International Courts and Tribunals

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The most significant developments in 1996 regarding international courts and tribunals are reviewed herein, particularly events relating to the International Court of Justice, the European Court of Justice, and the proposed Permanent International Criminal Court. Other significant developments relating to the International Criminal Court for the Former Yugoslavia, the International Criminal Court for Rwanda, and the World Trade Organization are detailed in other reports in this issue.

I. International Court of Justice

The International Court of Justice (ICJ), which is the principal judicial organ of the United Nations charged with the task of delivering judgments in contentious cases submitted to it by sovereign states and issuing nonbinding advisory opinions at the request of certain UN organs and agencies, began the year 1996 (the 50th since its first inaugural sitting on April 18, 1946) with nine contentious cases and two requests for advisory opinion. One case was discontinued and another one was introduced in 1996. This section reports briefly on the main judicial activity of the ICJ during 1996 and on certain elections that were held.

A. CONTENTIOUS CASES DURING 1996

1. *Aerial Incident of July 1988 (Iran v. United States)*

On February 23, 1996, the ICJ Registry announced that proceedings in this case brought by Iran against the United States on May 17, 1989, had been discontinued. The case had

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been suspended following the announcement by both parties on August 8, 1994, that they had entered into negotiations with a view to reaching a friendly settlement of the matter. The discontinuance followed the joint notification by the two parties that their governments had entered into "an agreement in full and final settlement of all disputes, differences, claims, counterclaims, and matters directly or indirectly raised by or capable of arising out of, or directly or indirectly related to or connected with, this case."[1] The ICJ President's Order of February 22, 1996, officially removed the case from the General List of ICJ cases.

2. *Land and Maritime Boundary (Cameroon v. Nigeria)*

In this inter-African case, hearings were held between March 5 and 8, 1996, in connection with the request for the indication of provisional measures filed by Cameroon on February 12, 1996, following certain armed incidents between the armed forces of Cameroon and Nigeria in the disputed Bakassi peninsula in early February. The ICJ, by its Order of March 15, 1996, indicated, *inter alia*, that no action was to be taken by either party that might aggravate the tensions between the two countries and that they should facilitate the fact-finding mission of the UN Secretary-General to the Bakassi peninsula, and maintain their respective military positions held prior to February 3, 1996.

3. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia) (Jurisdiction)*

The ICJ delivered a Judgment on July 11, 1996, in which it rejected all of the preliminary objections raised by Yugoslavia and found that it has jurisdiction to deal with the merits of the case on the basis of the existence of an international legal dispute between the two states that falls within the scope of Article IX of the 1948 Genocide Convention. The ICJ held that the object and purpose of the Genocide Convention, as well as the rights and obligations embodied in the Convention, are *erga omnes* (*i.e.*, opposable to any state) and that the obligation of each state to prevent and to punish the crime of genocide is not territorially limited by the Convention. The ICJ also held that the Genocide Convention does not contain any clause which limits the scope of its jurisdiction *ratione temporis*. By an Order of July 23, 1996, the ICJ fixed July 23, 1997, as the time-limit for the filing by Yugoslavia of its Counter-Memorial on the merits of the case.

4. *Oil Platforms (Iran v. United States) (Jurisdiction)*

Hearings were held between September 16 and 24, 1996, on the preliminary objections of the United States relating to the admissibility of the Application filed by Iran and the jurisdiction of the ICJ. On December 12, 1996, the ICJ dismissed those objections and held that it has jurisdiction to deal with the merits of the cases.

5. *General List*

As of December 1996, the General List of ICJ cases is composed as follows: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United States), Oil*

1. For an official summary of the settlement agreement, *see* 90 AMER. J. INT'L L. 278 (1996).

Platforms (Iran v. United States), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Gabcikovo-Nagymaros Project (Hungary/Slovakia), Land and Maritime Boundary (Cameroon v. Nigeria), Fisheries Jurisdiction (Spain v. Canada), and *Kasikili/Sedudu Island (Botswana/Namibia).*

