally the controversial debate in the *Ad Hoc* Committee (Report, *supra* note 7, par. 128-194).

43 See Art. 25 par. 4 in conjunction with Art. 23 ILC-Draft; similarly the Alternative Draft, *supra* note 10. For a critical view see Graefrath, *supra* note 2, at 307ff.

44 Cf. Crawford, 1995, *supra* note 4, at 413; Report of the *Ad Hoc* Committee, *supra* note 7, par.120.

45 See recently the discussion in the *Ad Hoc* Committee (Report, *supra* note 7, par.71, 120-126)

quent trial. This procedure is dangerous for the accused and should, therefore, only be admitted if he has legal assistance.⁴⁶

The *order of the trial phase* is of similar importance. Reading of the indictment and the statement as well as the personal and substantive examination of the accused should take place before the evidence is heard. The presence of the accused is quite significant for his defence. Different solutions are possible. The ILC Draft and – in a more restricted way – the Alternative Draft permit a trial *in absentia* (Art. 37 para. 2)⁴⁷; not so the statutes for the former Yugoslavia and Rwanda. For practical reasons, a trial *in absentia* cannot be absolutely prohibited, although political and legal criticism of such trials has to be taken seriously.⁴⁸ In any case, exceptions should only be permitted in clearly specified circumstances. The proper role of the tribunal – quite active as in a mixed instructorial (*instruktorisch*) system or passive as in a pure adversarial system – is a matter for discussion.⁴⁹ Ultimately, a combination of the two dominant systems – the Anglo-American adversarial and the continental mixed systems – should be reached.

All statutes separate the actual *judgement* – concerning the guilt of the accused – from the *sentencing phase*. Those in favour of such a separation contend that it prevents the tribunal – normally a jury – deciding on the question of guilt from being improperly influenced by information about the personal circumstances of the accused (information that is only necessary for sentencing purposes); however, there is no jury in an ICC, and it cannot seriously be claimed that no information regarding the personal circumstances of the accused will reach the judges of an international tribunal nor that such judges are immune to improper influence. Therefore, the division of the trial into two phases seems to be unnecessary.

Given the lack of international norms with respect to *the scope of penalties* one must refer to national law.⁵⁰ It is highly unlikely that there are international stan-

46 Art. 37 par. 4 Alternative Draft, *supra* note 10. Cf. Report of the *Ad Hoc* Committee, *supra* note 7, par. 168.

47 Art. 37 par. 2 ILC-Draft admits a trial *in absentia* only as an exception ((a) 'for reasons of security or the ill-health', (b) 'accused is continuing to disrupt the trial', (c) 'has escaped'). Art. 37 par. 2 Alternative Draft, *supra* note 10, is more restrictive, admitting a trial *in absentia* only if '(a) the accused expressly waives the right to be present; (b) ... is continuing to disrupt the trial; (c) after the commencement of the trial ... has escaped from lawful custody ... or has violated the terms of bail.'

48 According to the UN Human Rights Committee, Art. 14 (3) (d) International Covenant for Civil and Political Rights (ICCPR) does not prohibit a trial *in absentia* if everything was done to inform and notify the accused (see *Mbenge v. Zaire*, No. 16/1977, Selected Decisions of the Human Rights Committee under The Optional Protocol, Volume 2, UN-Doc. CCPR/C/OP/2, at 76ff.; see also the European Court of Human Rights in *Colozza v. Italy*, ECHR (1985) Series A, 89. See also Report of the *Ad Hoc* Committee, *supra* note 7, par. 164-167.

49 See the differentiation in Walter Perron, 'Rechtsvergleichender Querschnitt', in Perron (ed.), *Die Beweisaufnahme im Strafverfahrensrechts des Auslandes*, (Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht) (1995) at 560-567.

50 This is evident if, as in the Yugoslavian case, the affected State has transformed the applicable international treaties in its national law and has provided for corresponding sentencing guidelines. However, it is unfortunate that the statute does not refer to these sentencing guidelines but only to the general practice (Oellers-Frahm, *supra* note 2, at 427).

dards at all. Therefore, a mere reference to imprisonment or fine as types of penalties (cf. Art. 47 ILC-draft) without specifying the length or amount could conflict with the *nulla poena* principle.⁵¹ In this context, the general question of the *applicable law* arises. There will only be a satisfactory solution if the applicable law in an individual case is either linked to the corresponding jurisdiction in that case or the statute itself clearly determines the applicable law. The SC has ignored these questions in the statutes of the *ad hoc* tribunals. The ILC-Draft has addressed it, but in an unsatisfactory fashion. It is far from clear to refer to 'this Statute; applicable treaties and the principles and rules of general international law' (Art. 33 a), b)), if, on the other hand, the discussion on the subject matter jurisdiction demonstrates that the number of universally recognized international criminal law norms is very limited. Still less convincing is the reference to '... any rule of national law ... to the extent applicable' (Art. 33 c)): the very issue is to what extent national law is applicable in a given case.⁵² The Alternative Draft displays at least a modicum of awareness of the problem referring in this context to 'open questions and elements to be regulated in a General Part'.⁵³

Regarding the *execution of a sentence* a situation could arise in which no State is willing to host a sentenced person. Who would host criminals like Karadzic, leader of the Bosnian Serbs, or the – recently deceased – Columbian drug trafficker Pablo Escobar? For these cases no statute presents a convincing solution. In the long run it may be possible for the ICC to establish its own prison installations on extraterritorial areas; however, even under these circumstances, the affected country would have to consent to incarcerations on its territory.⁵⁴

The reference to national *release or mitigation provisions* implies the danger of the circumvention of sentences imposed by the ICC. Therefore, limitations derived from international law should be included in the statute. An absolute remission of a sentence in the case of grave human rights violations cannot be permitted.⁵⁵ In any event, decisions granting partial exemption from punishment should, if at all, be taken only by the ICC itself.⁵⁶

Despite the theoretical and technical implications of all these problems one should not overlook that the central issue of any procedural system is of a criminal policy

51 The Alternative Draft, *supra* note 10, at least provides for a minimum sentence of *not less than one year* and an *appropriate* fine. See also Report of the *Ad Hoc* Committee, *supra* note 7, par. 187-190. However, the prevailing doctrine considers that the *nulla poena* principle only requires the establishment of a *general* penalty; a concrete indication of type and length or amount is not needed (cf. Triffterer, 'Bestandsaufnahme zum Völkerstrafrecht', in: Hankel and Stuby, *supra* note 2, at 169-269, particularly 218, 219).

52 For the critical comments of States cf. Report of the *Ad Hoc* Committee, *supra* note 7, par. 52, 53.

53 Alternative Draft, *supra* note 10, commentary to Art. 33. These elements have been put into concrete terms at the beginning of 1996 (*supra* note 11).

54 This is the tendency within Bassiouni's draft as stated in the commentary to Art. 28: 'The Tribunal may also place the convicted persons in its own detention facilities, which could be established by the Convention in accordance with a host-state agreement between the Tribunal and the State wherein the detention facility will be established' (Bassiouni, *supra* note 1, at 79).

55 See Ambos, *supra* note 16, pp. 209 ff.

56 Art. 60 of the Alternative Draft, *supra* note 10.

nature: to guarantee a proper balance between the rights of the suspect or the accused and the effectiveness of the prosecution. Fortunately, it seems to be a consensus among the States involved in the debate that this balance has to be ensured.⁵⁷

III. The Substantive Level: Observations on an International Criminal Code

A. General Part

The *concept of crime* used in the Draft Code 1991 was a clear indication of the Code's political character.⁵⁸ Instead of providing a clear definition, Art. 1 referred to 'crimes [under international law].' The Draft Code 1996, though still not providing a clear definition, is an improvement because it refers to the crimes defined in the special part and these crimes have been substantially reduced. Threat of aggression, intervention, colonial domination, mercenaries and illicit drug trafficking are now excluded (see part B. below for more detail).

The question of how the *subjective circumstances* of a criminal act ('motives' in the language of the Draft Code 1991, 'intention' in the language of the Draft Code 1996) should be treated has not yet been solved satisfactorily. Fortunately, the Draft Code 1996 eliminated the confusing Article 4 of the Draft Code 1991.⁵⁹ The *subjective* elements are now included in the individual responsibility provision establishing that an individual is responsible if he or she 'intentionally commits such a crime' [Art. 2 par. 3 (a)]. This means that responsibility presupposes at least a *general* intent bearing in mind that certain crimes require *special* intent (esp. genocide). However, there still remains some doubt as Art. 2 includes all possible *objective* conducts constituting a crime (ordering the commission, omission, aiding, abetting, direct participation, incitement, attempt) without making clear whether such a conduct also requires *mens rea*. Given that there was consensus within the ILC that *mens rea* is a necessary element of a crime and disagreement existed only if this had to be expressed explicitly, one might argue that the *mens rea* requirement is self-evident. Indeed, some members of the ILC consider subjective elements to be an inherent part of international crimes and therefore do not see the need for an explicit norm, whereas others wanted to have it included explicitly in the norm regulating

57 Report of the *Ad Hoc* Committee, *supra* note 7, par. 132.

58 For the discussion within the ILC see Report of the ILC, *supra* note 4, par. 109-117; and Report of the ILC on the work of its forty-seventh session, 2 May - 21 July 1995, GA, official records, fiftieth session, supplement No 10 (A/50/10), par. 47.

59 Art. 4 provided 'Responsibility ... is not affected by any motives ... which are not covered by the crime'.

individual responsibility.⁶⁰ Thus, the solution presented by the Draft Code 1996 seems to be a compromise in the sense that it explicitly mentions general intent but does not regulate it in an independent and generally valid form. With regard to *negligent* conduct the new Art. 2 seems to make clear that it should not be punishable. This corresponds with the Alternative Draft including only 'knowledge' and 'intent' as mental elements (Art. 33-7).

In the field of *defences* it is striking that the questions related to superior order and command responsibility require three articles (Art. 5-7) whereas other defences are not even mentioned. This is partly due to the practical experience from the Nazi war crime trials which clearly showed that superior order is the most important defence.⁶¹ Other defences have neither been recognized by the Statute of the International Military Tribunal (hereinafter IMT Statute) nor by succeeding international instruments.⁶² Thus, legal history provides a strong argument in favour of leaving it to the Court to determine the admissibility of a defence 'in accordance with the general principles of law, in the light of the character of each crime' (Art. 14 Draft Code). It is clear that defence counsel will – as they did in Nuremberg and the following trials – put forward defences known from national law. Then the Court will have to decide on the general validity and concrete applicability of the defence. The ILC, albeit not mentioning them in the draft, has four defences in mind: self-defence, duress or coercion, mistake of fact and age of the offender.⁶³

The final division between defences (Art. 14) and extenuating circumstances (Art. 15) – introduced due to widespread criticism of the old provision mixing the two concepts⁶⁴ – takes into account that the grounds for justification belong to the constituting elements of a crime while the grounds for mitigation should be considered within the framework of sentencing. A further separation within the defences (in relation to justification and excuse)⁶⁵ – though recognized and discussed by the ILC⁶⁶ – has not been considered necessary. Thus, the structural problems caused by

60 See 12th Report of the Special Rapporteur (to 'Part I', Art. 1-14): UN-Doc. A/CN.4/460 from 15 April 1994 (46th session 1994), par. 30ff.; Report of the ILC, *supra* note 58, par. 49. On the general elements of a crime see Triffterer, *supra* note 51, at 219ff.; Tomuschat, *supra* note 5, at 286ff.

61 See for the Nuremberg Trial against the major war criminals: US-GPO, *Nazi Conspiracy and Aggression*, Washington D.C. 1946-48, 9 Volumes; for the twelve trials before US-Military Courts at Nuremberg: US-GPO, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Volumes I-XV, Washington D.C., 1950-1953; for other trials: *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, Volumes I-XV, London, 1947-1949.

62 Report of the ILC, *supra* note 6, pp. 74f. referring to the Genocide, Geneva and Apartheid Conventions.

63 Report of the ILC, *supra* note 6, pp. 75 ff.

64 Eser, in Bassiouni *supra* note 5, at 48ff.; Robinson, in *ibid.*, at 199ff.; 12th Report of the Special Rapporteur, *supra* note 60, par. 135ff.

65 See Eser and Fletcher (eds), *Rechtfertigung und Entschuldigung/Justification and Excuse, Comparative Perspectives*, 2 Volumes, (1987 and 1988) (Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht).

66 Cf. Report of the ILC, *supra* note 4, par. 176-190, esp. 179; Report of the ILC, *supra* note 6 pp. 73f.

an undifferentiated approach to justification and excuse on the one hand and considerations regarding sentencing on the other continue to exist.