B. Advisory Opinions Issued During 1996

1. *Legality of the Threat or Use of Nuclear Weapons*

On July 8, 1996, the ICJ handed down its opinion in reply to the request of the UN General Assembly to give an opinion on the following question embodied in Resolution 49/75K of December 15, 1994: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[2] The ICJ found that the most directly applicable law governing this question was formed by (i) the provisions of the UN Charter relating to the threat or use of force, (ii) the law applicable in armed conflict, including international humanitarian law, and the law of neutrality, and (iii) any relevant treaties on nuclear weapons, taking into account the unique characteristics of such weapons. The ICJ held that the Charter provisions apply to any use of force, regardless of the type of weapon employed, and that the dual customary condition of necessity and proportionality applies whatever the force used in self-defense. However, the Charter neither expressly prohibits nor permits the use of any specific weapon. With regard to the law applicable in armed conflict, the ICJ found that no treaty or customary rule contained a general authorization or prohibition of the threat or use of nuclear weapons.

With regard to the principles and rules of humanitarian law in armed conflict, the ICJ identified the two cardinal principles to be the protection of noncombatants and the avoidance of unnecessary suffering to combatants. Nevertheless, the ICJ was uncertain what conclusions to draw from such applicability. Since the Judges were evenly split on this issue, the ICJ President, in an unprecedented move, used his casting vote to hold that the threat or use of nuclear weapons generally would be contrary to the law applicable in armed conflict and in particular humanitarian law, but that the ICJ did not have a sufficient basis for reaching a definitive conclusion as to whether the use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense in which a nation's very survival is at stake. Finally, the ICJ held, unanimously, that Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons involves an obligation in good faith to pursue and to conclude a treaty resulting in complete disarmament.

2. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*

Also on July 8, 1996, the ICJ ruled on a similar request for an advisory opinion filed by the World Health Organization (WHO) on September 3, 1993, that read: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"

The ICJ determined that three conditions must be satisfied in order to have jurisdiction to deal with a request from a Specialized Agency such as the WHO: (i) the Specialized Agency requesting the opinion must be duly authorized under the UN Charter to request opinions from the ICJ, (ii) the request must relate to a legal question, and (iii) the question must be one arising within the scope of the activities of the requesting body.

2. *See also* 35 Int'l Legal Mat. 809 (1996).

The ICJ, by 11 votes to 3, found that it was unable to give the opinion requested, because the third condition had not been fulfilled in this case. It determined that the request related, not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. However, the constituent instrument and the practice of the WHO do not confer upon the WHO a competence to address the issue of the legality of the use of nuclear weapons. According to the ICJ, questions concerning the use of force and the regulation of armaments and disarmament are within the competence of the United Nations and do not lie within the scope of the activities of Specialized Agencies such as the WHO, which are restricted by the principle of specialty applicable to international organizations in general.

C. New Cases Filed in 1996

On May 29, 1996, Botswana and Namibia jointly notified the ICJ of a Special Agreement dated February 15, 1996, in which they requested the ICJ to determine, on the basis of the Treaty between Great Britain and Germany of July 1, 1890, and the rules and principles of international law, the boundary between Botswana and Namibia around Kasikili/Sedudu Island and the legal status of the island. A Joint Team of Technical Experts from both countries that had been in operation since May 24, 1992, had failed to determine the boundary around Kasikili/Sedudu island. The Court, by its Order of June 24, 1996, fixed February 28, 1997, as the time-limit for the filing by each party of a Memorial and November 28, 1997, as the time-limit for a Counter-Memorial.

D. Judicial Elections Held During 1996

Gonzalo Parra-Arranguren (Venezuela) was elected by the U.N. Security Council and General Assembly on February 28, 1996, to hold office for the remainder of the term of Judge Andrés Aguilar-Mawdsley, who died in office on October 24, 1995.

During the regular triennial elections held on November 6, 1996, Peter Kooijmans (The Netherlands) and José Rezek (Brazil) were elected to the ICJ to serve nine-year terms. President Mohammed Bedjaoui (Algeria), Vice-President Stephen Schwebel (United States), and Judge Vladlen Vereshchetin (Russian Federation) were reelected. Following the election on November 6, the current make-up of the ICJ is: President Mohammed Bedjaoui (Algeria), Vice-President Stephen Schwebel (United States), Judges Shigeru Oda (Japan), Gilbert Guillaume (France), Christopher Weeramantry (Sri Lanka), Raymond Ranjeva (Madagascar), Géza Herzegh (Hungary), Shi Jiuyong (China), Carl-August Fleischhauer (Germany), Abdul Koroma (Sierra Leone), Vladlen Vereshchetin (Russian Federation), Rosalyn Higgins (United Kingdom), Gonzalo Parra-Arranguren (Venezuela), Peter Kooijmans (The Netherlands), and José Rezek (Brazil).