With regard to *superior order* the Draft Code 1996 amends the old and confusing Art. 11⁶⁷ and takes up a proposal by the Drafting Committee (based on Art. 8 IMT Statute). Art. 5 now excludes the order as a reason for exemption of punishment but provides for a mitigation 'if justice so requires'. This accurately reflects the conventional and customary international law on the matter.⁶⁸ Systematically, however, the superior order defence is converted into an extenuating circumstance (cf. Art. 15 Draft Code 1996). Art. 6 maintains the command responsibility rule (Art. 12 Draft Code 1991) and Art. 7 excludes the act of State doctrine (Art. 13 Draft Code 1991, based on Art. 7 IMT Statute).

From the Special Rapporteur's point of view the prohibition of *retroactivity* (*nullum crimen, nulla poena sine lege*) based upon international human rights treaties⁶⁹ is beyond controversy. Thus, it has been finally adopted by the Draft Code 1996 (Art. 13). However, the exact meaning of the principle in international criminal law is not totally clear.⁷⁰ Art. 13 para. 2 of the Draft Code 1996 only states that any criminal act which was punishable at the time of its commission 'in accordance with international law or national law' can be prosecuted, independently of the existence of an ICC.⁷¹ It remains an open question which particular criminal acts, especially with regard to the so-called crimes against humanity, are included in this general statement.⁷² According to para. 2 of Art. 13 the punishability of an act in the national law is sufficient. This is obviously correct as uncertainty only exists with regard to the applicable international law. Contemporary international law certainly does not require a detailed written description of a certain conduct as criminal (as continental lawyers might assume). It is sufficient that the wrongfulness of a certain conduct is universally acknowledged and, therefore, its punishment could not be regarded as illegitimate. This was recognized in trials of the Nazi-war criminals⁷³ and recently by the European Court of Human Rights.⁷⁴ However, at least one pro-

67 It provided that acting on the basis of an order does not exclude criminal responsibility if 'in the circumstances at the time, it was possible ... not to comply with that order'.

68 Cf. Ambos, *supra* note 16, pp. 294 ff.

69 See Art. 15 ICCPR, 7 ECHR, 9 ACHR, 11 II Universal Declaration of Human Rights, and Crawford, 1995 *supra* note 4, at 414.

70 Regarding the importance of the *nullum crimen* principle in international criminal law see the fundamental work of O. Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg*, (1966).

71 See also Swart, in Bassiouni, *supra* note 5, at 187.

72 See for example the new approach employed by T. Meron, 'International Criminalization of Internal Atrocities', 89 *AJIL* (1995), at 554-577, applying the *nullum crimen* principle to common Art. 3 and Protocol II of the Geneva Conventions (at 565, 566).

73 See Law Reports of Trials of War Criminals, *supra* note 61, Volume XV, at 166-170. See also my analysis of the recent decision of the German Constitutional Court in *Strafverteidiger 1/97*.

74 ECHR Reports, Series A, 335-B and 335-C (*SW v. UK*; *CR v. UK*); cf. Ch. Greenwood, 'International Humanitarian Law and the *Tadić* Case', 7 *EJIL* (1996) 265-283, at 281; Meron, *supra* note 72.

vision of the Draft Code itself conflicts with the prohibition of retroactivity.⁷⁵ On the other hand, in the light of the *nulla poena* principle, it must be asked how clear and definite penalties should be.⁷⁶ Art. 3 Draft Code 1996 leaves the sentencing to the ICC only stating that ‘the punishment shall be commensurate with the character and gravity of the crime’.

Art. 7 of the Draft Code 1991 excluded the application of a *statute of limitations*. Some States have criticized this, claiming that the Draft Code's concept of crime is too extensive to justify the exclusion of statutes of limitation for all the crimes regulated. The Special Rapporteur, therefore, proposed its elimination⁷⁷; the Draft Code 1996 followed this proposal. From an international criminal law viewpoint this decision is problematic as the duty to prosecute certain international crimes might imply the exclusion of a statute of limitations.⁷⁸ For that reason, a solution that differentiates between crimes according to their gravity⁷⁹ instead of simply eliminating the Article would have been more convincing.

The remaining provisions deal rather with *procedural* questions. Art. 11 establishing *judicial guarantees* is based on Art. 14 ICCPR and is similar to Art. 41 ILC Draft Statute. It essentially guarantees a fair trial. The regulation of the *ne bis in idem* principle in the Draft Code 1991 (Art. 9) has provoked a great deal of criticism. It is closely linked to the aforementioned principle of complementarity, since it indirectly rules on the relationship between an ICC and the national jurisdiction. The criticism has led the Special Rapporteur to propose a reformulation based on Art. 10 of the ‘Yugoslavia Statute’ and Art. 42 of the ‘ILC Draft Statute’.⁸⁰ This proposal was taken up by the Draft Code 1996 (Art. 12). The principle represents an indispensable protection of those accused persons who have already been sentenced by an ICC: they cannot be sentenced again before national courts. On the other hand it does not protect persons who have – for political reasons – gone unpunished before their national courts and actually deserve a sentence. The aforementioned provisions solve this dilemma by granting unrestricted application of the *ne bis in idem* principle only in the case of a first sentence by the ICC; on the other hand, the ICC

75 Art. 16 refers to the crime of aggression (see also notes 33 and p. 536). The SC determines – according to the ILC Draft Statute – its existence. This determination, however, must take place after the commission of the aggression, i.e. a constituting element of the act produces retroactivity (see A. Eser, in Bassiouni, *supra* note 5, at 45 and Swart, in *ibid.*, at 188, 189; Tomuschat, *supra* note 5, at 278). For the critical discussion within the ILC see Report of the ILC, *supra* note 58, par. 67-70. Regarding the violation of the *nullum crimen* principle by the Yugoslavia Statute from the Slovenian perspective see P. Dolenc, ‘A Slovenian Perspective on the Statute and Rules of the International Tribunal for the Former Yugoslavia’, 5 *CLF* (1994), at 458, 459.

76 See on this issue *supra* note 51.

77 12th Report of the Special Rapporteur, *supra* note 60, par. 81.

78 Explicitly for genocide, war crimes and crimes against humanity, see the corresponding UN-Convention of 26 November 1968 (UNTS volume 754, at 73); see also the 12th Report of the Special Rapporteur, *supra* note 59, par. 78 ff.

79 See Bassiouni *supra* note 5, at 163. The ILC's discussion initially also took this direction (cf. Report of the ILC, *supra* note 4, par. 147-153, esp. 151, 152).