II. United Nations Compensation Commission

The United Nations Compensation Commission (UNCC), created by the U.N. Security Council pursuant to Resolution 687 in 1991, is the principal international institution responsible for the processing, determination, and payment of claims against Iraq arising from the Gulf War. A number of interesting developments concerning the UNCC have occurred in the past year, the most significant of which include the processing of most individual claims; an agreement with Iraq for the sale of oil the proceeds of which will be used in part for payment of awards to successful claimants; and the presentation of reports by the Governing Council of the UNCC

framing the key issues relevant for resolution of the corporate, government, and large individual claims.

A. Funds for UNCC Awards

In December 1996, the United Nations authorized Iraq, pursuant to Resolution 986, to sell $1 billion worth of oil per quarter, with thirty percent, or $300 million per quarter, earmarked for the UNCC Compensation Fund to settle Gulf War claims. Initially, these monies will be used to satisfy awards already rendered to individual claimants. As of October 1996, approximately $4 billion has been awarded to UNCC claimants, with $3.2 billion awarded to 900,000 claimants in category A (departure claims), $13.5 million awarded to 4,000 claimants in category B (serious personal injury or death claims), and $800 million awarded to 425,000 claimants in category C (individual claims up to $100,000). An additional $500 million for certain Egyptian workers in category C claims will likely be awarded in 1997.[3]

As for other claimants, to date no decisions have been rendered regarding the many corporate, government, and large individual claims with claims totaling over $200 billion. The UNCC has composed one category D panel (individual claims in excess of $100,000), two category E panels (corporate claims), and two category F panels (government claims) to hold hearings in 1997 on several test cases that will resolve major jurisdictional and substantive issues. The decisions rendered in these cases will have far-reaching impact for the remaining category D, E, and F claimants. There are approximately $15 billion in category D claims, $80 billion in category E claims, and between $100 and $200 billion in category F claims. It is anticipated that decisions in those test cases will be rendered in early 1998.

B. Governing Council Reports

In 1996, the Executive Secretary submitted to the Governing Council of the UNCC three Reports regarding category D, E, and F claims, marking the beginning of comprehensive reporting by the Governing Council on corporate, government, and large individual claims. These Reports were drafted in response to the many factual and legal issues that have arisen in preparation for hearings in certain category D, E, and F test cases. In accordance with Article 16(3) of the UNCC Provisional Rules, governments that have submitted claims were given the opportunity to provide their views and comments on these Reports for consideration by the UNCC panels, and many governments did so. These Reports do not resolve the many issues presented by such claims, but rather frame the most fundamental legal issues for consideration by the panels. Resolution of these issues will determine whether billions of dollars' worth of claims are compensable.

1. *Report No. 15*

On April 30, 1996, the Executive Secretary circulated its fifteenth report to the Governing Council (Report No. 15).[4] In Report No. 15, the most significant jurisdictional and substantive issues arising from category D, E, and F claims were addressed.

As for category D claimants, the issues centered on questions of causation and whether certain costs or injuries incurred by individual claimants were the direct result of Iraq's invasion

3. *Future of UNCC Hinges on Funding, Says Its Chief of Legal Services*, 11 Mealey's Int'l Arb. Rep., No. 10 (Oct. 1996).

4. *See* U.N. Doc. S/AC.26/1996/R.2 (1996).

and occupation. Such injuries include relocation costs, children born with severe handicaps, loss of future income due to disability, loss of income, and real property foreclosures due to inability to pay mortgage payments.

Regarding category E corporate claims, the Governing Council raised a number of fundamental issues, including (i) the legal effect, if any, of the trade sanctions on claims arising out of work performed in Iraq following the imposition of sanctions; (ii) whether the UNCC has jurisdiction over debts and obligations of Iraq (*i.e.*, unpaid invoices) that arose prior to Iraq's invasion of Kuwait; (iii) whether a debt or obligation of Iraq arises on the date work is performed under a contract, or the date payment is due; (iv) whether the rescheduling of debt or contractual acceleration clauses toll the time that Iraq's debt or obligation under the original contract arose; (v) whether claimants have a duty to mitigate damages for lost or destroyed equipment; (vi) the appropriate valuation methodology for the loss of tangible assets and lost profits; and (vii) whether bank accounts that were not confiscated but are rendered inaccessible due to conversion restrictions are a basis for compensation.