80 See 12th Report of the Special Rapporteur, *supra* note 60, par. 89 ff (104). For criticism regarding the original Art. 9 see Swart, in Bassiouni, *supra* note 5, at 173 ff.

is allowed to proceed against a person sentenced by a national court if this person has been sentenced only for an 'ordinary' – instead of an 'international' – crime⁸¹, if the trial was not impartial or if the prosecution was not seriously pursued.⁸² In addition, Art. 12 Draft Code 1996 – taking up the Drafting Committee's proposal – permits another trial before a *national court* if the same act was committed in the territory of the affected State or if this State was the 'main victim' of the act (Art. 12 par. 2 (b)). Credit shall be given to earlier periods of imprisonment in order to avoid excessive sentences (Art. 12 par. 3). This provision, however, applies only to an ICC.⁸³ Therefore, it remains unclear whether national courts initiating second proceedings according to Art. 12 par. 2 (b) must also take into account periods of imprisonment already served. The position of the accused is – due to the uncertainty in this area – extremely vulnerable. Finally, all these reflections assume the existence of an ICC. In the absence of an ICC the status of the *ne bis in idem* principle is unclear: so many States fail to recognize it that it cannot claim universal validity.⁸⁴ In cases of possible multiple prosecution, sufficient protection of the accused can only be achieved if the affected States agree on a diplomatic level – upon initiation of an investigation – where the trial should take place and where the eventual sentence should be executed.⁸⁵ An international Code, therefore, should contain an obligation to bilateral consultations in order to avoid double sentencing; a detailed regulation of the *ne bis in idem* principle can be left to the statute of an ICC.

The aforementioned questions are closely related to the establishment of *national jurisdiction* for international crimes and *judicial cooperation* between States and between an ICC and States. While the Draft Code 1991 ignored this area the Draft Code 1996 contains relatively detailed rules. In principle, States can prosecute the

81 The distinction between 'ordinary' and 'international' crimes, however, is not undisputed, as Art. 14 par. 7 ICCPR already prohibits a second sentence if the accused was sentenced 'in accordance with the law and penal procedure of each country', i.e. according to national (ordinary) criminal law (see Crawford, 1994, *supra* note 4, at 149; Report of the *Ad Hoc* Committee, *supra* note 7, par. 179). Regarding the conflict of Art. 10 of the Yugoslavia Statute with the Slovenian constitution see Dolenc, *supra* note 75. In favour of the regulation, see Nsereko, *supra* note 2, at 514, 515.

82 Graefrath, *supra* note 2, at 301, 302 and 310, 311. Such cases could also arise if the application of national provisions granting remission of the punishment, in particular amnesties and pardons, is too generous. Art. 42 par. 2b Alternative Draft, *supra* note 10, is, therefore, correct in including these measures.

83 Art. 12 par. 3 states: '... the court ... shall take into account the extent to which any penalty imposed by a national court ... has already been served'; 'the court' in this sense means the ICC, not a 'national court' (Art. 9 par. 5 draft of the Drafting Committee; UN-Doc. A/CN. 4/L.506 from 22 June 1995 – limited distribution). Members of the Drafting Committee were: Alexander Yankov (Chairman), Doudou Thiam, Husain Al Baharna, James Crawford, Gudmundur Eiriksson, Qizi He, Peter Kabatsi, Mochtar Kusuma-Atmadja, Igor Ivanovich Lukashuk, Guillaume Pambou-Tchivounda, Robert Rosenstock, Alberto Szekely, F. Villagran-Kramer, Edmundo Vargas Carreno and Chusei Yamada.

84 12th Report of the Special Rapporteur, *supra* note 60, par. 97ff., in particular par. 110, refusing the application of this principle. See also Report of the ILC, *supra* note 4, par. 162 and German Constitutional Court (BVerfGE 75/1ff.: *On the Validity of the Principle ne bis in idem in Public International Law*). Prof. H. Jung, however, observes an increasing internationalization of the principle: 'Zur "Internationalisierung" des Grundsatzes "ne bis in idem"', in *Festschrift Schüler Springorum*, (1993) at 493-502, 500.

85 See Swart, in Bassiouni, *supra* note 5, at 180.

perpetrators of international crimes – with the exception of aggression – independently of an ICC (Art. 8 Draft Code 1996). If they do not prosecute they must extradite to another State claiming jurisdiction (Art. 9, *aut dedere aut judicare*); however, this does not cover the transfer or surrender to an ICC.⁸⁶ The Draft Code may serve as a legal basis for extradition (Art. 10 par. 2).

B. Special Part

As mentioned above, the Draft Code still does not give a precise definition of a crime but refers to the crimes regulated in the special part. The substantial reduction of the crimes from twelve to five (aggression, genocide, crimes against humanity, crimes against UN and associated personnel, war crimes)⁸⁷ is a response to widespread criticism as indicated by the Special Rapporteur:

... the Special Rapporteur is proposing a more restricted list ... This is what the vast majority of Governments want. In order for an international wrongful act to become a crime under the code, not only must it be extremely serious but the international community must decide that it is to be included.⁸⁸

The substantive criteria for this reduction are that the crime, one the one hand, be recognized by existing customary international law and, on the other hand, that it entails a threat to international peace and security. As to the latter criterion, two of the crimes, aggression and genocide, by their very nature pose such a threat to the international community. The remaining three crimes (crimes against humanity, crimes against UN and associated personnel, war crimes) are covered only if they meet the additional requirement of having been committed in a systematic manner or on a large scale (cf. Art. 18-20 Draft Code 1996).⁸⁹

As to the first criterion the existing *customary international law* and the 'official' statutes⁹⁰ refer us to the following four groups of international crimes: genocide,

86 Report of the ILC, *supra* note 6; p. 51. There is a clear distinction between extradition (between States) and transfer or surrender (to an international organ). See, for example, Art. 53 ILC Draft Statute and par. 3 of the German 'Jugoslawien-Strafgerichtshof-Gesetz' (BGBl I 1995, 485) and its official motivation (BTDRs. 13/57, S. 8, 10).

87 However, *apartheid* is included in Art. 18 par. (f) under institutional discrimination as a crime against humanity and *environmental damage* in Art. 20 par. (g) as a war crime. For *international terrorism* see following note 88.

88 13th Report of the Special Rapporteur (to 'Part II', Art. 15-26), UN-Doc. A/CN. 4/466 from 24 March 1995 (47th session 1995), par. 4. However, the Special Rapporteur proposed to include international terrorism and illicit traffic in narcotic drugs. While several ILC members refused to consider 'illicit traffic in narcotic drugs' as a crime against the peace and security of mankind (Report of the ILC, *supra* note 58, par. 112-118, 135, 140), the most important criticism concerning 'international terrorism' was that its definition is not sufficiently precise (*ibid.*, par. 105-111, 138, 140). However, international terrorism may be covered by Art. 18 as a crime against humanity as that Art. refers to commission by 'any organization or group'.

89 The *systematic manner* requirement implies a preconceived plan or policy. The *large scale* requirement refers to acts directed against a multiplicity of victims either as a result of a series of attacks or a single massive attack (Report of the ILC, *supra* note 6, pp. 94 f.).

90 Art. 1-5 Yugoslavia Statute and Art. 20 'ILC-Draft' (*supra* notes 2 and 4). See also the Special Rapporteur's summary of the ILC's discussion (Report of the ILC, *supra* note 58, par. 130). On the

aggression, war crimes and crimes against humanity. One can subdivide them into two groups.⁹¹ The first group refers to the crimes that reflect existing international law and possess a solid treaty basis providing definitions sufficiently clear to apply these offences in concrete cases. This group includes the crime of *genocide* and *war crimes*. The second group refers to the crimes that extend existing international law and lack a treaty basis as well as uniform definitions. This group includes *aggression* and *crimes against humanity*.

* The crime of *genocide* (Art. 17 Draft Code 1996) has a solid treaty basis⁹² and is universally recognized constituting a *ius cogens* norm.⁹³ There was a broad consensus about its inclusion in a Code⁹⁴ and the jurisdiction of an ICC⁹⁵. All this implies that genocide is directly punishable under international criminal law.⁹⁶ Against this background it is a rather academic exercise to discuss whether genocide forms an independent category or falls under the crimes against humanity.⁹⁷

* *War crimes* include, on the one hand, the 'grave breaches' of the Geneva Conventions and, on the other hand, (further) 'violations of the laws or customs of war'. The 'grave breaches' follow from Art. 50 of the first, 51 of the second, 130 of the third and 147 of the fourth Geneva Convention including among others 'wilful killing' and 'torture or inhuman treatment'.⁹⁸ The 'violations of the laws or customs of war' are a category of customary law including for example 'employment of poisonous weapons or other weapons calculated to cause unnecessary suffering' or 'wanton destruction of cities ... not justified by military necessity'.⁹⁹ It is increasingly disputed whether the laws and customs

particular crimes see Triffterer, *supra* note 50, at 176ff.; Tomuschat, *supra* note 5, at 278ff; McCormack and Simpson, *supra* note 5, at 13ff.

91 For a different division referring to the complete Draft Code see McCormack and Simpson, *supra* note 5, at 13, 24, 42. The Special Rapporteur takes a similar approach (Report of the ILC, *supra* note 58, par. 130-133).

92 The definition of genocide corresponds to Art. 2 of the 'Convention on the Prevention and Punishment of the Crime of Genocide'. This Convention is considered to be the expression of international law on the subject (McCormack/Simpson, *supra* note 5, at 13, 14).

93 Meron, *supra* note 71, at 558.

94 Report of the ILC, *supra* note 58, par. 78-83, 130, 132.

95 Report of the *Ad Hoc* Committee, *supra* note 7, par. 59.

96 Cf. Triffterer, *supra* note 70, at 188-190. The criminality also follows from the fact that various countries made genocide a crime under their national legislation (*ibid.*, at 189; e.g. par. 220 a German Criminal Code (*Strafgesetzbuch*)). See also the recent judgement of the ICS, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 11 July 1996, espec. par. 22 ff.

97 Clearly, crimes against humanity overlap to a considerable extent with genocide; therefore, there is a strong argument in favor of subsuming the latter under the former (cf. Meron, *supra* note 72, at 558; Triffterer, *supra* note 70, at 188-190).

98 The Geneva Conventions entered into force on 21 October 1950 and have been signed by 186 States as of 31 December 1995; two more than for the UN-Charter (Comité International de la Croix-Rouge, Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977, signatures, ratifications, accessions and successions as of 31 December 1995, Geneva 31 January 1996).

99 See also Art. 2 and 3 of the Yugoslavia Statute, *supra* note 4, as well as 13th Report of the Special Rapporteur, *supra* note 88, par. 110. For a critical analysis see McCormack and Simpson, *supra* note 5, at 36-39; Triffterer, *supra* note 70, at 177-187. For the States' point of view see Report of

applicable in armed conflict should include those governing *non-international* armed conflicts, notably Common Article 3 of the Geneva Conventions and Additional Protocol II thereto.¹⁰⁰ The Yugoslavia Tribunal, invoking 'State practice'¹⁰¹ reaching from the Spanish Civil War to the more recent conflicts in Somalia and Chechnya, convincingly argues that laws and customs of war within the meaning of Art. 3 of the Statute also apply to an internal armed conflict.¹⁰² Art. 20 par. (f) Draft Code 1996 also includes 'acts committed in violation of international humanitarian law applicable in armed conflict *not* of an international character' (emphasis added).

* Apart from the aforementioned problems concerning *aggression*,¹⁰³ the determination of an act of aggression is still strongly debated. Further, it is not at all clear how to distinguish between 'war of aggression', 'act of aggression' and 'threat of aggression', all terms contained in Art. 15 and 16 Draft Code 1991.¹⁰⁴ The Drafting Committee defined 'aggression' as 'use of armed force by a State against the territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations', thereby limiting the extensive definitions used in the Draft Code 1991.¹⁰⁵ Art. 16 Draft Code 1996 adopts aggression as defined in Art. 6 (a) IMT Statute punishing leaders and organizers actively participating in or ordering 'the planning, preparation, initiation or waging of aggression committed by a State'.

* Using the title *systematic or mass violations of human rights*, Art. 21 Draft Code 1991 essentially extended the concept of *crimes against humanity*, as defined in Art. 6 (c) of the IMT Statute, to all acts of this nature regardless of the circumstances in which they are perpetrated.¹⁰⁶ Therefore, the Special Rapporteur proposed to employ the better

the *Ad Hoc* Committee, *supra* note 7, par.72-76. For the discussion within the ILC see Report of the ILC, *supra* note 58, par. 98-103, 130, 132.