Finally, the issues presented by the category F government claims include (i) whether costs of evacuating diplomats in countries other than Kuwait and Iraq are compensable; (ii) whether expenses such as redundancy payments to staff members or "unofficial payments" to Iraqi officials to obtain exit permits are compensable; (iii) whether increased costs of construction in Kuwait and increased expenses incurred in currency exchanges are compensable; and (iv) questions of valuation and claim verification, such as the proper method of valuing damaged or destroyed government property and the burden of proof to substantiate claims for lost property in Iraq.

2. *Report No. 16*

On July 31, 1996, the Executive Secretary circulated its sixteenth report to the Governing Council (Report No. 16).[5] Report No. 16 contains further factual and legal issues raised by category D, E, and F claims. The issues presented regarding category D claims include whether relocation costs, personal injury, personal and real property losses, loss of income, and individual business losses are compensable.

As for category E corporate claims, Report No. 16 presented, *inter alia*, the following issues: (i) whether proposed resumption of contractual relations with Iraq for future work upon the lifting of sanctions should suspend or moot claims before the Commission; (ii) whether Iraq's failure to pay under letters of credit is compensable as a loss or injury directly resulting from the Gulf War; (iii) whether the Commission has jurisdiction over contingent liabilities; (iv) whether third-party conduct, such as a shipper's refusal to deliver goods, breaks the chain of causation; and (v) whether costs incurred in mitigating damages are compensable.

Regarding category F government claims, the issues presented include whether the loss of use of diplomatic premises, personal residences, embassies, and consulates and salaries paid to Kuwait foreign ministry staff unable to work during the Gulf War are compensable.

3. *Report No. 17*

On October 31, 1996, the Executive Secretary circulated its seventeenth report to the Governing Council (Report No. 17).[6] Issues presented regarding category E claimants included

5. *See* U.N. Doc. S/AC.26/1996/R.16 (1996).
6. *See* U.N. Doc. S/AC.26/1996/R.17 (1996).

the following: (i) whether labor costs paid following the invasion of Kuwait for which no benefit was received are compensable; (ii) whether expenses incurred by one claimant in paying another claimant salaries and relocation expenses pursuant to a contractual obligation are compensable; (iii) whether payment of commissions on guarantee contracts were the direct result of the invasion and occupation of Kuwait; (iv) the evidentiary burden of claimants to prove they held title to assets that were lost or destroyed; (v) whether deposits against customs duties are "debts" or "obligations" of Iraq that are compensable; (vi) whether anticipated lost profits are compensable and should be discounted to reflect the attendant risks of construction projects in developing countries; and (vii) whether the Commission has jurisdiction to resolve contractual disputes that were outstanding between the claimants and Iraq prior to the invasion.

III. European Court of Justice

The European Court of Justice (ECJ), the principal judicial organ of the European Union, rendered a number of significant decisions concerning the competence of European institutions to enter into treaties, the legal basis for the passage of legislation by the European Council, and the liability of Member States for violations of Community law.

A. Brasserie du Pêcheur v. Germany

On March 5, 1996, the European Court of Justice delivered an opinion regarding two cases in which the question was whether Member States could be held liable to compensate individuals for damage caused by Member State infringements of Community law.[7] In one case, a French brewery was prevented from selling beer in Germany as a result of German beer purity laws that were in violation of provisions in the Treaty of Rome regarding the free movement of goods. In the other, British companies challenged a British law on registration of fishing vessels that violated provisions in the Treaty of Rome regarding rights of establishment. The ECJ held that Community law confers a right of reparation on individuals where the rule infringed was intended to confer directly effective rights on individuals, the breach of Community law was sufficiently serious, and the breach directly caused the damage to the individual. A breach of Community law is sufficiently serious when the Member State manifestly and gravely disregarded the limits of its discretion, taking into account such factors as the clarity and precision of the rule breached, the measure of discretion left to national authorities, whether the infringement was intentional, and whether the infringement was excusable.

B. Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms

On March 28, 1996, the ECJ delivered an opinion on whether the European Union has competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).[8] The ECJ held that in the field of international relations, the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. The ECJ ruled that no Treaty provision confers on Community institutions the general power

7. Cases C-46-93 and C-48-93, *Brasserie du Pêcheur v. Germany, R. v. Secretary of State for Transport, ex parte Factortame*.

8. Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

to enact rules on human rights or to conclude international conventions in this field. As for powers conferred by Article 235 to take action necessary to enable the Community institutions to carry out the objectives established by the Treaty of Rome, the ECJ ruled that accession to the European Convention would entail a substantial change in the present Community system for the protection of human rights that would entail entry into a distinct international institutional system and integration of all provisions of the European Convention into the Community legal order. Such a modification, the ECJ held, would go beyond the power conferred on EU institutions by Article 235 and could only be effected by amending the Treaty of Rome.

C. United Kingdom v. Council of Ministers

On November 12, 1996, the ECJ rejected the United Kingdom's challenge to the legality of the European working time directive.[9] The United Kingdom had argued that the working time directive, which requires a maximum 48-hour work week, should have been enacted pursuant to Article 100 and Article 235 of the Treaty of Rome concerning the rights and interests of employees, both of which require unanimity, rather than based upon Article 118a concerning legislative competence in social policy to safeguard workers' health and safety, which requires a qualified majority. The ECJ ruled that the working time directive could properly be enacted as social policy because the directive contributed to improving the health and safety of workers. The ECJ reasoned that the concepts of "working environment," "safety," and "health" in Article 118a should be interpreted broadly to embrace all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment.

IV. Inter-American Juridical Committee of the Organization of American States[10]

On August 23, 1996, the Inter-American Juridical Committee (Committee), the juridical organ of the Organization of American States, delivered an opinion regarding the validity under international law of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms-Burton), signed by President Clinton on March 12, 1996.[11] Title III of Helms-Burton provides a cause of action permitting any person who is now a U.S. citizen whose property was confiscated without compensation by the Cuban Government to sue any person who "traffics" in such property for the full value of the confiscated property. The Committee unanimously held that Helms-Burton did not conform to international law because, *inter alia*, the United States does not have the right to: (i) espouse claims by persons who were not its nationals at the time of injury; (ii) attribute liability to nationals of third States for a claim against Cuba; (iii) attribute liability to nationals of third States for using property in Cuba in conformity with the laws of Cuba; (iv) impose liability on third parties not involved in the nationalization; and (v) impose compensation greater than the effective damage resulting from the nationalization. Regarding the extraterritorial exercise of jurisdiction, the Committee held that the United States does not have the right to exercise jurisdiction over acts of "trafficking" abroad by aliens where neither the alien nor the conduct in question has any connection with

9. C-84/94, *United Kingdom v. European Council.*

10. *See* Opinion of the Inter-American Juridical Committee on Resolution AG/DOC.3375/96 *Freedom of Trade and Investment in the Hemisphere.*

11. *See* 35 Int'l Legal Mat. 1322 (1996).

its territory and where no apparent connection exists between such acts and the protection of its essential sovereign interests.

V. The International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea (ITLOS) was established under Part XV of the 1982 United Nations Convention on the Law of the Sea, which became effective in 1994.

The state parties elected twenty-five judges for ITLOS for staggered terms in August 1996 and they were sworn in on October 18, 1996. Judge Thomas A. Mensah of Ghana was elected its President and Judge Rudiger Wolfrum of Germany its Vice President for a period of three years.[12] On October 21, 1996, Mr. Gritakumar E. Chitty of Sri Lanka was elected the Registrar of the Tribunal. The seat of the Tribunal has been established in Hamburg, Germany.

The first session of the Tribunal was formally closed on November 1, 1996. The Tribunal is now considering its rules of procedures. No cases have yet been brought before the Tribunal, but it is widely expected that within a few years it will have a substantial docket of cases brought under the Law of the Sea Convention by State Parties in lieu of bringing their disputes before the International Court of Justice or an *ad hoc* arbitral tribunal.

VI. Proposed Permanent International Criminal Court—The Preparatory Committee

In December 1995, the General Assembly adopted a resolution establishing the United Nations Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee) with the mandate to prepare a widely accepted consolidated text of a convention for an international criminal court using the International Law Commission's draft statute (Draft Statute)[13] as a framework for discussion.