- 100 See especially Meron, *supra* note 72, arguing, at 561, that 'there is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars.' See also Report of the *Ad Hoc* Committee, *supra* note 7, par.74.
- 101 The Tribunal, however, understands as State practice 'words' ('official pronouncements of States, military manuals and judicial decision') rather than 'deeds' because 'it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field ...' (*Prosecutor vs. Dusko Tadic*, *supra* note 17, par.99; see also Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 *AJIL* (1996), pp. 238-249, at 239). Sceptical about this tendency contrary to the traditional understanding of State practice, B. Simma, 'International Human Rights Law and General International Law: a Comparative Analysis', in *Academy of European Law* (ed.), *Collected courses of the Academy of European Law*, (1995) 153-236, 216 ff.
- 102 *Prosecutor vs. Dusko Tadic*, *supra* note 16, par.86 ff. Cf. Meron, *supra* note 100, at 241-2; Greenwood, *supra* note 74, at 279-80.
- 103 See *supra* notes 33, 75.
- 104 Cf. McCormack and Simpson, *supra* note 5, at 24-29; Triffterer, *supra* note 70, at 202-207; Report of the *Ad Hoc* Committee, *supra* note 7, par. 63-71; for the discussion within the ILC see Report of the ILC, *supra* note 58, par. 60-74, esp. 63, and 131, 132.
- 105 Drafting Committee, *supra* note 80, Art. 15. However, the final version remains to be seen. For the original definition see GA Res. 3314 (XXIX) 14 December 1974, (Official Records, 29th session, supplement No. 19, A/9619 and Corr. 1).
- 106 Cf. McCormack and Simpson, *supra* note 5, at 14, 15. See also *Prosecutor vs. Dusko Tadic*, *supra* note 17, par. 141 '[it is a] settled rule ... that crimes against humanity do ... not require a connection' to any conflict at all. Cf. Meron, *supra* note 99, at 242; Greenwood, *supra* note 74, at 282.

known category of crimes against humanity¹⁰⁷ and the Draft Code 1996 adopted it as Art. 18. Accordingly, murder, extermination, torture, enslavement, persecution, institutionalized discrimination, deportation, disappearance¹⁰⁸, rape and other forms of sexual abuse and other inhuman acts are included.¹⁰⁹ However, the contents of this category is not undisputed and the doctrine developed various definitions.¹¹⁰ The ILC in its commentary on Art. 20 Draft Statute presents the following definition: '... the definition of crimes against humanity encompasses inhuman acts of a very serious character involving *widespread* or *systematic* violations aimed at the *civilian* population in whole or in part. The hallmarks of such crimes lie in their *large-scale and systematic nature*. The particular forms of unlawful acts ... are less crucial to the definition than the factors of *scale and deliberate policy*, as well as in their being targeted *against the civilian population* in whole or in part ... The term 'directed against any civilian population' should be taken to refer to acts committed as part of a widespread or systematic attack against a civilian population on *national, political, ethnic, racial or religious grounds*. The particular acts referred to in the definition are acts *deliberately committed* as part of such an attack'.¹¹¹

This definition – in accordance with Art. 18 Draft Code 1996 – is as clear as possible and certainly constitutes a step forward. However, within the framework of the recent debate in the UN *ad hoc* Committee it was again noted that there is 'no convention containing a generally recognized and sufficiently precise juridical definition of crimes against humanity'¹¹². This clearly shows that a more precise definition is still required.

In spite of the remaining problems, a broad consensus about the inclusion of these crimes in an international Criminal Code and the (inherent) jurisdiction of an ICC may be identified.¹¹³ The inclusion of the new Art. 19 (crimes against UN and associate personnel) appears all the more surprising. It is a consequence of the increasing number of attacks against UN-personnel which led the GA to adopt a corresponding Convention¹¹⁴ and the Secretary General to demand adequate protection of UN

107 13th Report of the Special Rapporteur, *supra* note 85, par. 64-97; see also Report of the ILC, *supra* note 58, par. 87-97, 130, 133.

108 See the UNGA-Declaration on the Protection of all Persons from Enforced Disappearances (Res. 47/133, 18 December 1992) and the Convención Interamericana sobre la Desaparición Forzada de Personas of 9 June 1994 (OEA/Ser.P, AG/doc.3114/94 rev.1 of 8 June 1994).

109 Cf. Art. 5 of the Yugoslavia Statute, *supra* note 2, and Art. 3 of the Rwanda-Statute, *supra* note 3.

110 Jescheck, for example, classifies crimes against humanity as a sub-group of crimes against international law which, according to his definition, represent international crimes (EPIL, Instalment 8, 1985, at 332). Bassiouni also considers them 'a category of international crimes' referring to Art. 6 c of the IMT Statute; at the same time he criticizes this concept as a 'chaotic legal structure with many unresolved legal issues' (*Crimes against Humanity in International Criminal Law*, (1992), at 47, 470, 480, 481). According to Ferencz crimes against humanity do not represent 'isolated incidents but large and systematic actions, often cloaked with official authority, which by the dimension of brutality placed the international community in danger or shocked the conscience of humankind' (EPIL, Instalment 1, 1992, at 869, 870). See also Triffterer, *supra* note 51, at 187-202; McCormack and Simpson, *supra* note 5, at 14-24.

111 Emphasis added (ILC Report, *supra* note 4, at 76).

112 Report of the *Ad Hoc* Committee, *supra* note 7, par. 78. Cf. also Report of the ILC, *supra* note 58, par. 88.

113 Report of the *Ad Hoc* Committee, *supra* note 7, par. 59, 63, 72, 77; Report of the ILC, *supra* note 58, par. 130, 140.

114 GA resolution 49/59, 9 December 1994.

personnel.¹¹⁵ The provision is certainly a political signal; one wonders, however, whether there is real need for privileged treatment of UN personnel given that the attacks in question are already covered by the other crimes and UN personnel are in the same position as the civilian population in zones of armed conflict.

IV. Future Perspectives

At the moment, the fate of the *statute* for an ICC and of an International Criminal Code is difficult to predict. The PrepCom was, as mentioned initially, established in order to combine 'further discussions with the drafting of texts, with a view to preparing a consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries'.¹¹⁶ Its first draft report on 'General Principles of Criminal Law'¹¹⁷ combined with the – certainly improved – Draft Code 1996 is a substantial step forward. The PrepCom has now to take into account the Draft Code 1996 and try either to incorporate it in a Statute or clearly separate substantive and procedural norms. In any case, the substantive criminal law requires some further improvement which – though it is a difficult endeavour to put forward a general part which will be convincing both to common and continental lawyers – should not be impossible.¹¹⁸ Taken as it is, the Draft Code 1996 could be adopted in the form of a convention by the GA or a States conference, in the form of a declaration by the GA or, as already mentioned, incorporated in the Statute. Although there is no formal agreement on the timing aspect, a States' conference will probably take place in 1998 after three or four more meetings of the PrepCom in 1997.¹¹⁹ In any case, a more or less solid and convincing general part would require a thorough analysis of the jurisprudence and codification efforts since Nuremberg supported by comparative legal research in order to distill fundamental structural elements of substantive international criminal law. Such research would take time and it might be a political mistake to wait for its results.