The Preparatory Committee held two three-week meetings in New York in 1996, the First Session from March 25 to April 12 and the Second Session from August 12-30. The most important political development arising out of these meetings was the emergence of a core group of States committed to coordinating efforts on the early establishment of a permanent Court and, concomitantly, the constructive role played by many States who previously had openly opposed the creation of a permanent criminal court. The Preparatory Committee will meet three or four more times in preparation for an international diplomatic conference to adopt a convention establishing an international criminal court scheduled for April 1998. The next scheduled Preparatory Committee meeting is in early 1997. As discussed below, significant progress was made at the Preparatory Committee meetings regarding many technical matters at issue in the ILC's Draft Statute.[14]

12. *See* ITLOS Press Release ITLOS/Press/1 of Oct. 5, 1996.

13. *See Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. Doc. A/49/355 (1994).

14. *August Preparatory Committee Tentatively Calls for a Diplomatic Conference in 1998*, 2 INT'L CRIM. CT. MONITOR 1, 2 (Oct. 1996). Unless otherwise noted, the discussion that follows is based on, and should be read with reference to, the official Report of the Preparatory Committee. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/51/22 (Vol. I) (1996).

A. Establishment and Relationship to United Nations

There was general support at the Preparatory Committee meetings that the proposed International Criminal Court (Court) should be an independent judicial body established by a multilateral treaty rather than an organ of the United Nations established pursuant to a resolution of the Security Council. While establishing the Court by Security Council resolution affords an efficient and time-saving approach that would be binding on all U.N. Member States, the general view at the Preparatory Committee meetings was that establishment of the Court by multilateral treaty provided the necessary and desired independence and authority for the Court. Of course, establishing the Court by treaty raises the specter that States that sponsor or perpetrate serious international crimes will not accede to such a convention.

B. Subject Matter Jurisdiction

The Draft Statute provides that the Court shall have jurisdiction over the "most serious crimes of concern to the international community as a whole." Article 20 enumerates the specific crimes in which the Court will have subject matter jurisdiction including the crime of genocide, the crime of aggression, war crimes, crimes against humanity, and treaty-based crimes such as terrorism, drug-trafficking, and apartheid. Numerous definitional problems arose during the Preparatory Committee sessions, particularly concerning the proper definition of aggression and crimes against humanity. Concerns were also raised as to whether certain crimes should fall within the Court's jurisdiction, either because such crimes have not obtained the status as crimes under customary international law, *e.g.*, drug-trafficking, or because certain crimes are considered more properly addressed by other fora, such as the Security Council in the case of aggression or national courts in the case of terrorism. There was general agreement on including genocide, war crimes, and crimes against humanity as part of the Court's subject matter jurisdiction.

C. Trigger Mechanism

One of the more contentious issues is the so-called trigger mechanisms by which investigations are initiated. The Draft Statute provides two bases for initiating an investigation: a State Party may, in the case of genocide, lodge a complaint with the Prosecutor, and the Security Council may refer a matter to the Court. Moreover, pursuant to Article 23(3), no prosecution may be commenced arising from a situation that is being dealt with by the Security Council as a threat to or a breach of the peace or an act of aggression, unless the Security Council decides otherwise. This provision effectively prohibits the Prosecutor from initiating an investigation related to issues of breaches of the peace or acts of aggression unless the Security Council affirmatively so authorizes.

At the Preparatory Committee meetings, some delegations expressed the view that these trigger mechanisms would politicize the process by which investigations are initiated and therefore the Prosecutor should be independently empowered to initiate investigations, as is the case for the Prosecutors of the Tribunals for Rwanda and former Yugoslavia. Other delegations were of the view that the Court would not receive widespread acceptance if the Prosecutor's role were so expanded.

Similar concerns were expressed regarding the Security Council's authority under Article 23(3). Proposals included eliminating such authority, or modifying the provision to permit prosecution unless the Security Council took a formal decision asking the Court not to proceed,

thereby preventing a permanent member of the Security Council from having veto power over a prosecution. Other delegations were of the view that the primary role of the Security Council in addressing breaches of the peace of acts of aggression necessitated retention of Article 23(3) or even expanding the provision to include all situations which were being dealt with by the Security Council.