Finally, in spite of the euphoria surrounding certain positive political developments, it should not be overlooked that the *internationalisation* of criminal law, in particular the creation of mechanisms of international criminal justice, will only meet its expectations if the corresponding competences or even obligations to prosecute certain criminal acts defined as 'international crimes' are *internalized*, i.e. recognized and accepted by the prosecutors, the accused and the victims, as materi-

115 Report of the ILC, *supra* note 6, pp. 104 f.

116 Report of the Ad Hoc Committee, *supra* note 7, par. 257.

117 *Supra* note 8.

118 For another sceptical viewpoint see also Tomuschat, *supra* note 5, at 291; McCormack and Simpson, *supra* note 5, at 46; see, on the other hand, the rather optimistic viewpoint of Crawford, 1995, *supra* note 4, at 415.

119 Report of the Ad Hoc Committee, *supra* note 7, par. 252; Report of the PrepCom suppl. 22, *supra* note 9, par. 368, 370.

ally valid and just law.¹²⁰ The individual, as opposed to the State, cannot initiate proceedings before an ICC.¹²¹ Therefore, existing mechanisms of protection, such as individual complaint procedures, civil law remedies¹²² and inter-State cooperation in criminal matters¹²³ should be maintained and improved. They can in certain cases serve the human rights cause far better than 'package solutions' offered by international criminal law; solutions which too often tend to fail because of the State community's lack of political will to enforce them.

120 Regarding the discrepancy between 'internationalisation' and 'internalisation' in a pure human rights context see Simma, *supra* note 101, at 191.

121 In this sense, the cruel irony of international protection of human rights, as observed by Reisman and Koven Levit, is maintained in spite the recognition of individual responsibility ('Reflections on the Problem of Individual Responsibility for Violations of Human Rights', in Cançado Trindade (ed.), *The Modern World of Human Rights: Essays in Honor of Thomas Buergenthal*, (1996) 419-436, at 421).

122 See S. Walther, "'Private" Ahndung schwerer Menschenrechtsverletzungen: Grenzüberschreitende Denkanstöße zum internationalen Strafrecht', in Arnold et al (eds.), *Grenzüberschreitungen, Festgabe für Albin Eser zum 60 Geburtstag*, (1995) 229-247.

123 In any case, the principle of complementarity implies that international criminal and judicial cooperation on an inter-State level will not lose its importance (see for example the discussion in the *Ad Hoc* Committee: Report, *supra* note 7, par. 39-51, 195-243).

V. Appendix: Comparative overview of the most important provisions of the statutes establishing an International Criminal Court (ICC)

	UN – Security Council resolutions (1993/94) ¹²⁴	ILC-draft (1994)	Alternative-draft (1995)
legal nature/structure	Establishment as a subsidiary organ (Art. 29 UN-Charter) on the basis of ch. VII UN Charter two trial and two appeals chambers, prosecutor, registry (Art. 11-17).	Treaty: permanent ICC/ 'Presidency', trial and appeals chamber, prosecutor, registry (Art. 1-19, 22).	As ILC-draft.
jurisdiction		Prerequisites: state complaint (Art. 21 - 25) or Security Council action (Art. 23) ['pre-trial proceedings'], then decision by the Court (Art. 24); challenge to the jurisdiction possible (Art. 34) and discretion of the Court to exercise jurisdiction in case of national prosecution or crimes of less gravity (Art. 35).	In principle as ILC-draft, but state complaint facilitated and role of the SC discussed (part. III).
– subject matter jurisdiction	Grave breaches of the Geneva Conventions, ¹²⁵ violations of the laws or customs of war, genocide, crimes against humanity, no exclusive enumeration (Art. 1-5).	Specific 'crimes' (genocide, aggression, breaches of the laws of war, crimes against humanity) and treaty crimes 'of international concern' (Art. 20) ¹²⁶ ; ipso iure jurisdiction over genocide.	In principle as ILC-draft, but exact definition of specific crimes and additional crimes according to annex.
– personal jurisdiction	Natural persons who 'planned, instigated, ordered, committed or otherwise aided ... in the planning, preparation or execution' of the above mentioned crimes, exclusion of the 'Act of State' doctrine and 'superior order' (Art. 6 -7).	Any natural person (ex Art. 21 par. 1).	As ILC-draft.
– territorial/temporal jurisdiction	Territory of the former Yugoslavia from 1/1/91 until the establishment of peace and security. ¹²⁷	In principle unlimited, depends on the acceptance of the jurisdiction by a state party (Art. 22).	As ILC-draft.

124 The statutes approved by the two resolutions refer to the former Yugoslavia and Rwanda and are almost identical; a separate discussion, therefore, is only necessary for those few areas where the resolutions differ. The overview is based on the 'Yugoslavia-Resolution' (827), (the 'rules of procedure and evidence' are not taken into account).

125 Resolution 827 refers to 'grave breaches' of the Geneva Conventions and laws or customs of war, whereas resolution 955 refers to common article 3 of the Geneva Conventions and the second additional protocol, since the Rwanda conflict is considered 'not international'.

126 See the treaties in the annexes, particularly the Geneva Conventions, the Torture (1984) and Drug Convention (1988).

127 Resolution 955 also refers to the territory of neighbouring states concerning the crimes of Rwandan citizens and will be valid from Jan 1 until 31/12/1994.