D. State Consent and Inherent Jurisdiction

Pursuant to Article 21 of the Draft Statute, except in cases of genocide, the Court may not exercise jurisdiction over a crime unless (i) the complaining State accepts the Court's jurisdiction over such crime; (ii) the State with custody over the accused consents to the Court's jurisdiction; and (iii) the State in which the crime allegedly occurred consents to the Court's jurisdiction. Regarding genocide, as long as a complaining State is a member of the 1948 Genocide Convention, the Court has "inherent jurisdiction" to exercise jurisdiction over the crime of genocide without State consent.

At the Preparatory Committee sessions, many delegations were of the view that the State consent requirements would seriously undermine the success of the Court, given that the government of the State with custody of the accused or the government of the State in which the crimes occurred would in many cases be a party to the violations. Therefore, many delegations argued that the Court's inherent jurisdiction should be expanded to include other core crimes, such as war crimes and crimes against humanity. While there are legitimate concerns that such expanded jurisdiction would violate national sovereignty, many expressed the view that such concerns could be protected by virtue of the State consenting when it becomes a party to the Statute. Other delegations were of the view that provisions for State consent would maximize universal participation.

E. Complementarity

The Draft Statute provides that the Court is "intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective." The principle of complementarity is also relevant to a number of articles in the Draft Statute, including provisions regarding inadmissibility, commencement of prosecution, state cooperation, extradition, and double jeopardy.

During the Preparatory Committee meetings, many delegations expressed the view that the Draft Statute should be more explicit in reflecting the intention that the Court should have jurisdiction only when there is no prospect of persons accused of the relevant crimes being duly tried in national courts. Thus, the Court's jurisdiction will not be primary or even concurrent, but rather exceptional and residual. Others were of the view that the Court's jurisdiction should be concurrent, particularly in cases such as genocide, in which the Court has inherent jurisdiction. The combined effect of complementarity and the State consent requirements is that the Court may prosecute in the rare circumstance in which a State refrains from prosecuting persons within its territory, but consents to the prosecution of such persons by others. A number of delegations expressed concern that the principle of complementarity, unless properly defined and circumscribed by objective criteria, could be used by a State as a vehicle to shield the accused. On the other hand, there was general agreement that the principle of complementarity reflected proper solicitude to legitimate national sovereignty concerns, particularly the primacy of national court prosecution over crimes committed within a State's territory.

F. General Principles of Criminal Law

The Draft Statute is silent on general principles of criminal law, reflecting the view expressed by some delegations at the Preparatory Committee that an international criminal court with universal jurisdiction would be sustainable only on the basis of a flexible and concise statute. Other delegations, however, were reluctant to adhere to the approach taken by the *ad hoc* tribunals in Yugoslavia and Rwanda, in which the judges were left to adopt substantive rules of procedure and evidence, noting that articulation of the fundamental principles of criminal law in the Statute was consistent with the prerogative of legislative power of sovereign States. These delegations were of the view that the Statute should incorporate substantive principles of liability, defense, and punishment. Specific issues were also raised concerning procedural due process and the establishment of rules of criminal procedure, including issues involving the information and complaint, investigation and prosecution, protection of the rights of accused, rules of evidence, judgment and appeal, and sentencing. Procedural issues of particular importance included grounds for trials in abstentia, the advisability of allowing the accused to enter a plea of guilty, protection of witnesses and victims, and cooperation with national judicial systems regarding indictment, arrest, and pretrial detention. As with the propriety of incorporating substantive principles of criminal law into the Statute, a similar debate arose in connection with procedural questions and whether it would be advisable and feasible to include rules of criminal procedure and rules of evidence in the Statute.

VII. Conclusion

The past year has seen a number of striking developments in the field of international tribunals. International tribunals have ruled on such fundamental issues as the legality of nuclear weapons under international law, the use of secondary boycotts such as Helms-Burton to bring democracy to Cuba, and the competence of the European Union to enter into international human rights treaties. For the first time since the cessation of hostilities in the Persian Gulf, there is a real prospect that many of the millions of victims of the Gulf War will receive some measure of compensation. Finally, a seed planted in the 1950s for a permanent international criminal court is now beginning to germinate and may soon bear fruit.