Establishing an International Criminal Court and an International Criminal Code

	UN – Security Council resolutions (1993/94)	ILC-draft (1994)	Alternative-draft (1995)
– national jurisdiction?	In principle concurrent jurisdiction, but primacy of the ICC in case of conflict (Art. 9).	Primacy of the ICC in case of subject matter jurisdiction (ex 51 ff.), otherwise complementary (Art. 35, see above and preamble).	As ILC-draft.
proceedings			
– pre-trial proceedings	Investigation and indictment by prosecutor, review and possible compulsory measures by judge of the trial chamber (Art. 18,19).	Investigation and indictment by prosecutor, review and possible compulsory measures by 'Presidency' (Art. 25-31).	In principle as ILC-draft, only minor changes (see below).
•Investigation	<i>Ex officio</i> or on the basis of 'information ... from any source'.	On the basis of complaint by a state party which is party to the Genocide Convention or – in the case of other crimes – has accepted the jurisdiction of the court; or on the basis of Security Council decision (Art. 25 par. 4 in conjunction with 23).	As ILC-draft.
•indictment	On the basis of <i>prima facie</i> case; confirmation or dismissal by judge.	On the basis of <i>prima facie</i> case; 'Presidency' confirms, amends or dismisses the indictment (ex 27 par. 2); also reviews negative decision of the prosecutor at the request of a complaining state or the Security Council and may request the prosecutor to reconsider the decision. Consideration of national prosecution and gravity of the crime (Art. 35)	In principle as ILC-draft, but definition of <i>prima facie</i> case in the sense of an urgent suspicion of a criminal act and right to a hearing for parties (Art 27 par. 1, 2).
•compulsory measures?	Only if ordered by the judge (e.g. arrest warrant); prosecutor: can only request compulsory measures and carry out certain investigation measures, e.g. interrogation.	Similar to UN-SC resolutions, with more exact provisions, particularly conditions of arrest (Art. 28).	As ILC-draft.

	UN – Security Council resolutions (1993/94)	ILC-draft (1994)	Alternative-draft (1995)
– Trial proceedings	Art. 20-21.	Art. 32-47	Art. 32-47
•applicable law	–	Statutes, applicable treaties and rules and principles of general international law; 'to the extent applicable' national law (Art. 33).	As ILC-draft, but draws attention to 'elements to be regulated in a General Part'.
•course of the trial	Reading of the indictment, pleading of the accused, presence, date for trial.	Reading of the indictment, ensuring respect for the rights of the accused, his pleading (Art. 38).	As ILC-draft.
•powers of the Court	Arrest of the accused, exclusion of the public.	Exclusion of the public, conducting trial, decisions about evidence (Art. 38).	As ILC-draft.
•evidence	–	Hearing of witnesses according to national law, including criminalization of perjury; ICC decides about admissibility and relevance of evidence, does not require proofs or facts of common knowledge; illegally obtained evidence not admissible (Art. 44); record of evidence taken before indictment chamber admissible in subsequent trial (Art. 37).	Own rules of evidence; audio or video-recording as documentary evidence; prohibition of use of evidence obtained in 'serious violation' of human rights; right of witness not to testify; possible sanctions against witnesses (44); 'record of evidence' only in case of legal assistance (Art 37).
– judgment	Simple majority, delivered in public, accompanied by reasoned opinion in writing (Art. 23).	Simple majority concerning guilt and sentencing, inability to agree leads to new trial; deliberations secret, judgment in writing and delivered in open court (Art. 45).	As ILC-draft.
– sentencing	Only imprisonment; length according to 'general practice' in the former Yugoslavia and gravity of the crime and individual circumstances of the convicted person; additionally, order of the return of any property and pursuits acquired by criminal conduct possible (Art. 24).	Imprisonment or fine, length or amount according to the national law of the convicted person, place of the commission of the crime and the competent state (Art. 47); further separate hearing; consideration of the gravity of the crime and individual circumstances (Art. 46).	In principle as ILC-draft but minimum punishment of 1 year imprisonment and fine additionally (not solely); confiscation of proceeds or instruments of the crime; credit for period of pre-trial detention (Art 47).

Establishing an International Criminal Court and an International Criminal Code

	UN – Security Council resolutions (1993/94)	ILC-draft (1994)	Alternative-draft (1995)
judicial remedies	Reasons for appeal and review (Art. 25-26).	Reasons and consequences for appeal and review (Art. 48-50).	Art. 48-50
– <i>appeal</i>	In case of error of law or fact.	In case of unfair trial, error of law or fact (new decision or trial); in case of disproportion between crime and sentence (amendment of the sentence) (Art. 48, 49).	In principle as ILC-draft, but: error of fact only in case of ‘miscarriage of justice’ reason for appeal; prosecutor and accused have right to appeal (Art 48).
– <i>revision</i>	In case of new, decisive facts.	Similar to UN-SC resolutions, Presidency requests a decision of the former or new trial chamber or refers the matter to appeals chamber (Art. 50).	As ILC-draft.
– <i>others</i>	–	<i>Habeas corpus</i> during pre-trial proceedings (Art. 29 par. 3).	As ILC-draft and additionally right to appeal against pre-trial rulings (Art 48 par. 1).
execution of a sentence	Art. 27, 28.	Prerequisite: recognition of judgments by state parties (Art. 58).	In principle as ILC-draft, but stronger legal obligation by expression ‘abide’.
– <i>principle</i>	In a certain state according to its law under supervision of the ICC.	Similar to UN-SC resolutions, if impossible in ‘host state’ (Art. 59).	Additionally to ILC: formal acceptance of the administering state; no consent of the sentenced person; also applicable to fines and confiscatory measures (Art 59).
– <i>exceptions</i>	Pardon or commutation of sentences subject to the decision of the ICC.	Pardon, parole and commutation of sentences according to national law on request of convicted person at ICC (Art. 60).	No release according to national law; decision by the ICC alone (Art 60)

Kai Ambos

	UN – Security Council resolutions (1993/94)	ILC-draft (1994)	Alternative-draft (1995)
rule of law principles	<i>Ne bis in idem</i> (Art. 10), <i>pre-trial proceedings</i> : right to counsel (Art. 18 par. 3); <i>trial</i> : 'fair trial' principles, including presence of the accused (Art. 20); protection of witnesses and victims (Art. 21).	Judicial independence (Art. 10); <i>pre-trial proceedings</i> : right to silence, right to counsel (Art. 26 par. 6), in principle release after 90 days (Art. 28 par. 2), notification of the indictment (Art. 30); <i>trial</i> : 'fair trial', but hearing in absence of accused possible (Art. 37 par. 1-3, 38 par. 3, 40, 41); <i>nullum crimen</i> (Art. 39), <i>ne bis in idem</i> (Art. 42); protection of accused, witnesses and victims (Art. 43).	As ILC-draft with amendments in Art. 26 par. 6, Art 37 (trial in absence more difficult), Art 41 (right to examine the evidence by defence), Art 42 (not applicable in case of exemption of punishment; taking into account other penalties), Art 43 (victims and witness service).
other provisions	Judicial co-operation and assistance (Art. 29).	Judicial co-operation and assistance (Art. 51-57), particularly Court may request state to take provisional measures (Art. 52).	Various changes (Art. 51 to 57a).